

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application Seeking     )  
Approval of Ohio Power Company's         )  
Proposal to Enter into an Affiliate Power     ) Case No. 14-1693-EL-RDR  
Purchase Agreement in the Power             )  
Purchase Agreement Rider.                     )

In the Matter of the Application of Ohio     )  
Power Company for Approval of Certain       ) Case No. 14-1694-EL-AAM  
Accounting Authority.                         )

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**MOTION TO STAY PROCEEDINGS PENDING A RULING BY FERC  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,  
APPALACHIAN PEACE AND JUSTICE NETWORK,  
AND  
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

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March 21, 2016

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To protect 1.3 million Ohio consumers from paying non-refundable rates for a power purchase agreement ("PPA"), these proceedings should be stayed while the Federal Energy Regulatory Commission ("FERC") considers a complaint that would require a review of the PPA between affiliated companies. If FERC rescinds the waiver on affiliate power sales restrictions previously granted to AEP Ohio and reviews the proposed affiliate PPA to ensure that its rates, terms, and conditions are just and reasonable, and free from affiliate abuse,<sup>1</sup> the stay should remain until a final decision is issued by FERC regarding the legality of AEP Ohio's proposed PPA.

A stay is needed to avoid what the Supreme Court of Ohio has previously recognized as an "unfair outcome" to customers and a "windfall" to the utility. In 2014,

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<sup>1</sup> 16 U.S.C. 824d; *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 at 62,167-169 (1991) (*Edgar*); *Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082 at 61,417-418 (2004) (*Allegheny*).

AEP Ohio was permitted to keep \$463 million of Ohioans' money after the Court overturned a PUCO decision approving an unlawful charge that was collected from customers during the pendency of the appeal, but concluded, based on AEP Ohio's assertions, that refunds would not be made to AEP Ohio's consumers.<sup>2</sup> In order to prevent a potential, similar, unjust windfall to AEP Ohio, the PUCO should stay a ruling on AEP Ohio's request to collect millions of dollars from customers through the PPA Rider during the pendency of the FERC proceeding.

This Motion is supported by the following Memorandum in Support.

Respectfully submitted,

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<sup>2</sup> *In re: Columbus S. Power Co.*, 138 Ohio. St. 3d 448 (2014); *see also In re: Columbus Southern Power Co.*, 128 Ohio St. 3d 512 (2011) (Court found that the PUCO had engaged in retroactive ratemaking but did not return \$463 million wrongfully collected from customers).

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**I. INTRODUCTION**

The Office of the Ohio Consumers' Counsel, Appalachian Peace and Justice Network, and the Ohio Manufacturers' Association Energy Group (collectively, "Consumers") respectfully request that the PUCO stay this proceeding until FERC rules on the complaint filed by the Electric Power Supply Association, et al. ("EPSA") on January 27, 2016. The complaint was filed against AEP Generation Resources and AEP Ohio ("EPSA Complaint").<sup>3</sup> EPSA asked FERC to rescind the waiver on affiliate power sales restrictions previously granted to AEP Ohio and review AEP Ohio's PPA with its

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<sup>3</sup> *EPSA, et al. v. AEP Generation Resources and Ohio Power Company*, FERC Case No. EL-16-33-000. A similar complaint was filed against FirstEnergy and FES. See *EPSA, et al. v. FES and Ohio Edison, Cleveland Electric Illuminating Company, and Toledo Edison*, FERC Case No. EL-16-34-000.

affiliated generator, AEPGR, to ensure that its rates, terms, and conditions are just and reasonable, and free from affiliate abuse.

**II. THE PUCO SHOULD PROTECT CONSUMERS FROM UNJUST AND UNREASONABLE CHARGES FOR A POWER PURCHASE AGREEMENT BY STAYING THE CURRENT PROCEEDING PENDING A RULING BY FERC.**

To prevent injury to the interests of the public and avoid irreparable harm to customers, Consumers request that the PUCO exercise its discretionary power under Title 49 of the Revised Code to protect the customers of AEP Ohio. The PUCO's authority to act to protect customers can be found under various statutes and case precedent.<sup>4</sup>

The Supreme Court of Ohio has recognized that there is an apparent unfairness when a decision is determined to be unlawful, but customers receive no refund of the unlawful charges that were already collected (retroactive ratemaking).<sup>5</sup> But if the PUCO stays the proceeding regarding AEP Ohio's purchase power agreement and AEP Ohio's request to collect related costs from customers through the PPA Rider, it can avoid such unjust results. Accordingly, the PUCO should stay this proceeding until FERC rules on the EPSA Complaint.

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<sup>4</sup> See, e.g., *In re Columbus & Southern Ohio Electric Co.*, Case No. 83-1058-EL-AIR, Entry (November 17, 1982); *In re Commission's Review of Columbus Southern Power Company's and Ohio Power Company's Independent Transmission Plan*, Case No. 02-1586-EL-CSS, Entry (February 20, 2003); *Cinnamon Lake Utilities Co. v. Pub. Util. Comm.*, 42 Ohio St. 2d 259 (1975) (Ohio Supreme Court noted that R.C. 4909.16 exists to protect the public interest as well as the interests of the public utility).

<sup>5</sup> See *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512 (2011); *In re: Columbus S. Power Co.*, 138 Ohio St.3d 448 (2014).



**A. The Law.**

Although the PUCO has noted that there is no controlling precedent in Ohio setting the conditions under which it will stay one of its orders,<sup>6</sup> it has favored a four-factor test governing a stay that was delineated in a dissenting opinion by Justice Douglas.<sup>7</sup> This standard has been deemed appropriate by courts when determining whether to stay an administrative order pending judicial review.<sup>8</sup> The criteria in the four-factor test include:

- (a) Whether there has been a strong showing that movant is likely to prevail on the merits;
- (b) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;
- (c) Where the public interest lies; and
- (d) Whether the stay would cause substantial harm to other parties.<sup>9</sup>

As discussed below, Consumers satisfy the four-part test to warrant a stay.

**B. The PUCO should grant a stay to prevent PPA costs from being collected from customers consistent with the four-part test.**

**1. There is a strong likelihood that EPSA will prevail at FERC on the merits.**

EPSA is asking FERC to rescind a previously granted waiver that, according to AEP Ohio, allows it to enter into a wholesale sale of electricity with its affiliate without FERC oversight. The premise of EPSA's Complaint is that circumstances have changed

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<sup>6</sup> See *In the Matter of the Commission's Investigation Into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing (February 20, 2003) ("Access Charge Decision") at 5.

<sup>7</sup> See *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 31 Ohio St. 3d 604 (1987).

<sup>8</sup> Access Charge Decision at 5.

<sup>9</sup> *Id.*

since the waiver was granted. While FERC originally granted the waiver on the grounds that retail choice has taken effect in Ohio, that justification no longer applies due to the rate design mechanism of the PPA Rider, which will flow through the costs of the PPA to all of Ohio's retail customers. Regardless of whether Ohio retail customers have the choice to select their provider of generation services, customers will have *no* choice about whether to pay the PPA Rider and subsidize AEP Ohio's generating affiliate. Given the non-bypassable nature of the PPA Rider, the Commission's reasoning that retail customers in retail choice states are not captive because they can select a generation supplier of their choosing, and thereby bypass charges associated with an affiliate contract, is inapplicable here.<sup>10</sup> Insofar as the costs associated with the PPA are concerned, *all* Ohio retail customers served by AEP Ohio are captive.

The proposed Affiliate PPA threatens to harm competition in the wholesale markets by guaranteeing a revenue stream to a fleet of aging and uneconomic generating units through a non-bypassable rider assessed to Ohio retail customers. The guaranteed revenue stream from captive retail customers will make the Affiliate PPA Units agnostic to wholesale-market prices, distort wholesale-market price signals, and deter new entry from competitive generation suppliers. It is imperative that FERC fulfill its core responsibility to "guard the consumer from exploitation by non-competitive electric power companies."<sup>11</sup>

At its core, the PPA is not a competitive solution. Thus, it would almost certainly fail the *Edgar/Allegheny* standards for the simple reason that AEP Ohio did not employ a competitive solicitation process. Rather than putting out a request for proposal for the

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<sup>10</sup> *Duquesne Light Holdings, Inc.*, 117 FERC ¶ 61,326 at page 38 (2006).

<sup>11</sup> *NAACP v. FPC*, 520 F.2d 432, 438 (D.C. Cir. 1975).

purpose of procuring power at the least cost for the benefit of its Ohio retail customers, AEP Ohio struck a deal with its affiliate for the purpose of delivering value to the parent company's shareholders. The economic incentive for the wholesale buyer (AEP Ohio) to favor its affiliate wholesale seller (AEPGR) in this situation is at its apex and plainly necessitates FERC scrutiny. A rescission of the waiver will allow FERC to review the PPA under the *Edgar/Allegheny* standards in order to protect against injury to the wholesale markets and to Ohio's captive retail customers. Such a review is necessary and likely given the change in circumstances since the waiver was granted.

**a. The most credible evidence shows that the costs of the PPA will be above market and therefore an unreasonable cost to consumers.**

OCC Witness Wilson has estimated that the affiliate PPA will cost consumers \$1.9 billion (\$700 per customer) over its eight-year term.<sup>12</sup> This is a best case scenario, as it assumes that the PPA Units clear the PJM markets, generating revenue to offset PPA costs. The worst case scenario for consumers is that the PPA Units are offered into the market and *do not* clear. The PJM Independent Market Monitor has argued that the PPA Units should be required to offer at cost to protect the competitive market from the inherent subsidy the PPA arrangement provides.<sup>13</sup> That requirement would increase the likelihood that the PPA Units do not clear the PJM markets and do not generate revenue

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<sup>12</sup> See Supplemental Direct Testimony of James F. Wilson (OCC Ex. 34) filed December 28, 2015 at 5:4-5; *id.* at 11:3-5.

<sup>13</sup> See First Supplemental Testimony of Joseph E. Bowring on behalf of the Independent Market Monitor for PJM (IMM Ex. 2) filed December 28, 2015 at 6:16-33.

to offset the PPA costs.<sup>14</sup> Customers then would be responsible for paying even more. Either scenario represents an unjust and unreasonable outcome for consumers that should not be permitted by FERC or approved by the PUCO.

**b. AEP Ohio's customers are captive, and subject to significant unreasonable and unlawful charges through the PPA Rider.**

The PPA Rider is non-bypassable.<sup>15</sup> All AEP Ohio customers must pay the costs associated with the PPA through the PPA Rider. Therefore, customers cannot avoid this charge by leaving AEP Ohio's SSO rate and taking generation service from a supplier.

This issue is crucial to FERC's analysis of the EPSA Complaint. FERC's market-based rate regulations expressly provide that "no wholesale sale of electric energy or capacity may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization for the transaction under section 205 of the [Federal Power Act]."<sup>16</sup> For purposes of these restrictions, "captive customers" are "wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation."<sup>17</sup> Presumably, AEP

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<sup>14</sup> OEG, itself a signatory to the Joint Stipulation, recognized the potential harm flowing from this scenario. It acknowledged that a requirement that the PPA Units bid at cost would "threaten the ability of th[e] PPA Unit[s] to clear." See OEG's Post-Hearing Brief at 20. According to OEG, if the PPA Units do "not clear in the PJM market, then there would be no capacity revenue from th[e] PPA Unit[s] to offset [] costs." See *id.* "This would dramatically raise the level of costs collected through the PPA Rider." See *id.*

<sup>15</sup> See, e.g., Direct Testimony of William A. Allen (AEP Ohio Ex. 10) filed May 15, 2015 at 6:8.

<sup>16</sup> 18 C.F.R. § 35.39(b) (2015).

<sup>17</sup> 18 C.F.R. § 35.36(a)(6) (2015). Retail customers electing to take cost-based service from a franchised public utility acting as a provider of last resort ("POLR") "are not considered captive customers because, although they may choose not to do so, they have the ability to take service from a different supplier whose rates are set by the marketplace." *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 480 ("Order No. 697"), *on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 ("Order No. 697-A"), *on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *clarified*, 131 FERC ¶ 61,021 (2010), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied Pub. Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012).

Ohio received a waiver under FERC's market based rate authority because it had no captive retail customers at the time it requested such waiver. AEP Ohio's retail customers have retail choice and can purchase their power requirements at market-based rates from marketers. But FERC's granting of the waiver did not contemplate the non-bypassable PPA.

There is no escape for AEP Ohio's distribution customers from the PPA Rider – they are captive. Therefore, the PUCO should not rule on the PPA Rider until FERC rules on the EPSA Complaint.

**2. Allowing unlawful PPA rates to be collected pending the EPSA Complaint would likely cause irreparable harm to AEP Ohio's customers.**

Harm is irreparable “when there could be no plain, adequate and complete remedy at law for its occurrence and when any attempt at monetary restitution would be ‘impossible, difficult, or incomplete.’”<sup>18</sup> In the context of judicial orders, the Supreme Court of Ohio traditionally looks to whether there is an effective legal remedy if the order takes effect to determine whether to stay the proceedings.<sup>19</sup>

In *Tilberry v. Body*, the Court found that the effect of a court order calling for the dissolution of a business partnership would cause “irreparable harm” to the partners because “a reversal . . . on appeal would require the trial court to undo the entire accounting and to return all of the asset distributions” – a set of circumstances that would be “virtually impossible to accomplish.”<sup>20</sup> In *Sinnott v. Aqua-Chem, Inc.*, the Court found that a lower court's pre-trial findings could be appealed at the point they were issued

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<sup>18</sup> *FOP v. City of Cleveland*, 141 Ohio App.3d 63, 81 (Cuyahoga 2001) (citation omitted).

<sup>19</sup> See, e.g., *Tilberry v. Body*, 24 Ohio St. 3d 117 (1986); *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St. 3d 158, 161 (2007).

<sup>20</sup> *Tilberry*, 24 Ohio St.3d at 121.

because the findings allowed the case to proceed to trial.<sup>21</sup> The majority reasoned that “the incurrence of unnecessary trial expenses is an injury that cannot be remedied by an appeal from a final judgment,”<sup>22</sup> and so concluded that “[i]n some instances, [t]he proverbial bell cannot be unrung and an appeal after final . . . judgment on the merits will not rectify the damage’ suffered by the appealing party.”<sup>23</sup> Here, the bell is ringing loudly and Ohio customers need the PUCO to protect their interests.

Although, as Justice Rehnquist observed, “the temporary loss of income, *ultimately to be recovered*, does not usually constitute irreparable injury,”<sup>24</sup> *Tilberry* and *Sinnott* illustrate that economic harm does become irreparable where the loss cannot be recovered. If the PPA Rider request is approved, Ohio customers, who will be paying the PPA Rider, will be confronted with arguments that they cannot recover charges that have already been collected regardless of a ruling by the Court that the PPA Rider is unlawful. As explained previously, the unrecoverable economic harm could amount to \$1.9 billion (\$700 per customer) over the PPA’s eight-year term if not stayed.<sup>25</sup>

### **3. A stay would further the public interest.**

In Justice Douglas’ dissent in the Supreme Court of Ohio case that recommended standards for a stay of a PUCO decision, he noted that PUCO Orders “have effect on everyone in this state – individuals, business and industry.”<sup>26</sup> That effect on customers is all the more pronounced in these times when customers can ill afford increases in what

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<sup>21</sup> *Sinnott*, 116 Ohio St.3d at 164.

<sup>22</sup> *Id.* at 163.

<sup>23</sup> *Id.* at 162 (internal quotations and citation omitted).

<sup>24</sup> *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (emphasis added).

<sup>25</sup> See Supplemental Direct Testimony of James F. Wilson (OCC Ex. 34) filed December 28, 2015 at 5:4-5; *id.* at 11:3-5.

<sup>26</sup> *MCI*, 31 Ohio St.3d at 606.

they pay for an essential service – electricity. It thus was fitting that Justice Douglas, in articulating a standard for stays, emphasized that the most important consideration is “above all in these types of cases, where lies the interest of the public” and that “the public interest [] is the ultimate important consideration for this court in these types of cases.”<sup>27</sup>

As discussed above, the stay Consumers seek would prevent irreparable harm to AEP Ohio’s customers, with no substantial harm to the utility, as discussed below. Additionally, the stay would provide some relief to customers who are already burdened by the state of the economy. The public interest, therefore, would be furthered by a stay of the PUCO’s proceeding.

#### **4. A stay would not cause substantial harm to AEP Ohio.**

Waiting for a decision at FERC does not disadvantage AEP Ohio. The PPA Rider is nothing more than a “pass-through” of costs and purported revenues associated with the PPA. It is revenue neutral to AEP Ohio.<sup>28</sup> Because the PPA Rider is revenue neutral to AEP Ohio, staying these proceedings would not cause harm to AEP Ohio.

The PUCO should stay this proceeding until FERC issues a decision on the pending EPSA Complaint.

### **III. CONCLUSION**

The PUCO should protect AEP Ohio’s customers so they do not have to endure any more unfairness regarding the potential non-refundability of charges. This unfairness to customers manifests itself if there can be no refund of monies collected that are later

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<sup>27</sup> *Id.*

<sup>28</sup> See Hearing Transcript at Vol. I, p. 211:6-11; Vol. VI, p. 1706:2-1707:6.

found to be unlawful. The PUCO should exercise its powers to stay this proceeding, which will not cause harm to AEP Ohio. It is clearly in the interest of the public to grant a stay.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Motion to Stay and Memorandum in Support was served on the persons stated below via electronic transmission, this 21<sup>st</sup> day of March 2016.

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Summary: Motion Motion to Stay Proceedings Pending a Ruling By FERC by the Office of the Ohio Consumers' Counsel, Appalachian Peace and Justice Network and the Ohio Manufacturers' Association Energy Group electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.