

FILE

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 for Inclusion 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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JOINT APPLICATION FOR REHEARING  
OF  
THE PJM POWER PROVIDERS GROUP  
AND  
THE ELECTRIC POWER SUPPLY ASSOCIATION

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Pursuant to Revised Code Section (“R.C.”) 4903.10 and Ohio Administrative Code Rule 4901-1-35, the PJM Power Providers Group (“P3”)<sup>1</sup> and the Electric Power Supply Association (“EPSA”)<sup>2</sup> submit this Joint Application for Rehearing of the March 31, 2016 Opinion and Order issued by the Public Utilities Commission of Ohio (“Commission”) in this matter. P3 and EPSA are parties to this proceeding and actively participated in all phases of the proceeding.

P3 and EPSA jointly file this Application for Rehearing because the Commission’s March 31, 2016 Opinion and Order is unreasonable and unlawful in the following respects:<sup>3</sup>

### **GENERAL**

1. The Commission erred by giving the alleged Joint Stipulation and Recommendation undue weight because it does not qualify as a true stipulation.
2. The Commission’s approval of Rider PPA is unreasonable and unlawful because it represents a reversal by the Commission from the General Assembly’s legislative directives to promote competition, a reversal that is solely intended to benefit the utility’s affiliate and parent corporation at the expense of ratepayers.

### **LEGAL AUTHORITY**

3. The Commission erred in holding that Rider PPA is authorized by Ohio R.C. 4928.143(B)(2)(d) because Rider PPA constitutes a “charge or credit.”

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<sup>1</sup> P3 is a non-profit organization whose members are energy providers in the PJM Interconnection LLC (“PJM”) region, conduct business in the PJM balancing authority area, and are signatories to various PJM agreements. Altogether, P3 members own over 84,000 megawatts (“MWs”) of generation assets, produce enough power to supply over 20 million homes, and employ over 40,000 people in the PJM region, representing 13 states and the District of Columbia. This brief does not necessarily reflect the specific views of any particular member of P3 with respect to any argument or issue, but collectively presents P3’s positions.

<sup>2</sup> EPSA is a national trade association representing leading competitive power suppliers, including generators and marketers. Competitive suppliers, which collectively account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. This brief does not necessarily reflect the specific views of any particular member of EPSA with respect to any argument or issue, but collectively presents EPSA’s positions.

<sup>3</sup> P3 and EPSA note that several parties in this proceeding have taken the position that a Commission order imposing the PPA Rider would be preempted by the Federal Power Act and the Supremacy Clause of the U.S. Constitution. P3 and EPSA take no position on those issues before this Commission, and expressly waive their right to have those issues adjudicated by this Commission. Instead, P3 and EPSA intend to assert any such claims (to the extent applicable to a final order entered by the Commission) only in federal district court.

4. The Commission erred in holding that Rider PPA is authorized by R.C. 4928.143(B)(2)(d) on the grounds that it places a “financial” limitation on customer shopping for retail electric service.
5. The Commission erred in holding that Rider PPA satisfies the additional requirement of R.C. 4928.143(B)(2)(d) because it will stabilize electric retail rates.
6. The Commission erred in not complying with all ESP requirements and instead in conducting a cursory ESP versus MRO analysis after concluding that it did not apply.
7. The Commission erred in not complying with all ESP requirements and instead, finding that AEP Ohio has the option to reject the Commission’s modifications to the ESP III and to withdraw its ESP III, while also finding that this proceeding is only to populate the rate in Rider PPA.
8. The Commission erred in failing to find that Rider PPA violates R.C. 4928.02(H) protections against abuse of affiliate power.
9. The Commission erred in failing to find that Rider PPA violates R.C. 4928.03 separation of service requirements by merging competitive and non-competitive services (requiring customers to pay for affiliated generation).
10. The Commission erred in failing to find that Rider PPA violates R.C. 4928.17 because it will not maintain corporate separation between AEP Ohio and its affiliate AEP Generation Resources Inc.
11. The Commission erred in failing to find that Rider PPA violates R.C. 4905.22 by imposing an “unreasonable” charge, i.e., an unknown charge for market risk.
12. The Commission erred in failing to find that due process requirements were not met.

#### **STIPULATION TEST**

13. The Commission erred in applying its three-prong test for the legal standard of “reasonableness” to approve the filed stipulation.
14. The Commission erred in using the three-prong test to evaluate the stipulation in light of the utility’s authority to reject modifications.

15. The Commission erred in holding that the reasonableness of the Stipulation is not affected by the \$9.9 million in favors that AEP Ohio traded for signatories' signatures.
16. The Commission erred in holding that the reasonableness of the Stipulation is not affected by the existence of a side deal with a non-opposing party.
17. The Commission erred in holding that the reasonableness of the Stipulation is not affected by a side deal that is disclosed to parties after negotiations ceased.
18. The Commission erred in finding that the Stipulation is reasonable if it benefits ratepayers and the public interest "as a package," regardless of the nature and extent of its harmful effects.
19. The Commission erred in finding that the Stipulation is reasonable on the basis of utility commitments to make proposals in future proceedings.

#### **RIDER PPA PROJECTIONS AND RATES**

20. The Commission erred in adopting projections by witnesses that it believed were better than projections by other witnesses, without regard to whether they were sufficiently reliable to meet AEP Ohio's burden of proof.
21. The Commission erred in finding that the weather-normalized financial projection by AEP Ohio witness Pearce is reliable.
22. The Commission erred in not analyzing and weighing the expert testimony presented by P3/EPSC witness Cavicchi regarding the financial projections by AEP Ohio.
23. The Commission erred in discounting the criticisms of AEP Ohio's projections on the grounds that the critics did not present a full projection of energy prices and net revenues under the Rider PPA.
24. The Commission erred in finding that a two-year limit on rate increases related to Rider PPA will "protect customers" against rate volatility and price fluctuations, and provide additional rate stability.
25. The Commission erred in finding that it could properly ignore known downward price trends in the price of natural gas when it makes financial projections.

26. The Commission erred by not imposing annual and aggregate limits on Rider PPA charges.
27. The Commission erred in finding that Rider PPA will result in a net credit to ratepayers over its eight-year term.
28. The Commission erred in evaluating the overall impact of Rider PPA over the eight-year term, while ignoring the short-term impacts predicted, which include charges to ratepayers.
29. The Commission erred in approving Rider PPA for an eight-year term based on an outdated forecast that the Commission requires to be replaced with the first quarterly adjustment of Rider PPA.

#### **EFFECTS OF RIDER PPA**

30. The Commission erred in finding that Rider PPA will promote economic development by providing “jobs and other economic benefits to the region.”
31. The Commission erred in finding that Rider PPA will provide rate stability for all ratepayers in Ohio.
32. The Commission erred in finding that rates will stabilize even though Rider PPA does not guarantee a sufficient net credit to ratepayers to offset the rider’s volatility.
33. The Commission erred in finding that quarterly adjustments of forecasted values will provide rate stability, when they will lead to instability.
34. The Commission erred in finding that Rider PPA provides a “more balanced approach than relying exclusively on the market, through a diversified portfolio with a cost-based hedge, sourced from 20 generating units \* \* \*” when there are existing mechanisms to protect against rate volatility.
35. The Commission erred in adopting a limitation on the first two years of Rider PPA without providing a coherent formula for the calculation of the limitation.
36. The Commission erred in approving the Rider PPA and recovery of legacy costs because it will allow AEP Ohio to recover transition revenues or any equivalent revenues in violation of R.C. 4928.38 and because the Commission was without knowledge of what those costs entail.

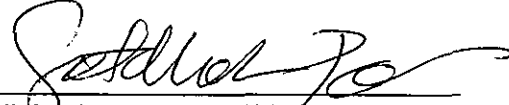
37. The Commission erred in finding that Rider PPA does not provide a subsidy to AEP Ohio's affiliates.
38. The Commission erred in finding that Rider PPA is not an anti-competitive benefit to AEP Ohio's affiliates.
39. The Commission erred in not ordering AEP Ohio to return all amounts collected from customers under Rider PPA in the event that Rider PPA is struck down.

#### **OTHER ERRORS**

40. The Commission erred in finding that the Stipulation as modified will modernize the grid through deployment of advanced technology and procurement of renewable energy resources.
41. The Commission erred in finding that the Stipulation as modified will promote retail competition by enabling competitive providers to offer innovative products to serve customers' needs.
42. The Commission erred in approving Rider PPA and approving the collection from ratepayers of generation costs based on a power purchase agreement that was not the product of a competitive process.
43. The Commission erred in approving the Stipulation's severability provision when it will only be triggered when a "court of competent jurisdiction" strikes down the PPA and will not apply if the FERC strikes down the PPA.
44. The Commission erred in approving a Stipulation with numerous terms that are unrelated to the application, without having given due notice of modifying the ESP III and the addition of new terms for the ESP III.
45. The Commission erred in not rejecting the OVEC component of the PPA proposal, which was previously rejected by the Commission in AEP Ohio's last electric security plan proceeding.
46. The Commission not only erred in approving Rider PPA, it also erred in allowing the rider to be effective as of June 1, 2016.

The facts and arguments that support these grounds for rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Settineri", written over a horizontal line.

Michael J. Settineri (00073369), Counsel of Record  
Gretchen L. Petrucci (00046608)

Vorys, Sater, Seymour and Pease LLP

52 East Gay Street

Columbus, OH 43215

614-464-5462

[mjsettineri@vorys.com](mailto:mjsettineri@vorys.com)

[glpetrucci@vorys.com](mailto:glpetrucci@vorys.com)

*Counsel for PJM Power Providers Group and  
the Electric Power Supply Association*

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## **MEMORANDUM IN SUPPORT**

### **I. INTRODUCTION**

The Public Utilities Commission of Ohio (“Commission”) wrongly approved, for eight years beginning on June 1, 2016, the Power Purchase Agreement (“PPA”) Rider proposal submitted by Ohio Power Company (“AEP Ohio”). The Commission has erroneously concluded that the generation costs of AEP Ohio’s affiliate, AEP Generation Resources Inc., and AEP Ohio’s entitlement to the Ohio Valley Electric Corporation output can be passed through and imposed on AEP Ohio’s ratepayers. The Commission reached that conclusion despite multiple provisions of Ohio law to the contrary, strenuous concerns about the impact that this rider will have on the wholesale and retail markets, and the uncertainty of the rider’s impact on ratepayers. Furthermore, the Commission wrongly concluded that the proposed Joint Stipulation and Recommendation (“Stipulation”), as modified by the Commission, is a valid stipulation based on serious bargaining, will benefit ratepayers and the public interest, and does not violate any regulatory practices and principles.

The PJM Power Providers Group (“P3”) and the Electric Power Supply Association (“EPSA”) respectfully disagree with the Commission’s weighing of the evidence related to Rider PPA and the Stipulation. Compelling evidence and arguments from numerous parties demonstrates the illegality and harmful impact of Rider PPA, and the Stipulation as modified by the Commission does not mitigate those problems. For multiple reasons explained below, the Commission should reverse its decision and reject Rider PPA and the Stipulation.<sup>4</sup>

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<sup>4</sup> P3 and EPSA note that several parties in this proceeding have taken the position that a Commission order imposing the PPA Rider would be preempted by the Federal Power Act and the Supremacy Clause of the U.S. Constitution. P3 and EPSA take no position on those issues before this Commission, and expressly waive their right to have those issues adjudicated by this Commission. Instead, P3 and EPSA intend to assert any such claims (to the extent applicable to a final order entered by the Commission) only in federal district court.

## II. ARGUMENT

P3/EPSA's Assignments of Error fall into the following categories:

- The Stipulation does not qualify as a true stipulation.
- Approval of Rider PPA is a reversal of the General Assembly's directive to promote competition.
- Rider PPA is not authorized by Ohio law and/or violates Ohio laws
- Application of the Commission's three-prong test for stipulations was erroneous
- The approved projection of Rider PPA presented by AEP Ohio is not reliable and the Commission's evaluation of the projection evidence was not conducted properly
- Rider PPA will not promote economic development
- Rider PPA will not provide rate stability
- Rider PPA is an anti-competitive subsidy
- The Commission has not put in place sufficient and effective protections  
The Power Purchase Agreement should have been the product of a competitive process
- Proper notice of the changes to AEP Ohio's third electric security plan was required

**A. The Commission has not properly evaluated the PPA Rider proposal or the Stipulation.**

**Assignment of Error No. 1: The Commission erred by giving the alleged Joint Stipulation and Recommendation undue weight because it does not qualify as a true stipulation.**

The record is clear – some parties in this proceeding joined the Stipulation, while other opposed it. As demonstrated in the chart below, there was widespread opposition to the Stipulation and fewer, special-interest groups supporting the Stipulation:

Opposing the Stipulation	Supporting the Stipulation
Appalachian Peace and Justice Network Dynergy Environmental Defense Fund Environmental Law & Policy Center EPSA Kroger Ohio Consumers' Counsel Ohio Environmental Council Ohio Manufacturers' Association Energy Group P3 PJM Independent Market Monitor Retail Energy Supply Association Sam's East, Inc. Walmart Stores East LP  <u>Amicus</u> Advanced Power Services Carroll County Energy LLC Oregon Clean Energy LLC South Field Energy LLC	AEP Ohio Buckeye Power, Inc. Direct Energy Services LLC Direct Energy Business LLC FirstEnergy Solutions Corp. Interstate Gas Supply, Inc. Mid-Atlantic Renewable Energy Coalition Ohio Energy Group Ohio Hospital Association Ohio Partners for Affordable Energy Sierra Club Staff

When widespread affected stakeholders do not join a stipulation and the majority of stakeholders oppose the stipulation, there is no broad-based stakeholder support for the stipulation.

As is clear from the decision, the Commission focused on the Stipulation and the three-prong test, instead of conducting a full analysis of the amended application in light of *all* of the evidence of record (one piece of which is the Stipulation). For example, the Commission stated:

- “The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted.”<sup>5</sup>
- “As an initial matter, several of the non-signatory parties argue that the stipulation should not be held to the same standard as previously used by the Commission, as many of the components are not germane to the proposed PPA rider and are unrelated to the scope of these proceedings (OCC/APJN Br. at 13-16, 55; ELPC/EDF/OEC Br. at 52-54). However, under the three-prong test, the Commission always carefully reviews all

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<sup>5</sup> Opinion and Order at 48.

terms and conditions of the proposed stipulation, in order to determine whether the stipulation is in the public interest.”<sup>6</sup>

As a result, the Commission “promoted” the Stipulation, moving it to the forefront of this proceeding, giving its substantial added weight and special evidentiary value. This is the wrong approach when significant, major opposition exists to the Stipulation.

The Commission, thus, erred in applying its less stringent version of the three-prong test to evaluate the Stipulation filed in this proceeding. The Commission also erred in approving the Stipulation in a slightly modified form when the record plainly establishes that the Stipulation resulted from favor-trading and side deals, rather than serious bargaining among the interests of every party that it affects. Unlike a stipulation in civil litigation, the Stipulation signed by AEP Ohio and selected signatories in this proceeding constitutes advocacy for their interests at the expense of the interests of the other parties. This is another reason why the Stipulation in this case should not be given the weight normally given to judicial stipulations. Instead, the Commission should have approached the record in a fashion more akin to a motion for summary judgment by AEP Ohio and the beneficiaries of its Stipulation, by considering all of the evidence of record and not placing a priority on a hotly contested Stipulation.<sup>7</sup>

The Commission’s decision implies that a stipulation is the proper way to proceed and that parties who do not sign it are somehow being obstructionist. The Commission’s role in this proceeding is to remain impartial and to approve brokered stipulations only when they meet all statutory requirements and serve the interests of the public, not just the signatories.

Here, the Commission gave “substantial weight” to an agreement by half of the parties that was strenuously opposed by the other half of the parties. Important groups of those who will

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<sup>6</sup> Opinion and Order at 49.

<sup>7</sup> *See, also*, Opinion and Order, at 49 (“the Commission *may* place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.” *Emphasis added*).



be most affected by the Stipulation, such as wholesalers, urged the Commission to reject it. There is no reason that the Stipulation should be entitled to substantial weight, or to any weight at all.

Accordingly, the Commission erred in approving the Stipulation, and it should correct that error on rehearing.

**Assignment of Error No. 2: The Commission's approval of Rider PPA is unreasonable and unlawful because it represents a reversal by the Commission from the General Assembly's legislative directives to promote competition, a reversal that is solely intended to benefit the utility's affiliate and parent corporation at the expense of ratepayers.**

For more than 10 years, the Commission has been transitioning Ohio's electric distribution utilities toward a fully competitive retail-market construct.<sup>8</sup> The Staff had found previously that AEP Ohio's OVEC-only PPA proposal would be a step backwards in the Commission's goal to transition AEP Ohio to a fully competitive market.<sup>9</sup> Multiple parties in this proceeding, including the Staff initially, argued similarly that AEP Ohio's current PPA proposal and Rider PPA will also "reverse course" for Ohio, taking it away from the competitive generation regulatory environment and move it back to the traditional regulatory scheme that existed before 1999.<sup>10</sup>

The Commission disagreed, and as a result of its March 31, 2016 decision in this matter, AEP Ohio's regulated service will now include Rider PPA, which the Commission claims will benefit consumers. The uncontroverted evidence, however, establishes that the driving force behind AEP Ohio's application in this proceeding is neither AEP Ohio nor its customers.

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<sup>8</sup> Staff Ex. 1 at 9.

<sup>9</sup> *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO et al., Opinion and Order at 12 (February 25, 2015) ("AEP ESP IIP").

<sup>10</sup> See, e.g., Tr. Vol. 16 at 3892, 3895-3896, 3956; ELPC/EDF/OEC Initial Brief at 3; OMAEG Initial Brief at 1-2; P3/EPSC Initial Brief at 55; RESA/Constellation/Exelon Initial Brief at 20-23; and Dynegy Inc. Initial Brief at 9.

American Electric Power Company (“AEP Parent”) is pushing for the AEPGR PPA proposal as part of *the parent’s* overall business strategy. This case is not about providing customers and Ohio with rate stability; it is about satisfying the utility’s parent company and helping the parent meet its business strategies and the expectations of the Wall Street investment community. AEP Ohio witnesses admitted this.<sup>11</sup>

Given that (a) AEP Parent is pushing for a sustainable financial support model for the involved plants, (b) Rider PPA is based on a no-bid, non-arms-length agreement between affiliates, (c) AEP Ohio’s customers have not asked for this proposal, and (d) numerous customers oppose it,<sup>12</sup> the Commission should have rejected AEP Ohio’s claim that its customers are the “alleged” beneficiaries of the PPA proposal, recognizing that this proposal is really intended to bolster AEP Parent’s bottom line profits for its shareholders.

A review of how Rider PPA will function explains that the true benefit of the rider is the significant transfer of market risk to the ratepayers. AEPGR will be able to receive full cost recovery and a guaranteed return under its contract with AEP Ohio for the entire term and not be subject to the risk of not recovering all those costs when the power is sold into the PJM market.<sup>13</sup> AEP Ohio will pay AEPGR at a rate of “cost plus a return on equity” (10.38%) for the capacity, energy, and ancillary services that each plant can provide,<sup>14</sup> even when the energy, capacity and ancillary services are unavailable, such as during to an outage, force majeure, or a failure to perform.<sup>15</sup> Under the terms of the OVEC agreement, AEP Ohio will continue to pay OVEC at a rate of cost plus a return on equity for the capacity, energy and ancillary services available to

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<sup>11</sup> Tr. Vol. 1 at 100-101; Tr. Vol. 4 at 1231-1232.

<sup>12</sup> The Commission’s docket in this case contains thousands of letters from the public, the majority of them oppose AEP Ohio’s request.

<sup>13</sup> Tr. Vol. 2 at 592, 595.

<sup>14</sup> P3/EPSC Ex. 10 at 7, 14-15.

<sup>15</sup> *Id.* at 8, 10, 14; Tr. Vol. 2 at 374-375, 459-460, 463-464. *See, also*, Tr. Vol. 1 at 111.

AEP Ohio through its OVEC entitlement share while receiving full reimbursement from ratepayers.<sup>16</sup> These payment and guaranteed-return provisions transfer the market risks associated with all of these plants to AEP Ohio, which in return is going to use the PPA Rider to transfer the market risks to its ratepayers. That is not rate stability for ratepayers.

Contrary to the Commission's belief, sufficient rate stability protections for ratepayers exist without Rider PPA. As the Commission found in 2015, there are already existing means by which generation price volatility can be mitigated – the laddering and staggering of SSO auction products and the availability of fixed-price contracts in the market.<sup>17</sup> Additionally, AEP Ohio has in place today multiple riders that adjust periodically to avoid rate volatility *for the services that AEP Ohio provides to its ratepayers* (unlike generation service). These riders are adjusted periodically and capture changes in costs for AEP Ohio's specific services. A few examples are:

- Retail Stability Rider – promotes stable retail-electric-service prices and ensures customer certainty regarding retail electric service.<sup>18</sup> It is a nonbypassable rider, applicable to all ratepayers.
- Enhanced Service Reliability Rider – recovers costs associated with AEP Ohio's enhanced vegetation management program. It is a non-bypassable rider.
- Economic Development Rider – recovers delta revenue costs associated with AEP Ohio's approved reasonable arrangements. It is a non-bypassable rider.

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<sup>16</sup> Sierra Club Ex. 3 at 7-11.

<sup>17</sup> *AEP ESP III*, Opinion and Order at 24.

<sup>18</sup> *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608 at ¶8.

- Distribution Investment Rider – recovers capital costs for distribution infrastructure investments to facilitate service reliability. It is a non-bypassable rider.

AEP Ohio’s ratepayers do not need another rider to allegedly provide rate stability – especially when the record evidence establishes that the rider is for the benefit of the utility’s parent and affiliate.

In sum, this Commission erred in changing the regulatory landscape for generation service by imposing, via Rider PPA, substantial risks and potentially billions of dollars on AEP Ohio ratepayers for the purpose of supporting the AEP Parent’s business plans, which inure to the benefit the AEP Parent’s shareholders. The Commission’s decision is a clear departure from the General Assembly’s legislative directives to promote competition, and the Commission has cited no record evidence supporting another rider for alleged rate stability. The Commission acted unreasonably and unlawfully in approving Rider PPA.

**B. Rider PPA is not authorized by Ohio law and violates several Ohio statutes.**

**Assignment of Error No. 3: The Commission erred in holding that Rider PPA is authorized by R.C. 4928.143(B)(2)(d) because Rider PPA constitutes a “charge or credit.”**

The Commission recognized in its Opinion and Order that its legal authority to approve Rider PPA as a provision of an electric security plan (“ESP”) is provided -- and limited -- by Ohio Revised Code Section (“R.C.”) 4928.143(B)(2).<sup>19</sup> AEP Ohio had claimed that Rider PPA is authorized by one provision of that statute, R.C. 4928.143(B)(2)(d). The Commission agreed.<sup>20</sup>

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<sup>19</sup> Opinion and Order at 93-94.

<sup>20</sup> *Id.* at 94.

First, the Commission found that Rider PPA will meet the first requirement of R.C. 4928.143(B)(2)(d), *i.e.*, that it consists of “terms, conditions, or charges” for retail electric service because Rider PPA will be either a charge or credit incurred by customers under the ESP.<sup>21</sup> That finding does not fit the statutory authority and therefore, should be reversed on rehearing as a matter of law.

The legal authority provided by R.C. 4928.143(B)(2) extends only to ESP components that are specifically included in the language of the statute.<sup>22</sup> The provisions that are authorized by R.C. 4928.143(B)(2)(d) are expressly limited to “[t]erms, conditions, or charges.” The Commission found that Rider PPA satisfies this requirement even though the projection it adopted estimates that Rider PPA will provide a net *credit* over the term of ESP IV.<sup>23</sup> Under that adopted projection, Rider PPA will not result in “charges” to customers during any of the years of its eight-year term.<sup>24</sup>

#### Weather-Normalized Projection

PPA Rider Projection	2016	2017	2018	2019	2020	2021	2022	2023	2024	Total
Net Credit/(Charge) incl. PJM CP, incl. CO2 tax	\$4M	\$29M	\$9M	\$8M	\$45M	\$95M	\$2M	\$16M	\$7M	\$214M

The Commission nevertheless concluded that the first requirement of R.C. 4928.143(B)(2)(d) is satisfied because “the PPA rider would consist of a charge or credit incurred by customers under the ESP.”<sup>25</sup> This does not satisfy the statutory requirement. The General Assembly authorized

<sup>21</sup> Opinion and Order at 94.

<sup>22</sup> *Columbus Southern Power Co. v. PUCO*, 128 Ohio St. 3d 512, 520, 2011 Ohio 1788, ¶ 32 (“if a given provision does not fit within one of the categories listed ‘following’ (B)(2), it is not authorized by the statute”); *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608, ¶ 49 (“[I]n construing a statute, we may not add or delete words.”).

<sup>23</sup> Opinion and Order at 80.

<sup>24</sup> AEP Ohio Ex. 52 at Settlement Exhibit WAA-2.

<sup>25</sup> Opinion and Order at 94.

provisions that constitute “charges,” not credits (*i.e.*, payments from the utility to customers). The statutory language is plain and unambiguous and the Commission lacks the authority to ignore it or subvert its plain meaning.<sup>26</sup> Given that Rider PPA will not be a “charge” under these circumstances, the Commission should find on rehearing that Rider PPA is not authorized by R.C. 4928.143(B)(2)(d).

**Assignment of Error No. 4: The Commission erred in holding that Rider PPA is authorized by R.C. 4928.143(B)(2)(d) on the grounds that it places a “financial” limitation on customer shopping for retail electric service.**

The Commission’s finding that it has legal authority to approve Rider PPA under R.C. 4928.143(B)(2)(d) should also be reversed on rehearing for another reason. Even if the credits that purportedly will result from Rider PPA could legally be defined as “charges,” they are not authorized by the statute unless they “relat[e] to limitations on customer shopping.”

The Commission found, however, that Rider PPA meets this second requirement of R.C. 4928.143(B)(2)(d) because Rider PPA “is a *financial* limitation on customer shopping for retail electric generation service.”<sup>27</sup> It conceded that Rider PPA will operate “as a financial hedge for retail customers, not as a physical hedge,” and “[t]o the extent that the \$214 million net credit projected under AEP Ohio’s weather normalized case is realized over the PPA term, the PPA rider will provide a direct financial benefit, along with a valuable hedging mechanism, to ratepayers.”<sup>28</sup> It reasoned that Rider PPA constitutes a “*financial* limitation on customer shopping” because “[t]he effect of the PPA rider is that the bills of all customers would reflect a price for retail electric generation service that is approximately 30 percent based on the cost of service of the PPA units and 70 percent based on the retail market, thus functioning as a financial

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<sup>26</sup> See, *Doe v. Marlinton Local Sch. Dist. Bd. of Educ.*, 122 Ohio St.3d 12, 2009-Ohio-1360, ¶ 29 (“It is our duty to apply the statute as the General Assembly had drafted it; it is not our duty to rewrite it.”).

<sup>27</sup> Opinion and Order at 94 (Emphasis added). This is consistent with the Commission’s finding in AEP Ohio’s ESP III. *AEP Ohio ESP III*, Opinion and Order at 22.

<sup>28</sup> Opinion and Order at 81 and 101.

hedge against complete reliance on the retail market for the pricing of retail electric generation service.”<sup>29</sup> The Commission’s “financial limitation” conclusion improperly construes the facts. Ratepayers will be charged and will pay 100% of their own selected generation costs (based on SSO or retail market rates) based on their usage. The ratepayers’ bills will be adjusted based on the Rider PPA rate.<sup>30</sup> The Rider PPA rate will ultimately be based on the differential between the PPA plant costs and the amount of revenues received by AEP Ohio from the PJM markets.<sup>31</sup> That differential is not tied to usage and it cannot be said that the differential will consistently be 30% of the ratepayers’ generation costs for the entire eight-year period. The Commission has misunderstood the evidence and how the Rider will function. The PPA plants’ generation is approximately 30% of the load in AEP Ohio’s service territory, but that generation will not be provided to the ratepayers – it is intended to be sold in the PJM markets.<sup>32</sup>

This “financial limitation” finding is also legally incorrect for two reasons, and it should be reversed on rehearing. First, R.C. 4928.143(B)(2)(d) does not speak to *financial* limitations on shopping. The Commission impermissibly inserted this word into the statute’s language. In construing the statute, the Commission is not permitted to add (or delete) words.<sup>33</sup> Additionally, the requirement relating to “limitations on customer shopping for retail electric generation service” is plain and unambiguous and the Commission lacks the authority to ignore it or subvert its plain meaning.<sup>34</sup>

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<sup>29</sup> Opinion and Order at 94.

<sup>30</sup> Tr. Vol. 2 at 583-585.

<sup>31</sup> AEP Ohio Ex. 10 at 5-6, 8.

<sup>32</sup> AEP Ohio Ex. 1 at 13; AEP Ex. 2 at 17; Tr. XVIII at 4616-4617, 4655.

<sup>33</sup> *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608 at ¶49, (“[I]n construing a statute, we may not add or delete words.”), citing *State ex rel. Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 105 Ohio St.3d 177, 2005-Ohio-1150, 824 N.E.2d 68, ¶32.

<sup>34</sup> *See, Doe v. Marlinton Local Sch. Dist. Bd. of Educ.*, 122 Ohio St.3d 12, 2009-Ohio-1360, ¶ 29 (“It is our duty to apply the statute as the General Assembly had drafted it; it is not our duty to rewrite it.”).

Second, even if Rider PPA would moderate unusually high and low prices through customer credits and charges, this would not *limit* customer shopping and thus cannot be authorized under R.C. 4928.143(B)(2)(d). With Rider PPA in place, ratepayers will continue to obtain generation service either through the SSO or through contracts with a competitive retail electric service (“CRES”) provider or aggregation.<sup>35</sup> Rider PPA will not change any part of that shopping process and will not restrict or otherwise limit customer shopping in any way. Ratepayers only pay more or less depending on whether the PPA units generate sufficient revenues in the PJM wholesale markets to cover the embedded costs.<sup>36</sup> In other words, Rider PPA does not limit *shopping*; rather, it has an economic impact on *all customers*, whether shopping or not, because it is a non-bypassable charge or credit.

Accordingly, the Commission should find on rehearing that Rider PPA does not relate to limitations on customer shopping and therefore is not authorized by R.C. 4928.143(B)(2)(d).

**Assignment of Error No. 5: The Commission erred in holding that Rider PPA satisfies the additional requirement of R.C. 4928.143(B)(2)(d) because it will stabilize electric retail rates.**

The Commission’s finding that it has the authority to approve Rider PPA under R.C. 4928.143(B)(2)(d) should also be reversed on rehearing for a third reason. Even if Rider PPA is a “charge” that “limits customer shopping,” it is not authorized by this statute unless it “would have the effect of stabilizing or providing certainty regarding retail electric service.” The Commission found that this statutory requirement was satisfied because Rider PPA is “capable” of stabilizing retail electric rates as it would “smooth out fluctuations in market prices, because

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<sup>35</sup> See, e.g., AEP Ex. 10 at 6 (“The energy, capacity and ancillaries associated with both the Affiliate PPA and OVEC entitlements will simply be sold into the PJM market. This[,] along with the nonbypassable nature of the PPA Rider, will ensure that this element of the Company’s proposed ESP will have no adverse impact on the SSO auction or the ability of Competitive Retail Electric Service (CRES) providers to compete for customers on a level playing field. This proposal allows customers to take advantage of market opportunities while providing added price stability.”)

<sup>36</sup> P3/ESPA Ex. 8 (Cavicchi Direct Testimony) at 12; RESA/Exelon Ex. 1 (Campbell Direct Testimony) at 17.



the rider would rise or fall in a way that is counter cyclical to the wholesale market.”<sup>37</sup> The Commission erred in making this finding, and it should be reversed on rehearing.

AEP Ohio claims that Rider PPA will stabilize retail electric rates by providing a hedge to customers to protect them from market volatility, especially during periods of extreme weather and by providing retail price certainty that Ohio businesses desire.<sup>38</sup> However, the evidence of record in this proceeding does not support either of these claims. On the contrary, the record evidence shows that Rider PPA will actually result in rate *instability*.

Current retail markets in Ohio are not unstable and are not at the mercy of fluctuations in wholesale spot market prices. The prices that the majority of retail customers pay for electricity are set by power procurements based on forward market prices that are much more stable than spot power prices.<sup>39</sup> SSO customers do not experience volatility because they have fixed contracts that are based on periodic blended auctions.<sup>40</sup> Shopping customers have fixed-price contract opportunities which can extend for up to three years.<sup>41</sup> In 2015, the Commission concluded that there are existing means – the laddering and staggering of SSO auction products and the availability of fixed-price CRES contracts – in the AEP Ohio service territory that provide a significant hedge against price volatility.<sup>42</sup> Nothing has changed in that regard.

AEP Ohio’s contention that Rider PPA is authorized by R.C. 4928.143(B)(2)(d) because it stabilizes retail electric service rests on two major premises: (1) the Rider PPA rate will move in the opposite direction of wholesale market prices and provide customers with a counter-cyclical hedge against the wholesale market volatility, and (2) ratepayers will receive a \$721

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<sup>37</sup> Opinion and Order at 94.

<sup>38</sup> AEP Ohio Ex. 1 (Vegas Direct Testimony) at 3.

<sup>39</sup> P3/EPSC Ex. 8 (Cavicchi Direct Testimony) at 10-11.

<sup>40</sup> P3/EPSC Ex. 8 (Cavicchi Direct Testimony) at 10; Staff Ex. 1 (Choueiki Direct Testimony) at 10.

<sup>41</sup> P3/EPSC Ex. 8 (Cavicchi Direct Testimony) at 10-11; RESA/Exelon Ex. 1 (Campbell Direct Testimony) at 17-18.

<sup>42</sup> *AEP ESP III*, Opinion and Order at 24.

million credit under Rider PPA over the course of its eight-year term.<sup>43</sup> The Commission essentially agreed with the first assumption and concluded that the rider credit will be \$214 million over the eight-year term.<sup>44</sup> However, both of these assumptions are incorrect, and the Commission simply ignored all of the evidence that Rider PPA will not have a stabilizing effect.

First, the charges under Rider PPA will not correspond to actual costs. Its initial rate, pursuant to the Stipulation,<sup>45</sup> will be calculated based on projected costs and projected revenues under the weather-normalized projection (based on 2013 data), and that rate will remain in effect until it is adjusted the following quarter. Until it is reconciled, the initial Rider PPA rate will not fluctuate and thus cannot be “counter-cyclical” to wholesale market prices. It therefore cannot stabilize or provide certainty as to retail rates as a matter of law.

Second, when it is reconciled in each quarter, the Rider PPA rate will once again be based on projected costs and projected revenues, but it will also capture (a) the amount that the prior rider rate had not recovered, together with carrying costs and (b) the unrecovered amount above the Commission-imposed cap between June 2016 and May 2018 (collectively, the “off amount”).<sup>46</sup> Some portion of every reconciled Rider PPA rate will pick up the off amount and carrying costs, and it is impossible to know today how much of the reconciled Rider PPA rates will be attributed to them. In fact, AEP Ohio’s own projections for Rider PPA do not include any reconciliation values.<sup>47</sup> As P3/EPSCA witness Cavicchi testified, “[w]ith power prices and PPA costs moving in many possible directions over time any supposed additional stability is practically impossible to quantify \* \* \*.”<sup>48</sup> With quarterly reconciliations, there will be even less

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<sup>43</sup> Tr. Vol. 2 at 582-583; AEP Ex. 52 at 15 and at Settlement Ex. WAA-2.

<sup>44</sup> Opinion and Order at 77, 80.

<sup>45</sup> AEP Ex. 52 at Settlement Ex. WAA-1 at 6.

<sup>46</sup> AEP Ex. 10 at 9; Tr. Vol. 18 at 4521; Tr. Vol. 19 at 4682, 4725; Opinion and Order at 81-82.

<sup>47</sup> Tr. Vol. 18 at 4519.

<sup>48</sup> P3/EPSCA Ex.13 (Cavicchi Supplemental Testimony) at 20.

additional stability. The Commission, therefore, cannot simply assume that the reconciled Rider PPA rates will fluctuate in the opposite direction of wholesale market prices. It is impossible to know whether Rider PPA will stabilize rates in subsequent years, given the nature of the reconciliation process.

AEP Ohio projected that Rider PPA will be a credit to ratepayers under its recommended projection.<sup>49</sup> The Commission, however, accepted as reliable a different AEP Ohio projection – the weather-normalized projection.<sup>50</sup> It, too, estimates that ratepayers will receive credits every year. Even so, there is conflicting evidence as to the effect of Rider PPA in the eight years of the period. Mr. Cavicchi testified that AEP Ohio projections rely on out-of-date data that ignores recent significant changes in energy prices.<sup>51</sup> More recent estimates show that Rider PPA will inevitably lead to substantial charges to ratepayers.<sup>52</sup> Also, the Commission did not address evidence regarding the electric demand assumptions in AEP Ohio’s projections, which also shifts the estimates of Rider PPA.<sup>53</sup> AEP Ohio will not even rely on the Commission-accepted forecast to implement the Rider PPA rates after the first quarter; it must prepare new forecasts and then again prior to filing each reconciliation application.<sup>54</sup> It was improper for the Commission to conclude in light of this evidence that Rider PPA will stabilize rates or provide certainty in these circumstances.

The evidence of record thus establishes that AEP Ohio did not meet its burden of proving that Rider PPA will have the effect of “stabilizing or providing certainty” as to rates for retail

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<sup>49</sup> Tr. Vol. 2 at 582-583; AEP Ex. 52 at Settlement Ex. WAA-2 (see, third row of the Average of High Load and Low Load Forecast).

<sup>50</sup> Opinion and Order at 77, 80.

<sup>51</sup> P3/EPSCA Ex.13 at 11-13.

<sup>52</sup> OCC Ex. 34 at 2-6.

<sup>53</sup> P3/EPSCA Ex. 13 at 11-20 and Attachments AJC-S-1 through AJC-S-4D.

<sup>54</sup> Opinion and Order at 90; Tr. Vol. 18 at 4521.

electric service throughout the eight-year period. The Commission should therefore find on rehearing that Rider PPA is not authorized by R.C. 4928.143(B)(2)(d).

**Assignment of Error No. 6: The Commission erred in not complying with all ESP requirements and instead conducting a cursory ESP versus MRO analysis after concluding that it did not apply.**

The Commission ruled that this proceeding is not an ESP case and, therefore, the ESP versus market rate offer (“MRO”) test mandated by Section 4928.143(C) does not apply.<sup>55</sup> Despite this ruling, the Commission conducted an analysis of the ESP versus MRO test to “resolve the parties’ arguments on this issue,”<sup>56</sup> but the Commission did so in an inadequate, summary fashion. There are multiple problems with these specific Commission’s rulings. First, if the Commission is correct and the ESP versus MRO test is not applicable in this proceeding, it was error for the Commission to conduct that analysis. As P3/EPSC argued previously, AEP Ohio’s application seeks to change the ESP III because the Rider PPA proposal is new and different.<sup>57</sup> The Commission should have required an application that complies with the ESP statutes and regulations and conducted a *full* ESP versus MRO analysis because of the significant change to the ESP III prompted by the PPA proposal.

Second, in addition to not properly ruling on the full applicability of the ESP statutes and regulations, the Commission conducted the analysis improperly in this proceeding. The Commission referenced both the quantitative benefits from the Rider PPA for the June 2016-May 2018 time frame as well as the quantitative benefits for the whole eight years. It is not clear which was used in the analysis. Moreover, the Commission added one of those values to the June 2015-May 2018 analysis conducted in the *AEP ESP III* proceeding, even though the ESP III is partially complete. This was error.

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<sup>55</sup> Opinion and Order at 105.

<sup>56</sup> *Id.*

<sup>57</sup> P3/EPSC Initial Brief at 57-60.

Third, the Commission's explanation of its analysis of the ESP versus MRO test is cursory and insufficient. If the Commission was correct in conducting the ESP versus MRO analysis, it did not address the issue in sufficient substantive fashion in its decision. R.C. 4903.09 requires the Commission to explain its decisions and identify, in sufficient detail to enable review, the record evidence upon which its orders are based.<sup>58</sup> It states: "In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, bas upon said findings of fact."

After summarizing the parties' arguments, the Commission's discussion consisted of only the following two paragraphs, and only two sentences therein are a direct discussion of the Commission's ESP versus MRO analysis:<sup>59</sup>

The Commission notes that, although this is not an ESP case and, therefore, the ESP/MRO test does not apply here, we will nevertheless address the test in the present proceedings, in order to consider and resolve the parties' arguments on this issue. In light of our above finding that the stipulation, including the PPA rider proposal, will result in a net benefit for customers, we agree with AEP Ohio's assertion that the Company's ESP, which is currently approved to continue through May 31, 2018, remains more favorable than the expected outcome under an MRO. In the *ESP 3 Case*, we determined that the ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, as modified by the Commission, is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142. With respect to the quantitative benefits of the ESP, the Commission found that the ESP, as modified, results in a total of \$53,064,000 in quantifiable benefits over the ESP term that would not be possible under an MRO. *ESP 3 Case*, Opinion and Order (Feb. 25, 2015) at 94-95, Second Entry on Rehearing (May 28, 2015) at 51-52, 55-57.

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<sup>58</sup> *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312, 513 N.E.2d 337 (1987); *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 30.

<sup>59</sup> Opinion and Order at 105 (Emphasis added, footnote omitted).

AEP Ohio's projection, under the weather normalized case, indicates that the PPA rider is expected to provide a net quantitative benefit to customers of \$37 million over the current ESP term through May 31, 2018, or \$214 million over the term of the PPA rider (Co. Ex. 52 at Ex. WAA-2). **With the stipulation's numerous other quantitative and qualitative benefits, as well as our modifications to the stipulation to ensure that ratepayers will benefit from the PPA rider, we do not agree with the non-signatory parties' contention that the PPA proposal in the stipulation upsets the positive results of our previous ESP/MRO analysis. As AEP Ohio correctly asserts, when the net positive benefit of the PPA rider proposal is combined with the existing net positive results of the ESP/MRO test conducted by the Commission in the *ESP 3 Case*, the result must remain, as a matter of basic addition, a net benefit, with the ESP becoming that much more favorable in the aggregate than the expected results of an MRO. We, therefore, reject the non-signatory parties' arguments on this issue.**

This brief discussion does not address the arguments in a substantive matter and therefore, is not compliant with R.C. 4903.09.

**Assignment of Error No. 7: The Commission erred in not complying with all ESP requirements and instead, in finding that AEP Ohio has the option to reject the Commission's modifications to the ESP III and to withdraw its ESP III, while also finding that this proceeding is only to populate the rate in Rider PPA.**

In its decision, the Commission determined that this proceeding is "an outcome of the *ESP 3 Case*, in order to facilitate a more in-depth review of the Company's PPA proposal, and, if approved by the Commission, to populate the rate in the PPA Rider."<sup>60</sup> Thus, this statement indicates the Commission's finding that the instant proceeding is not an ESP proceeding; rather, it is solely a tariff proceeding to populate the PPA rider. Contrary to that tariff-populating conclusion, however, Commission also determined that AEP Ohio has the option to reject any Commission modifications to its ESP III, and to withdraw the ESP III application.<sup>61</sup> This proceeding, however, cannot be both a tariff-populating proceeding and an ESP proceeding under R.C. 4928.143.

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<sup>60</sup> Opinion and Order at 93.

<sup>61</sup> Opinion and Order at 82.

Either the application in this case modifies AEP Ohio's ESP III, in which case a *full* ESP evaluation needed to be conducted, or no modification of the ESP III is taking place as a result of this proceeding, in which case AEP Ohio has no option to withdraw its ESP under R.C. 4928.143. As noted earlier, P3/EP SA's position is that AEP Ohio's application sought to change the ESP III because the Rider PPA proposal is substantially new and different.<sup>62</sup> The Commission should have required an application that complies with the ESP statutes/regulations and conducted a *full* ESP analysis because of the significant change to the ESP III prompted by the PPA proposal.

In addition, the Commission cannot apply only some statutory ESP requirements and not others in this proceeding. However, that is what the Commission's decision did when it concluded, on the one hand, that this case is just a tariff proceeding and, on the other hand, that AEP Ohio can reject the modifications made by the Commission to its ESP III. It was error for the Commission to reach both conclusions.

**Assignment of Error No. 8: The Commission erred in failing to find that Rider PPA violates R.C. 4928.02(H) protections against abuse of affiliate power.**

The Commission is statutorily required to ensure that the policies set forth in R.C. 4928.02 are effectuated.<sup>63</sup> This includes R.C. 4928.02(H), which expresses a policy to "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates

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<sup>62</sup> P3/EP SA Initial Brief at 57-60.

<sup>63</sup> R.C. 4928.06 states in pertinent part: "(A) Beginning on the starting date of competitive retail electric service, the public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated. \* \* \*"

\* \* \*.” Thus, the Commission must ensure that AEP Ohio’s proposal will avoid anticompetitive subsidies between competitive retail electric service and the utility’s noncompetitive retail electric service, including the recovery of any generation-related costs through distribution or transmission rates.

Numerous intervenors objected throughout these proceedings that Rider PPA is anti-competitive and will violate R.C. 4928.02, but the Commission was “not convinced.”<sup>64</sup> It recognized the state policies set forth in R.C. 4928.02 but rejected claims that the rider would violate R.C. 4928.02(H).<sup>65</sup> The Commission did not analyze the arguments raised by the opposing parties – namely that Rider PPA and the related PPA create an anticompetitive subsidy on multiple levels because:

- (a) Even though the AEP Ohio ratepayers will continue to purchase retail generation service as they wish, they will be required, through the non-bypassable Rider PPA, to pay the net costs (above-market costs) of the AEPGR and OVEC wholesale generation, making those generators in the wholesale market whole;
- (b) AEP Ohio is a “wires only” company and provides electric distribution service to its ratepayers.<sup>66</sup> Rider PPA will be a AEP Ohio non-bypassable distribution rider as part of its company tariffs imposing charges on the ratepayers, but it will collect for generation-related costs.

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<sup>64</sup> Opinion and Order at 96-97.

<sup>65</sup> *Id.*

<sup>66</sup> Staff Ex. 1 at 10.



This scheme will shift the affiliated generators' market risks to the AEP Ohio ratepayers and allow the affiliates to keep the price of their wholesale generation free of market pressures, and continue to function. It is a classic subsidy.

The Commission skirted these arguments completely, however.<sup>67</sup> Instead, the Commission concluded that Rider PPA will not be anticompetitive because (1) as a non-bypassable rider, it will have the same impact on shopping customers as SSO customers, (2) Rider PPA creates no advantage to shopping and no disincentive to shopping, and (3) impacts all shopping customers the same.<sup>68</sup> The Commission erred in not addressing the subsidy arguments set forth above and in finding that Rider PPA will not violate this statute.

The Commission was required to address the arguments presented to it, including the specific subsidy arguments listed above, but the Commission failed to do so.<sup>69</sup> This alone is reason for the Commission to reverse its ruling.

Moreover, the function of Rider PPA is really not in dispute – the flow of money and the shifting of risks is clear. The Commission should rule that Rider PPA will operate as a pass-through mechanism so that the AEP Ohio affiliates' net costs (above-market costs) are passed on to the AEP Ohio ratepayers, and the competitive market risks are shifted from the wholesale generator to the ratepayers. This is tantamount to an anticompetitive subsidy.

Turning to the recovery of the Rider PPA costs, the Commission has found Rider PPA to be a non-bypassable generation-related rider.<sup>70</sup> Rider PPA will be part of the tariffed services

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<sup>67</sup> The Commission did reflect that it is "mindful" of concerns that, in the event that AEP Ohio does not sell the purchased power in the PJM markets, AEP Ohio could enter into a bilateral contract with an affiliate, which could provide anticompetitive advantage to the affiliate, in violation of R.C. 4928.02(H). (Opinion and Order at 97) That conclusion also was in error and is addressed later in this Application for Rehearing.

<sup>68</sup> Opinion and Order at 96.

<sup>69</sup> *Accord, In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608 at ¶66 (reversing and remanding after finding that it was error for the Commission to "never offer[] a response to AEP's claims and thus failed to explain its decision.")

<sup>70</sup> *AEP ESP III*, Opinion and Order at 21, 22.

provided by AEP Ohio – those are “wires only.” This implies that Rider PPA will be collected as a distribution charge for the benefit of AEP Ohio’s generation affiliate even though it is a generation charge. This is another basis for finding that Rider PPA violates R.C. 4928.02(H) by imposing the financial costs of AEP Ohio’s affiliate’s generation on its ratepayers. Even if revenues exceed the affiliate’s costs, Rider PPA creates a subsidy from the distribution service to the affiliated generation service, shifts the market risk, and ratepayers would make payments to the unregulated affiliated generator.

Notably, the Federal Energy Regulatory Commission (“FERC”) has precluded sales with respect to the AEP Ohio/AEPGR PPA “unless and until the [FERC] approves the Affiliate PPA under *Edgar* and *Allegheny*.”<sup>71</sup> It concluded in its April 27, 2016 decision that the non-bypassable charges under Rider PPA present the “potential for the inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility.”<sup>72</sup>

Accordingly, the Commission should find on rehearing that Rider PPA provides an anticompetitive subsidy and allow for recovery of generation-related costs through distribution rates, in violation of R.C. 4928.02(H).

**Assignment of Error No. 9: The Commission erred in failing to find that Rider PPA violates R.C. 4928.03 separation of service requirements by merging competitive and regulatory services (requiring customers to pay for affiliated generation).**

As testified by RESA/Exelon witness Campbell,<sup>73</sup> Rider PPA requires shopping customers to pay for affiliated generation, thereby merging competitive electric services with regulated electric services in violation of R.C. 4928.03. The language of R.C. 4928.03 expressly includes retail electric generation as a “competitive” service:

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<sup>71</sup> *Electric Power Supply Association et al. v. AEP Generation Resources, Inc. and Ohio Power Company*, Docket No. EL16-33-000, Order Granting Company at ¶55 and fn. 85 (“*AEP v. AEP Generation*”).

<sup>72</sup> *Id.* at ¶55.

<sup>73</sup> RESA/Exelon Ex. 1 (Campbell Direct Testimony) at 17.

Beginning on the starting date of competition, retail electric service, retail electric generation, [*et al.*] \* \* \* are competitive retail electric services.

The Commission has found Rider PPA to be a generation-related charge.<sup>74</sup> As explained earlier, Rider PPA requires shopping customers to pay for AEP Ohio's affiliated generation, which merges competitive services (affiliated generation) with regulated services (AEP Ohio's wires-only rider) in violation of R.C. 4928.03.

The Commission erred as a matter of law in failing to find that Rider PPA violates the separation of services requirements of R.C. 4928.03. It should now correct that error on rehearing.

**Assignment of Error No. 10: The Commission erred in failing to find that Rider PPA violates R.C. 4928.17 because it will not maintain corporate separation between AEP Ohio and its affiliate AEPGR.**

The Commission noted objections by various intervenors that Rider PPA violates R.C. 4928.17 by abusing affiliate power and failing to maintain corporate separation, but it overruled them.<sup>75</sup> The Commission should correct this legal error upon rehearing.

The Ohio General Assembly long ago decided that generation is a competitive retail electric service, R.C. 4928.03, and that utilities must separate their electric generation assets from their non-competitive assets, R.C. 4928.02(H). AEP Ohio has divested its generation assets (except for the OVEC entitlement),<sup>76</sup> but it has now asked the Commission for permission to entangle itself once again with the same generation assets that it has previously divested, through a non-bid PPA and Rider PPA.

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<sup>74</sup> *AEP Ohio ESP III*, Opinion and Order at 21.

<sup>75</sup> Opinion and Order, at 100-102.

<sup>76</sup> *In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Finding and Order (December 4, 2013).

This violates Ohio's corporate separation statute, R.C. 4928.17(A), which provides:

\* \* \* [N]o electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:

(1) The plan provides, at a minimum, for the provision of competitive retail electric service \* \* \* through a fully separated affiliate of the utility, and the plan includes separate accounting requirements \* \* \* and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.

In short, R.C. 4928.17 requires separation between competitive and non-competitive services, but generation will not be separated from AEP Ohio under Rider PPA. Moreover, Rider PPA is not "consistent with the policy specified in [R.C.] 4928.02," for the reasons discussed *supra*.

The evidence of record establishes that there will be an intermixing of personnel with respect to generation from the affiliated plants.<sup>77</sup> The draft PPA confirms AEP Ohio's involvement in the plant operations. For example, at the AEPGR plants, AEP Ohio will schedule and dispatch all energy and ancillary services associated with the plants, approve capital improvements projects, and be one-third of the Operating Committee established.<sup>78</sup> Its oversight over the affiliated generating plants violates the corporate separation requirements of R.C. 4928.17. The Commission should reverse its holding on this issue during the rehearing proceedings.<sup>79</sup>

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<sup>77</sup> See, e.g., Tr. Vol. 2 at 332, 602-604; P3/EPSCA Ex. 10 at 11, 13-14, 21.

<sup>78</sup> P3/EPSCA Ex.10 at 11, 13, 21.

<sup>79</sup> It is April 27, 2016 Order, the FERC noted that "[i]n addition, the finding that AEP Ohio has captive customers with respect to the Affiliate PPA may impact other existing waivers of 18 C.F.R. § 35.39 granted to Respondents and their affiliates, including other provisions of the Commission's regulations, such as § 35.39(c) (separation of

**Assignment of Error No. 11: The Commission erred in failing to find that Rider PPA violates R.C. 4905.22 by imposing an “unreasonable” charge, i.e., an unknown charge for market risk.**

The Commission also implicitly rejected the intervenors’ objection that Rider PPA violates R.C. 4905.22 by imposing an “unjust or unreasonable charge” for retail electric services. It should review and reverse that ruling on rehearing.

Pursuant to R.C. 4905.22, “all charges made or demanded for any service rendered, or to be rendered, shall be just [and] reasonable \* \* \* and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service \* \* \*.” In this proceeding, AEP Ohio seeks to impose customer charges in order to transfer unknown future market risks to its ratepayers.<sup>80</sup> These charges are *per se* unreasonable in violation of this statute.

Under the PPA proposal, AEP Ohio’s affiliates will recover their costs plus a guaranteed return on and of equity under the contracts with AEP Ohio. The market risks they currently bear do not disappear; they are shifted to AEP Ohio and then transferred to AEP Ohio’s ratepayers under Rider PPA. It is fundamentally unfair to allow AEP Ohio to charge customers for market risk that are now properly placed on the affiliates. It is particularly unjust and unreasonable to impose an unknown and unlimited charge, based solely on wholesale transactions, for the benefit of AEP Ohio’s affiliates.

The Commission should reverse its initial ruling and find on rehearing that Rider PPA violates the R.C. 4905.22 prohibition against unjust or unreasonable charges.

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functions), § 35.39(d) information sharing), § 35.39(e) (non-power goods or services) and § 35.39(f) (brokering of power).” *EPSA v. AEP Generation Resources*, supra, at ¶ 67.

<sup>80</sup> P3/EPSA Ex. 8 at 9.

**Assignment of Error No. 12: The Commission erred in failing to find that due process requirements were not met.**

The Commission rejected arguments presented by P3, EPSA, and others that the Commission failed to adhere to due process requirements during the second phase of this proceeding.<sup>81</sup> The record establishes that during the second phase of this proceeding:

- The Commission established a procedural schedule requiring supporting parties to file their testimony in support of the Stipulation within 1.5 hours of the entry containing the procedural schedule being filed.
- The Commission established an unfair and too-brief procedural schedule during the holiday season, to locate available experts, prepare testimony, make discovery requests, answer discovery requests, participate in depositions, and prepare for the second phase of the hearing, with new and additional issues at hand because the proposed Stipulation included terms that raise many new issues and topics.
- The Commission established a procedural schedule that overlapped with another significant Commission proceeding<sup>82</sup> and which had numerous common parties and attorneys.

Event/Deadline	Case No. 14-1297-EL-SSO	Case Nos. 14-1693-EL-RDR et al.
Testimony in support of the stipulation due	December 15, 2015	December 15, 2015
Written discovery reopened	Yes, requests permitted until December 24, 2015	Yes, requests permitted until December 28, 2015
Testimony in opposition to the stipulation due	December 30, 2015	December 28, 2015
Hearing recommences	January 14, 2016	January 4, 2016 (the first business day of the new year)
Initial Brief due	February 12, 2016 <sup>83</sup>	February 1, 2016
Reply Brief due	February 19, 2016 <sup>84</sup>	February 8, 2016 (7 days later)

- The Commission did not rule on (a) the extension request filed on December 16, 2015 or (b) the application for interlocutory appeal filed on December 23, 2015 until the March 31, 2016 decision.<sup>85</sup>

<sup>81</sup> Opinion and Order at 10-11: Article I, Section 16 of the Ohio Constitution.

<sup>82</sup> *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. §4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO ("FirstEnergy ESP IV").

<sup>83</sup> On the morning of February 12, 2016, this deadline was extended by four days, at the request of P3/EPSA and others.

<sup>84</sup> On February 12, 2016, this deadline was extended February 26, 2016.

- The briefing schedule was too short and conflicted with the FirstEnergy ESP IV hearing.

The Commission found that a fair and full opportunity to address the issues was provided based on the length of time that the case has been pending, the number of responses provided by AEP Ohio to discovery requests, the number of days of hearing, and the opportunities to present testimony, cross-examine witnesses, and file briefs.<sup>86</sup> The Commission stated further that the parties' attorneys are competent, knowledgeable, and capable of litigating more than one case at a time.<sup>87</sup> These conclusions do not respond to the due process arguments raised by P3/EPSC and others, however. The fact that the attorneys are competent and knowledgeable, and ended up having to litigate more than one significant case at a time, does not address whether due process rights were violated. The Commission should have addressed the due process arguments presented.<sup>88</sup>

As to the conflict schedule with the FirstEnergy ESP IV hearing, the Commission agreed that this case and the FirstEnergy ESP IV proceeding are significant, but then stated that they "must be heard and decided in an expeditious manner and without delay."<sup>89</sup> Again, this Commission's decision did not address the specific argument posited. Moreover, significant cases are important but the fact that they are significant does not justify conflicting schedules and unfair timeframes that hinder the parties (especially the opposing parties) and preclude a fair opportunity to prepare. The due process rights of P3/EPSC and other parties were violated by the Commission.

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<sup>85</sup> At the first day of the second phase of the hearing, the Attorney Examiner stated, "All right. With that, the objections are noted for the record, but I think it's not going to come as any surprise to you we are all here today. This date has been established as the date for this hearing and we are going to move forward." (Tr. Vol. 18 at 4465) This is not a ruling, however.

<sup>86</sup> Opinion and Order at 12.

<sup>87</sup> Opinion and Order at 11.

<sup>88</sup> *Accord, In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, Slip Opinion No. 2016-Ohio-1607.

<sup>89</sup> Opinion and Order at 11.

**C. The Commission erroneously applied the three-prong test for Stipulations.**

**Assignment of Error No. 13: The Commission erred in applying its three-prong test for the legal standard of “reasonableness” to approve the filed stipulation.**

**Assignment of Error No. 14: The Commission erred in using the three-prong test to evaluate the stipulation in light of the electric distribution utility’s authority to reject modifications.**

As noted earlier, it was error to give the Stipulation undue weight. The Commission should first have evaluated whether the Stipulation qualified as a valid stipulation. Parties to Commission proceedings are permitted to enter into stipulations, which are not binding on the Commission but may be accorded substantial weight.<sup>90</sup> The Commission’s current interpretation of the three-prong test distorted the proper role of the Stipulation in this proceeding. In judicial disputes, a stipulation reached between truly adverse parties is inherently the result of genuinely serious bargaining, but in this matter, it constitutes advocacy for one side against another side. In other words, stipulations can determine the rights of intervenors and non-intervenors who oppose the terms of the stipulations, but the Commission is asked to approve those terms as “stipulations” that will be binding on all.

In this context, the Stipulation presented to the Commission is not a “stipulation” in the judicial sense of that word, and it should not be treated as if it is. It is an attempt to obtain a favorable outcome at the expense of other participants in the proceedings and must be reviewed and evaluated on that basis. The fact that some of the parties agreed to a stipulation that favors them is not an indication of serious bargaining and hardly suggests that their agreement is fair or beneficial to others or to the public interest. The Commission’s implicit assumption that the

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<sup>90</sup> Ohio Adm. Code 4901-1-30; *Consumer Counsel v. PUCO*, 64 Ohio St. 3d 123, 125 (1992); *Akron v. PUCO*, 55 Ohio St. 2d 155, 157 (1978).



Stipulation in this matter deserves some presumption of fairness on the merits is inconsistent with this Commission's performance of its statutory duties.

Assuming *arguendo* that the Stipulation is a valid stipulation, there is no statute or administrative regulation specifying the legal standard of review that the Commission should apply in deciding whether to approve, modify, or reject a stipulation. The Commission decided in this proceeding that "[t]he ultimate issue for our consideration is whether the agreement \* \* \* is reasonable and should be adopted."<sup>91</sup> It then adopted a standard of review that "has been discussed in a number of prior Commission proceedings," and which it described as three criteria:<sup>92</sup>

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

The Commission added that the Supreme Court of Ohio "has endorsed the Commission's analysis using those criteria," citing *Indus. Energy Consumers of Ohio Power Co. v. PUCO*, 68 Ohio St. 3d 559 (1994).

The Commission erred as a matter of law in using its current, modified version of this three-prong test to approve the Stipulation filed in the present matter, for several reasons. The Commission effectively nullified the first criterion by approving a Stipulation that is the product of favor-trading and side deals, not "serious bargaining," which allowed AEP Ohio to "buy" signatories to a deal that is favorable to AEP Ohio and the signatories, but not to its ratepayers. The Commission applied the second criterion, which requires that the Stipulation benefit

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<sup>91</sup> Opinion and Order, at 48.

<sup>92</sup> Opinion and Order at 48.

ratepayers and the public interest in such a vague and amorphous form, with no clear standards, that it abdicated its legal responsibility to judge the merits of the agreement and that would allow it to approve virtually any stipulation if it chooses to do so. Finally, it treats the third criterion of the three-prong test, violations of regulatory principles, as a discretionary consideration that allows the Commission's abstract notions of ratepayers' "benefits" outweigh mandatory statutory requirements adopted by the General Assembly.

In short, the Commission's current interpretation of the three-prong test does not truly evaluate the reasonableness of a proposed stipulation and is of little value in deciding whether it should be approved, modified, or rejected. None of the indicia of merit typically associated with products of serious bargaining apply here, when the Stipulation reflects side-deals and favor trading instead. There has been no *real* showing on the merits that the Stipulation will benefit ratepayers or the public interest; there are just optimistic hopes resting on wildly inaccurate predictions that ignore contemporary price changes, as well as a host of future filings. And, as discussed *supra*, the provisions of the Stipulation, including Rider PPA, are not authorized by Ohio law and violate numerous Ohio statutes, so it cannot be approved by the Commission regardless of the first two criteria of the three-prong test.

In addition, the three criteria included in the Commission's test are inapplicable when an electric distribution utility has the authority to simply reject modifications that the Commission proposes to a Stipulation. The Commission specifically noted that AEP Ohio has the option, under R.C. 4928.143, to reject any Commission modifications to the ESP III and withdraw its application for an ESP III.<sup>93</sup> As a result, the Commission is not acting in a truly adjudicatory role, and its ruling on the Stipulation is ultimately advisory.

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<sup>93</sup> Opinion and Order at 82. In addition, the Commission stated that, if AEP Ohio proceeds to file the PPA Rider tariffs and finalize the PPA with AEPGR based upon the term sheet, the Commission would construe those actions

Accordingly, the Commission should rule on rehearing that its current interpretation of the three-prong test is not the proper legal standard for evaluating the Stipulation and deciding whether it should be approved, modified, or rejected.

**Assignment of Error No. 15: The Commission erred in holding that the reasonableness of the Stipulation is not affected by the \$9.9 million and an exclusive pilot program in favors that AEP Ohio traded for signatories' signatures.**

The Commission found that the Stipulation in this matter “is the product of serious bargaining among capable, knowledgeable parties.”<sup>94</sup> It reached that conclusion despite evidence of record that a number of the signatories received substantial benefits from AEP Ohio through \$9.9 million of favor trading for their signatures on the Stipulation. This is legally incorrect, and it should be corrected on rehearing.

AEP Ohio was required to present evidence that the Stipulation resulted from serious bargaining.<sup>95</sup> Negotiations over the terms of a stipulation must be conducted fairly; “special considerations, in the form of side agreements among the signatory parties,” can give one party an “unfair advantage” that distorts the bargaining process.<sup>96</sup>

In this case, the Stipulation contains multiple provisions that reflect substantial favor trading. Over \$9.9 million in benefits are earmarked for specific signatories, including the Ohio Hospital Association (“OHA”) and Ohio Partners for Affordable Energy (“OPAE”). In addition, a special Supplier-Consolidated Billing pilot program is restricted to only the CRES participants

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as voluntary acceptance of the mechanism limiting the rate impacts of the PPA rider. *Id.* On April 5, 2016, AEP Ohio filed the tariff sheet and a letter indicating that the AEP Ohio/AEPGR PPA had been executed. The fact that AEP Ohio has taken those actions, however, does not negate the fact that AEP Ohio has the right to reject the Commission’s modifications to the Stipulation and reject the ESP III.

<sup>94</sup> Opinion and Order at 52.

<sup>95</sup> *Ohio Consumers Counsel v. PUCO*, 111 Ohio St. 3d 300, 2006 Ohio 5789.

<sup>96</sup> *Id.* at ¶ 86.

who signed the Stipulation.<sup>97</sup> This was not “serious bargaining” designed to improve the Stipulation for ratepayers and the public; it was simply favor-trading, in which payments or other benefits were exchanged to buy support for the Stipulation.

The severability provision of the Stipulation dramatically illustrates this point. It mandates that a signatory party will forfeit its “stipulation provision” if it unsuccessfully challenges any attempt by AEP Ohio to cure a termination of Rider PPA.<sup>98</sup>

The Signatory parties agree to work in good faith, on an expedited basis not to exceed 60 days, to cure any court-determined deficiency. The Companies will then file \* \* \* the modification to the PPA Rider, or its successor provision, for expedited approval by the Commission \* \* \*. A Signatory Party may choose to oppose and express any concerns with the modified PPA Rider, or its successor provision, to the Commission; however, if such concerns are not accepted by the Commission, then any Signatory Party that opposed the modified PPA Rider or its successor provision, will forfeit its stipulation provision(s) \* \* \*. No amounts collected shall be refunded as a result of this severability provision.

This language reveals that AEP Ohio traded “stipulated provision(s)” to obtain support for Rider PPA from specific signatories, and that a signatory will lose the favors it traded if it opposes -- or even “express[es] any concerns” about a modified PPA Rider to the Commission, in the circumstances described above.

The Commission summarily rejected the objections of multiple intervenors that it could not presume the “reasonableness” of the Stipulation from the fact that it was supported by numerous signatories, when the signatories supported the Stipulation because they received financial or other benefits for supporting it, not because they believed it was reasonable or

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<sup>97</sup> Direct Energy Services LLC, Direct Energy Business LLC, Interstate Gas Supply, Inc. and possibly FirstEnergy Solutions Corp.

<sup>98</sup> AEP Ex. 52 at Settlement Ex. WAA-1 at 35.

beneficial to ratepayers, the markets, or Ohio. Instead, the Commission simply dismissed concerns about favor trading out of hand:<sup>99</sup>

The Commission does not agree that certain provisions in the stipulation are nothing more than monetary inducements offered by AEP Ohio in exchange for the support of the signatory parties. The stipulation's provisions directing specific payments to OHA and OP&E require these parties, on behalf of Ohio hospitals and low-income customers, respectively, to take a number of steps to implement specific energy efficiency programs, and, as discussed above, energy efficiency measures provide significant customer benefits (Joint Ex. 1 at 13-16). The payments are, therefore, to be made in exchange for specific services and programs that add value to the stipulation as a package.

This excerpt from the Commission's ruling evidences a profound misunderstanding of its task in this proceeding. The fact that the monetary inducement will be used for specific programs or measures (even if related to energy efficiency) does not negate the fact that the terms in the Stipulation are monetary inducements. The Commission treats the fact that favors were traded for support of the Stipulation as evidence that the Stipulation is reasonable, when it is actually reason to disavow the reasonableness of the Stipulation and to question who will actually benefit. Parties to a stipulation will naturally "bargain in support of their own interests," but that is precisely why favor trading is suspect, and not evidence that a stipulation is good for ratepayers and the Ohio electric industry.

As noted above, the Supreme Court of Ohio has recognized that "special considerations, in the form of side agreements among the signatory parties" is evidence that "one or more parties may have gained an unfair advantage in the bargaining process."<sup>100</sup> The Stipulation in the

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<sup>99</sup> Opinion and Order, at 44.

<sup>100</sup> *OCC v. PUCO*, 111 Ohio St. 3d 300, 321, 2006 Ohio 5789, at ¶ 86.

present proceeding reveals multiple special considerations, including millions of dollars in monetary inducements. They include:<sup>101</sup>

- AEP Ohio will donate \$500,000 to a research and development program for clean energy technology.
- AEP Ohio will provide \$400,000 in EE/PDR funding each year to the OHA;
- AEP Ohio will provide up to \$600,000 each year in additional EE/PDR funding under an annual energy efficiency program for OHA members.
- AEP Ohio will pay \$200,000 to OPAE for the Community Assistance Program.
- AEP Ohio will decrease its Alternative Feed Service rates for OHA members (\$2.50 per kilowatt). This rate adjustment is estimated to save OHA members approximately \$100,000 each year, thus saving the OHA members significant amounts of money.<sup>102</sup>
- OPAE was designated as manager of the Community Assistance Program for 2017 under an \$8 million budget, for which it will be paid a five percent management fee roughly in the amount of \$400,000.<sup>103</sup>

In short, AEP Ohio has perverted the negotiation process by agreeing to trade millions of dollars in benefits to certain parties in exchange for their support of Rider PPA. Its success in that endeavor is not evidence that the Stipulation is reasonable.

Accordingly, the Commission should reconsider its finding that the Stipulation in this matter resulted from serious bargaining that demonstrates its reasonableness.

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<sup>101</sup> AEP Ex. 52 at Settlement Exhibit WAA-1 at page 13-16.

<sup>102</sup> Tr. 18 at 4551.

<sup>103</sup> Tr. 18 at 4558-4559.

**Assignment of Error No. 16:** The Commission erred in holding that the reasonableness of the Stipulation is not affected by the existence of a side deal with a non-opposing party.

**Assignment of Error No. 17:** The Commission erred in holding that the reasonableness of the Stipulation is not affected by a side deal that is disclosed to parties after negotiations ceased.

The Commission also rejected intervenors' objection that the Stipulation should not be deemed reasonable under the first criterion of the three-prong test, which requires serious bargaining, due to a side deal that AEP Ohio entered into with the Industrial Energy Users-Ohio ("IEU") to gain its non-opposition. The Stipulation does not result from serious bargaining in this circumstance, and the approval of entering into favorable side deals is not evidence that the Stipulation itself is good for anyone except the signatories of the side deals.

The Commission agreed with intervenors that "the existence of a side agreement can be relevant to a determination of whether serious bargaining occurred in the negotiation of a stipulation."<sup>104</sup> In this case, it found that the side deal between AEP Ohio and IEU had not "unduly influenced another party to these proceedings to sign or not sign the stipulation."<sup>105</sup> But that is not the point; if the side deal was the reason IEU choose not to oppose the Stipulation, and not all parties were aware of it until after the Stipulation negotiations were completed, then the Stipulation did not result from "serious bargaining" under the first criterion of the Commission's three-prong test because certain negotiations were taking place on the side. The Commission concluded that the side agreement did not "adversely affect whether serious bargaining occurred,"<sup>106</sup> but this ignores that some parties were kept in the dark about the side deal during Stipulation negotiations – a fact that AEP Ohio admitted.<sup>107</sup>

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<sup>104</sup> Opinion and Order at 44.

<sup>105</sup> *Id.* at 51.

<sup>106</sup> *Id.*

<sup>107</sup> Tr. Vol. 19 at 4814.

The Commission explained that its finding is based on four points: (1) the AEP Ohio/IEU agreement was acknowledged and provided to all parties; (2) the AEP Ohio/IEU agreement does not require IEU to support or endorse the Stipulation; (3) IEU is not a signatory party to the Stipulation; and (4) the AEP Ohio/IEU agreement was not submitted to the Commission and the Commission will not enforce its terms.<sup>108</sup> None of these “explanations” supports the Commission’s finding that the Stipulation resulted from serious bargaining. Also, none of these points mitigates the fundamental problem with the AEP Ohio/IEU side agreement –secret, exclusionary side dealing took place.

The negotiation of the Stipulation approving Rider PPA followed an evidentiary hearing that began in September 2015 and concluded in November 2015. On the same day that the Stipulation was finalized and filed on December 14, 2015, AEP Ohio and IEU executed the side agreement. It was not until December 22, 2015, that IEU revealed for the first time to *all* parties that had it had struck a separate side deal with AEP Ohio. AEP Ohio provided the side deal to all parties via discovery, but it too was after the negotiations were done.<sup>109</sup>

AEP Ohio’s failure to disclose this side deal during the negotiations over the Stipulation is exactly the type of behavior that the Ohio Supreme Court cautioned against, as providing an unfair advantage in the bargaining process, in *OCC v. PUCO, supra*. AEP Ohio gained an unfair advantage during bargaining by hiding this side deal from the other parties who were participating in the negotiations. Moreover, this point is accentuated by the fact that AEP Ohio handled the negotiations of a second side deal (with Sierra Club) during this same timeframe in

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<sup>108</sup> Opinion and Order at 51.

<sup>109</sup> Tr. Vol. 18 at 4573; Tr. Vol. 19 at 4810, 4812; Tr. Vol. 20 at 4957.



the opposite fashion – AEP Ohio fully disclosed its existence to all parties during the negotiations.<sup>110</sup>

The Court has reversed Commission orders when reasonable means for settlement participation were lacking.<sup>111</sup> This Commission has rejected a stipulation for lack of serious bargaining where there were side agreements and the evidence did not demonstrate the participation of parties during negotiations.<sup>112</sup>

The evidence regarding the AEP Ohio/IEU side agreement resembles exclusionary settlement discussions, not serious bargaining. The Commission erred in finding that that side deal did not adversely affect whether serious bargaining of the Stipulation took place. Even if the AEP Ohio/IEU side deal was ultimately revealed, it was not revealed until after the Stipulation was filed. The Commission should now correct that finding on rehearing.

**Assignment of Error No. 18: The Commission erred in finding that the Stipulation is reasonable if it benefits ratepayers and the public interest “as a package,” regardless of the nature and extent of its harmful effects.**

The Commission also erred as a matter of law when it found that the Stipulation satisfies the second prong of the three-prong test.<sup>113</sup> It believed that it “must determine whether the settlement, *as a package*, benefits ratepayers and the public interest.”<sup>114</sup> The Commission explained that:<sup>115</sup>

[T]he second part of the test specifically requires that we evaluate the Stipulations as a package \* \* \*. We have repeatedly found value in the parties’ resolution of pending matters through a stipulation package \* \* \*. We, therefore, affirm that the stipulation

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<sup>110</sup> Tr. Vol. 19 at 4820.

<sup>111</sup> *OCC v. PUCO*, *supra*.

<sup>112</sup> *In the Matter of the Application of the Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates*, Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM, 03-2080-EL-ATA, 2007 Ohio PUC Lexis 703, at \*104.

<sup>113</sup> Opinion and Order at 20, 53.

<sup>114</sup> Opinion and Order at 77; emphasis added.

<sup>115</sup> Opinion and Order at 77-78.

offered by the signatory parties in these proceedings must be viewed as a whole.

The Commission's "package" approach suggests that stipulated provisions that harm ratepayers and the public interest should nevertheless be approved if they are "outweighed" in some sense by beneficial provisions. This ignores the fact that harmful provisions can often be severed from a stipulation, so that the harm is avoided while the benefit is retained.

The issue is *not* whether the "good" provisions outweigh the "bad" provisions. It is whether provisions that harm ratepayers and the public interest are so essential to the proper functioning of the stipulation that they must be retained in order to achieve the other benefits it provides.

In this case, the Commission did not separately analyze the provisions that harm ratepayers and the public interest to determine whether it was reasonable to retain them. It glossed over that analysis by finding that some provisions provide benefits, which makes the Stipulation beneficial as a package. This is incorrect, as a matter of law, and the Court should reconsider its finding.

**Assignment of Error No. 19: The Commission erred in finding that the Stipulation is reasonable on the basis of utility commitments to make proposals in future proceedings.**

AEP Ohio agreed in the Stipulation (Section III.C and D) to include certain items in its future application for extension of its ESP III and make future filings.<sup>116</sup> These items will be proposals for the Commission's consideration. Unquestionably, it remains to be seen if any such proposals become part of a future ESP or are approved otherwise. As a part of its finding that

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<sup>116</sup> AEP Ohio Ex. 52 at Settlement Exhibit WAA-1 page 10-13. Among those items is AEP Ohio's commitment to file a grid modernization business plan is not a benefit because the utility already has a proposal that the Commission has elected not to move forward with. AEP Ohio has had a grid modernization business plan pending since 2013, and that proceeding had not progressed. *In the Matter of the Application of Ohio Power Company to Initiate Phase 2 of its gridSMART Project and to Establish the gridSMART Phase 2 Rider*, Case No. 13-1939-EL-RDR.

the Stipulation benefits ratepayers and the public interest under the second criterion of the three-prong test, the Commission counted as “benefits” these unenforceable “commitments.” Specifically, the Commission found “value for customers in AEP Ohio’s commitment to bring these proposals before the Commission for further consideration.”<sup>117</sup> It specifically cited to the future proposals related to an automaker credit, a carbon reduction plan, and a grid modernization business plan.<sup>118</sup> At the same time, the Commission admitted that these proposals are subject to further review in future proceedings and that *nothing* in its recognition of the “benefits” of the proposals should be construed as a predetermination of the outcome of those future proceedings.<sup>119</sup>

While it may be intended that these future applications could provide benefits to ratepayers and the public interest, there was no benefit from them prior to the Commission’s decision and there is still no benefit provided by them now that the Commission approved the Stipulation. Rather, any benefit is illusory. The status of those future filings remains the same: future filings will be proposed, and neither ratepayers nor the public interest will benefit from any of those future applications unless and until separate Commission action takes place at some unknown time in the future. As a result, it was unjust and unreasonable for the Commission to conclude that the commitments to offer proposals in future proceedings are actually benefits for purposes of evaluating the Stipulation. Moreover, and importantly, it is unjust and unreasonable for the Commission to conclude that these future applications provide a basis for finding the Stipulation to be reasonable, especially when linked to AEP Ohio’s PPA proposal.

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<sup>117</sup> Opinion and Order at 84.

<sup>118</sup> Opinion and Order at 84-85.

<sup>119</sup> Opinion and Order at 84.

- D. The proposed projection of Rider PPA is not reliable, nor was the Commission's evaluation of the evidence conducted properly.

**Assignment of Error No. 20: The Commission erred in adopting projections by witnesses that it believed were better than projections by other witnesses, without regard to whether they were sufficiently reliable to meet AEP Ohio's burden of proof.**

Faced with multiple divergent financial projections about the effects of Rider PPA, the Commission chose an erroneous standard of review for determining whether Rider PPA will benefit ratepayers and the public interest. It concluded that it must "evaluate the parties' projections, in order to determine a reasonable overall estimate of the PPA rider's net credit or charge based on the evidence of record."<sup>120</sup> The Commission recognized that even those projections are "simply predictions" of the future and "may be proven wrong, particularly over an eight-year timeframe."<sup>121</sup>

The Commission first considered the projection presented by the Office of the Ohio Consumers' Counsel ("OCC") witness Wilson and concluded that it was fundamentally flawed for several reasons. The Commission discussed the flaws with specificity. Then, the Commission summarily decided to give no weight to any of the projection-related testimony from Sierra Club and IGS witnesses because their testimony was not updated after the Stipulation.<sup>122</sup> Next, the Commission concluded that AEP Ohio's projections were thorough and rejected all criticisms about the AEP Ohio projections, stating simply the following:<sup>123</sup>

AEP Ohio witnesses Pearce, Bletzacker, and Allen, however, have provided a thorough analysis of the PPA rider's estimated impact, which incorporates the only actual forecast of long-term energy prices in the record. Despite the non-signatory parties' critical assessment of AEP

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<sup>120</sup> Opinion and Order at 78.

<sup>121</sup> *Id.* at 81.

<sup>122</sup> Sierra Club and IGS signed the Stipulation and therefore, their witnesses would not have updated their prior opposition testimony. Instead of weighing that evidence (knowing that it had not been updated), the Commission rejected their testimony entirely. Opinion and Order at 79-80, fn. 31.

<sup>123</sup> Opinion and Order at 80.

Ohio's projections, the Commission is not persuaded by their arguments and the fact remains that no other party has presented a full projection of energy prices and the net revenues under the PPA rider. As noted above, even OCC witness Wilson's projection is based, in large part, on the analysis of AEP Ohio's witnesses. Additionally, although several parties argue that the 2013 fundamentals forecast used by AEP Ohio is outdated and that the Company should have updated its projections using the 2015 fundamentals forecast, the U.S. Energy Information Administration (EIA) noted in its Annual Energy Outlook (AEO) for 2015 that the projected electricity prices for the Reference case, over the long term, actually increased in comparison to the Reference case in the AEO for 2014. \* \* \* Therefore, it is possible that, even if Mr. Bletzacker had used an updated fundamentals forecast, higher electricity prices may have resulted in AEP Ohio's PPA rider projections becoming more favorable to customers rather than less favorable.

Accordingly, based upon the evidence in the record, the Commission finds that AEP Ohio's PPA rider analysis is reliable and should be used to determine an estimate of the rider's net impact.

The plain language of the decision demonstrates that the Commission erred as a matter of law in adopting AEP Ohio's Rider PPA analysis, without presenting a substantive detailed analysis of the company's methodology that explains whether AEP Ohio carried its burden of proving that Rider PPA will actually benefit ratepayers and the public interest.

**Assignment of Error No. 21: The Commission erred in finding that the weather-normalized financial projection by AEP Ohio witness Pearce is reliable and reasonable.**

The Commission found that the PPA rider must not impose unreasonable costs on customers.<sup>124</sup> As a result, the Commission reviewed the projected impact of Rider PPA as presented by AEP Ohio. The Commission correctly understood that multiple projections were presented by the utility, based on several different assumptions. The Commission found that AEP Ohio's weather-normalized projection is reasonable and conservative.<sup>125</sup> The Commission cited as a basis for selecting this particular company projection, the fact that the stipulating

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<sup>124</sup> Opinion and Order at 78.

<sup>125</sup> Opinion and Order at 80.

parties had agreed that the initial rider rate should be based on the weather-normalized credit value for 2016.<sup>126</sup> Yet, that presents no explanation for finding the weather-normalized case reasonable for the entire eight-year period. The Commission also did not compare or analyze the weather-normalized case vis-à-vis the other three company projections. The Commission did not explain its decision to find the weather-normalized case as “reasonable and conservative.” This was error.<sup>127</sup>

The Commission also ignores key evidence from AEP Ohio, in which multiple company witnesses did not recommend the use of the weather-normalized projection:

- AEP Ohio witness Pearce acknowledged that weather is never normal,<sup>128</sup> which demonstrates that the weather-normalized projection is not the most reasonable one to rely upon.
- AEP Ohio witnesses Pearce and Allen both testified that the likely outcome for Rider PPA was listed under the average of High Load Low Load.<sup>129</sup>

Therefore it is unjust and unreasonable for the Commission to have found the weather-normalized projection to be reliable, reasonable, and a conservative projection of the impact of Rider PPA throughout the term.<sup>130</sup>

Additionally, the Commission ignores the evidence presented from the utility that demonstrates clearly that AEP Ohio’s own forecasts do not present credible or reliable evidence

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<sup>126</sup> AEP Ohio Ex. 52 at Settlement Exhibit WAA-1 at page 6.

<sup>127</sup> *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio1608, at ¶66, citing *In re Fuel Adjustment Clauses for Columbus S. Power Co. & Ohio Power Co.*, 140 Ohio St.3d 352, 2014-Ohio-3764, 18 N.E.3d 1157, ¶45.

<sup>128</sup> Tr. Vol. 18 at 4574.

<sup>129</sup> Tr. Vol. 2 at 498, 582-583; Tr. Vol. 18 at 4575, 4582-4584.

<sup>130</sup> Nothing presented in this argument by P3/EPSC is intended to reflect agreement with AEP Ohio’s projections. Rather, the point is that once the Commission determined that the company analysis was the most reliable, it chose a projection that nobody supported. Moreover, the Commission did not present any rationale for selecting the weather-normalized case other than citing the fact that an initial rider rate would be based upon a credit value from that projection. This wholly ignores the fact that the initial rider value will be adjusted only a few months later based upon a new projection and will not be relied upon at all for the remainder of the lengthy term.

of the impact of the PPA Rider on the ratepayers—it is unclear whether it will be a credit or a charge each year:

- AEP Ohio witness Vegas clearly stated that the company's forecasts only represent the costs and prices at a certain point in time and that they have inherent uncertainty.<sup>131</sup>
- AEP Ohio witness Allen testified in a similar manner, pointing out that the company has presented what it considers to be the best estimates of costs and revenues at the time the company prepared the case.<sup>132</sup>
- The projections swing wildly and they do not indicate whether the PPA rider will be a credit or a charge each year.<sup>133</sup>

Taken altogether, AEP Ohio's own evidence of the impact that Rider PPA will have on the ratepayers is uncertain, and the weather-normalized projection is not reasonable or reliable. Accordingly it was unjust and unreasonable for the Commission to conclude that the weather-normalized projection is reliable and reasonable.

**Assignment of Error No. 22: The Commission erred in not analyzing and weighing the expert testimony presented by P3/EPISA witness Cavicchi regarding the financial projections by AEP Ohio.**

The Commission not only discussed the rider projections presented by AEP Ohio, it addressed the projection presented by OCC, finding the latter to be fundamentally flawed.<sup>134</sup> The Commission further noted that it gave no weight to the projection testimony presented by two other witnesses (Sierra Club and IGS).<sup>135</sup> The Commission, however, failed to address the expert testimony presented by P3/EPISA witness Cavicchi, who criticized the AEP Ohio projections and presented adjusted projections based on (1) more current and accurate natural gas price assumptions separate from the U.S. Energy Information Administration's Annual Energy Outlook for 2015<sup>136</sup> and (2) electric demand assumptions.<sup>137</sup> It was error for the Commission to

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<sup>131</sup> Tr. Vol. 1 at 170-172.

<sup>132</sup> Tr. Vol. 18 at 4593.

<sup>133</sup> AEP Ohio Ex. 52 at Settlement Exhibit WAA-2.

<sup>134</sup> Opinion and Order at 79.

<sup>135</sup> Opinion and Order at 79-80, fn. 31.

<sup>136</sup> Natural gas prices are a major "driver" of electric prices. Tr. Vol. 21 at 5271.

fail to address this expert testimony in any substantive manner. AEP Ohio had the burden of proof in this proceeding and the Commission should have directly addressed and weighed all criticisms presented by expert witnesses regarding this key aspect of the proceeding. Failure to mention at all one of the few expert witnesses that discussed the projections in detail was unjust and unreasonable.

**Assignment of Error No. 23: The Commission erred in discounting the criticisms of AEP Ohio's projections on the grounds that the critics did not present a full projection of energy prices and net revenues under the Rider PPA.**

The Commission was not persuaded by the criticisms of AEP Ohio's Rider PPA projections. In the following passage, the Commission inexplicitly linked that conclusion with the fact that no other party presented a full projection of energy prices and the revenues under the PPA rider:<sup>138</sup>

AEP Ohio witnesses Pearce, Bletzacker, and Allen, however, have provided a thorough analysis of the PPA rider's estimated impact, which incorporates the only actual forecast of long-term energy prices in the record. Despite the non-signatory parties' critical assessment of AEP Ohio's projections, the Commission is not persuaded by their arguments and the fact remains that no other party has presented a full projection of energy prices and the net revenues under the PPA rider. As noted above, even OCC witness Wilson's projection is based, in large part, on the analysis of AEP Ohio's witnesses. \* \* \*

The fact that no other party presented a full projection has no bearing on whether (1) the criticisms against AEP Ohio's projections are justified or (2) AEP Ohio's projections are themselves reliable and reasonable. AEP Ohio's projections must be fully analyzed independent of any other projections. Moreover, AEP Ohio had the burden in this proceeding to prove that its PPA proposal was just and reasonable. Thus, the Commission, impermissibly, tied the lack of an independent projection to elevate AEP Ohio's projections to "reasonable." The lack of an

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<sup>137</sup> P3/EPISA Ex. 13 at 11-20 and Attachments AJC-S-1 through AJC-S-4D.

<sup>138</sup> Opinion and Order at 80.



independent projection should have no bearing at all on whether criticisms of AEP Ohio's projections are reasonable and, in turn, whether AEP Ohio's projections are reliable and reasonable.

**Assignment of Error No. 24: The Commission erred in finding that a two-year limit on rate increases related to Rider PPA will “protect customers” against rate volatility and price fluctuations, and provide additional rate stability.**

After evaluating the projections for Rider PPA, selecting the weather-normalized projection, and concluding that Rider PPA will result in an overall credit to customers, the Commission acknowledged that even the “most reliable” projections may be proven wrong.<sup>139</sup> The Commission then imposed limits on charges from June 2016 through May 2018.<sup>140</sup> It explained that the purposes of these limits are:

- To protect customers from rate volatility
- To protect customers against price fluctuations
- To provide additional rate stability for customers

The Commission's limits for the first two years of the rider are based on the June 1, 2015 “rate plan bill schedules” of SSO customers, and the rider rates cannot increase between June 2016 to May 2018 by more than five percent of those SSO schedules, except to allow for rate changes from prior proceedings (including distribution-related proceedings) or from subsequent proceedings. The Commission also expressly allowed the unrecovered amounts of Rider PPA expenses to be included in subsequent reconciliation calculations.<sup>141</sup>

This two-year “limit” is unreasonable for several reasons.<sup>142</sup> First, during the first two years of the ESP IV, multiple estimates of Rider PPA project that it could be a charge on

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<sup>139</sup> Opinion and Order at 81.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 81-82.

<sup>142</sup> P3/EPSC previously highlighted the unlimited nature of Rider PPA and argued that it should not be approved by the Commission on an unlimited basis. P3/EPSC Initial Brief at 16; P3/EPSC Reply Brief at 2-3. P3/EPSC continues to believe that an unlimited Rider PPA is unjust and unreasonable. However, the limit imposed on AEP

customer bills and therefore, the alleged protection to be afforded by this “limit” depends upon how different the June 1, 2015 SSO customer rate plan bill schedules are from the rider rates during the first two years of the rider. It is unclear from the Commission’s decision what effect this “limit” will actually have on ratepayers. We do know, however, that Rider PPA can nonetheless be an additional amount on the ratepayer’s bill that it would not have otherwise. Adding Rider PPA charges on the customer’s bills does not (a) protect customers from rate volatility, (b) protect customers against price fluctuations, or (c) provide additional rate stability for customers.

Second, if the Commission desires to truly to protect customers from rate volatility, and price fluctuations, or to provide additional rate stability, then the Commission “limit” should be not for just the first two years of the rider. The Commission presented no explanation as to why it does not apply this “limit” in other years.

Third, this limit expressly allows Rider PPA to be adjusted up and down during the quarterly adjustments during the first two years of the ESP IV. Adjusting the rider rate on a quarterly basis does not protect customers from rate volatility and price fluctuations, or provide additional rate stability. Quarterly adjustments will cause the Rider PPA rates to fluctuate and ratepayers will see those fluctuations on their bills.

Fourth, pursuant to the decision, AEP Ohio has the ability to roll over any amounts not recovered under Rider PPA during the first two years. Thus, those unrecovered amounts would be additional amounts on customer bills, which does not protect customers from rate volatility and price fluctuations, or provide additional rate stability for customers. As a result, the effect of

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Ohio by the Commission does not fulfill the alleged purpose for multiple reasons explained herein. Nothing in this assignment of error is intended to imply that Rider PPA should be implemented or should be implemented on an unlimited basis.

these roll-overs is that customers must pay the roll-over charges at a later date which does not protect customers from rate volatility and price fluctuations, or provide rate stability.

For all of these reasons, the Commission erred in finding that a two-year limit on rate increases related to Rider PPA will “protect customers” from price fluctuations over the term of the rider.

**Assignment of Error No. 25: The Commission erred in finding that it could properly ignore known downward price trends in the price of natural gas when it makes financial projections.**

In its decision, the Commission rejected the evidence in the record of recent drops in natural gas prices.<sup>143</sup> It ignores that *at present* natural gas prices are low and, thus, at a minimum, the beginning of Rider PPA (which is just around the corner) will begin at a time when natural gas prices are unusually low. Given that natural gas prices are a significant factor in the price of energy,<sup>144</sup> it was error for the Commission to categorically ignore this important evidence.

In contrast, the Commission found AEP Ohio’s projections to be reliable, even though they assumed higher natural gas prices for the entire period and the record evidence clearly demonstrates that, at a minimum, natural gas prices will not be at that high level for some of the time because they are so low now. The Commission erred in ignoring the downward trends in natural gas pricing and the effect that they have in the financial projections of Rider PPA.

**Assignment of Error No. 26: The Commission erred by not imposing annual and aggregate limits on Rider PPA charges.**

As set forth above, the financial projection that was adopted by the Commission estimates that Rider PPA will result in credits to ratepayers. However, substantial and credible evidence in the record questions whether the Rider will provide credits to ratepayers. The

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<sup>143</sup> Opinion and Order at 80. *See, also*, P3/EPSCA Ex. 13 (Cavicchi Supplemental Testimony) at 11-14.

<sup>144</sup> Tr. Vol. 21 at 5271.

Commission placed no limits on those charges, annually or in the aggregate, in the event that the Rider imposes charges on ratepayers. The Commission should review that ruling and adopt limits on PPA charges upon rehearing.

The Commission recognized in its ruling that projections are not guarantees and that they may be proven wrong.<sup>145</sup> The Commission attempted to provide some protection from this uncertainty to ratepayers by limiting the rate increase related to Rider PPA during the first two years of the Rider PPA term.<sup>146</sup> However, the Commission did not adopt annual or aggregate limits on Rider PPA charges despite the requests of several intervenors.<sup>147</sup> The same reasoning that requires a limit on the Rider PPA rate increases also requires a limit on the total amount of charges that are billed to ratepayers over the term. In the absence of such limits, significant charges would undermine the Commission's conclusion that Rider PPA benefits ratepayers and the public interest. In the absence of a cap on Rider PPA charges, its use as a hedge has an *unlimited* downside. There is no precedent for assigning a financial risk of this magnitude on ratepayers. The Commission has imposed annual and total limits on ratepayer payments in other proceedings.<sup>148</sup>

In the present proceeding, the amount of charges that will result under Rider PPA is unknown, and it could cost ratepayers billions of dollars over its term. OCC witness Wilson reviewed several scenarios based on updated market conditions and concluded that the most likely and reasonable estimate of Rider PPA charges to retail customers is \$1.5 billion.<sup>149</sup> In the

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<sup>145</sup> Opinion and Order at 80.

<sup>146</sup> *Id.*

<sup>147</sup> Opinion and Order at 81-82.

<sup>148</sup> See, e.g., *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC, Opinion and Order, at 9 (July 15, 2009).

<sup>149</sup> OCC Ex. 34 (Wilson Supplemental Testimony) at 5.

absence of an upper limit on charges, Rider PPA poses an unknown, substantial risk of massive charges to ratepayers over the next eight years.

The separate credits that the Commission has adopted for years five through eight of the term do little to mitigate this risk. First, these credits apply only to the last few years of Rider PPA, leaving ratepayers exposed to the full risk during the first four years. Second, the credits come from AEP Ohio, not from AEPGR or OVEC, and thus will provide an incentive to maximize revenues in the PJM markets only during the second four years. Third, the credits for the second four years apply only to their respective years and do not roll over or otherwise aggregate, and they are woefully inadequate to cover the massive risk that is being shifted to the ratepayers. Moreover, there is no guarantee that ratepayers will receive those credits in any year, even though AEPGR and OVEC receive all of their costs plus a return on equity in every year. AEP Ohio's risk is capped for years 5 through 8, when the risk to ratepayers is unlimited.

Accordingly, the Commission should impose annual and aggregate limits on Rider PPA charges to ratepayers.

**Assignment of Error No. 27: The Commission erred in finding that Rider PPA will result in a net credit to ratepayers over its eight-year term.**

After evaluating some (but not all)<sup>150</sup> of the projections presented, the Commission concluded that AEP Ohio's projections were reliable and that the weather-normalized projection is reasonable and conservative. The Commission made no adjustment to the weather-normalized projection based on the credible evidence in the record regarding errors in its assumptions. Other reasons explained above in this section also have a bearing on the Commission's conclusion that Rider PPA will result in a net credit to customers over the eight-year term. Those arguments will

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<sup>150</sup> In addition to not taking into consideration Mr. Cavicchi's analyses, the Commission gave no weight to testimony presented by Sierra Club witness Comings and IGS witness Leaza in its estimate of Rider PPA because they did not update their testimony after joining the Stipulation. Opinion and Order at 79-80.

not be repeated again. However, for those same reasons, the Commission erroneously overlooked, discounted, or ignored credible evidence from multiple expert witnesses that should have led it to conclude that, over the eight-year term, Rider PPA will not result in a net credit to ratepayers.

**Assignment of Error No. 28: The Commission erred in evaluating the impact of Rider PPA over the eight-year term, while ignoring the short-term impacts predicted, which include charges to ratepayers.**

The Commission concluded that the Stipulation will benefit the ratepayers and the public interest, in part, because it believed that Rider PPA will result in a net credit to customers of \$214 million over for the eight-year rider term.<sup>151</sup> But that is a “net” figure, and virtually every witness who addressed the issue testified that the rider will fluctuate during those eight years. The Commission simply ignored the distribution of charges and credits and the substantial risks inherent with the PPA proposal during the full eight-year term. This was error, and it should be corrected by the Commission on rehearing.

Most obviously, a “net” benefit is not necessarily a benefit at all. For example, a customer charged \$10 a year for 8 years will have a net charge of \$80, which is the same net charge that a customer would have if it was charged \$1,000 in the first year and then credited \$131.43 per year in the following years. But a \$1,000 expense in one year would be punitive, if not impossible, for some customers, and no one could claim that the customers are in the same position merely because the total net charge will be the same for both.

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<sup>151</sup> Opinion and Order, at 80.

**Assignment of Error No. 29: The Commission erred in approving Rider PPA for an eight-year term based on an outdated forecast that the Commission requires to be replaced with the first quarterly adjustment of Rider PPA.**

The Commission summarily rejected criticisms from multiple parties that AEP Ohio's projections were based on outdated key inputs.<sup>152</sup> The Commission concluded that, despite the outdated forecast, the weather-normalized case is a reliable and reasonable estimate of the Rider PPA for the eight-year term.<sup>153</sup> The rationale for that conclusion is that an updated forecast "may have resulted in AEP Ohio's PPA rider projections becoming more favorable to customers rather than less favorable."<sup>154</sup> That is speculation and an insufficient basis to conclude that an outdated forecast is reasonable.

More importantly, the Commission has ordered AEP Ohio to present a new *updated* forecast at the very first quarterly adjustment for Rider PPA.<sup>155</sup> Thus, the Commission found it acceptable to rely upon an outdated projection for evaluating the PPA proposal for eight long years (which process is inherently uncertain, by AEP Ohio's and Staff's own admissions),<sup>156</sup> but required that it be promptly replaced for calculating the rider rate at the end of the first quarter.

P3/EPSC agrees that an updated forecast is needed. It should have been provided as part of AEP Ohio's case. Also, the Commission should not have relied upon the outdated forecast for purposes of evaluating Rider PPA over eight years. The fact that the Commission has ordered that it be replaced at the first opportunity is further evidence that the Commission erred in relying on AEP Ohio's outdated projections.

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<sup>152</sup> *Id.* at 79-80.

<sup>153</sup> Opinion and Order at 77, 80.

<sup>154</sup> Opinion and Order at 80.

<sup>155</sup> Opinion and Order at 90.

<sup>156</sup> Opinion and Order at 84.

- E. **Rider PPA will not promote economic development or provide rate stability; it is only an anti-competitive subsidy.**

**Assignment of Error No. 30: The Commission erred in finding that Rider PPA and the Stipulation will promote economic development by providing “jobs and other economic benefits to the region.”**

The Commission found that the PPA proposal will “*guarantee* that the PPA units continue to provide jobs and other economic benefits to the region, while avoiding the potential for increased transmission costs that may result from premature retirements.”<sup>157</sup> It also concluded that the non-PPA terms of the Stipulation will promote economic development.<sup>158</sup> These findings are erroneous for several reasons. First, the PPA rider will not “guarantee” that the underlying plants will continue to operate during the eight-year term.<sup>159</sup> Nothing in the Stipulation as modified by the Commission guarantees that. Second, nothing in the Stipulation as modified by the Commission will guarantee that the PPA units will continue to provide the same number of jobs that currently exist at the plants. Notably, AEP Ohio has not committed to *develop* new and additional jobs during the eight-year term of the rider.

Third, nothing in the Stipulation as modified by the Commission guarantees continuation of other economic benefits, especially since numerous provisions in the Stipulation relate only to commitments to file future applications (including the automaker credit, the carbon reduction plan and the grid modernization business plan cited by the Commission). Even the conversion of Conesville Units 5 and 6 are contingent on cost recovery and other regulatory approvals.<sup>160</sup> Plus, Conesville Units 5 and 6 and Cardinal Unit 1 could be retired.<sup>161</sup> Similarly, an investigation of the co-owned PPA units (Conesville Unit 4, Zimmer Unit 1, Stuart Units 1-4 and OVEC Units)

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<sup>157</sup> Opinion and Order at 84 (Emphasis added).

<sup>158</sup> Opinion and Order at 84.

<sup>159</sup> In the Stipulation (Section III.D.6), AEP Ohio has agreed to maintain a nexus of operations (including employees) in Ohio, but that is not a commitment to continue all of the PPA plants. AEP Ohio Ex. 52 at Settlement Exhibit WAA-1 at page 16.

<sup>160</sup> AEP Ohio Ex. 52 at Settlement Exhibit WAA-1 at page 19.

<sup>161</sup> *Id.* at 20-21.



will be for possible retirement, repowering, or refueling. The Commission appears to have concluded that other economic benefits will occur because the PPA units will continue to operate for the time period, but the plain language of the Stipulation establishes that there is no such guarantee.

Moreover, the Commission does not accept continuation of a business enterprise to be economic development. The Commission's own administrative rules require applicants who seek Commission approval of economic development arrangements to demonstrate more than continuation of the status quo – they must demonstrate the creation of additional jobs, identification of benefits resulting from the new project, and an actual agreement to maintain operations at the project site for the term.<sup>162</sup> None of these indicators of economic development are contained within the PPA proposal or Stipulation.

Fourth, in a summary fashion, the Commission concluded that the PPA proposal will avoid increased transmission costs, but the decision included no analysis related to the company's estimate of transmission upgrades. P3/EPSCA contested the company's transmission upgrades study, noting significant flaws and false statements therein, but those were not addressed.<sup>163</sup> Accordingly, for multiple reasons, it was error for the Commission to conclude that Rider PPA and the Stipulation will promote economic development.

**Assignment of Error No. 31: The Commission erred in finding that Rider PPA will provide rate stability for all ratepayers in Ohio.**

**Assignment of Error No. 32: The Commission erred in finding that rates will stabilize even though Rider PPA does not guarantee a sufficient net credit to ratepayers to offset the rider's volatility.**

**Assignment of Error No. 33: The Commission erred in finding that quarterly adjustments of forecasted values will provide rate stability, when they will lead to instability.**

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<sup>162</sup> Rule 4901:1-38-03(A)(2), Ohio Administrative Code.

<sup>163</sup> P3/EPSCA Initial Brief at 21-23.

**Assignment of Error No. 34: The Commission erred in finding that Rider PPA provides a “more balanced approach than relying exclusively on the market, through a diversified portfolio with a cost-based hedge, sourced from 20 generating units \* \* \*” when there are existing mechanisms to protect against rate volatility.**

The Commission found that the Stipulation, as modified, “will protect consumers against rate volatility and price fluctuations by promoting rate stability for all ratepayers in this state” and that it is a “more balanced approach than relying exclusively on the market \* \* \*.”<sup>164</sup> There is no record support for finding that Rider PPA will provide rate stability for *all ratepayers in this state*, given that the rider will only apply to AEP Ohio’s ratepayers. Putting aside that plain error in the Commission’s findings, the Commission still erred in finding that Rider PPA will provide rate stability. It made that finding in connection with its claimed legal authority to approve Rider PPA under R.C. 4928.143(B)(2)(d), which requires that it have the effect of stabilizing or providing certainty regarding retail electric service. The Commission also claimed that this purported rate stabilization effect would allow the continuation of jobs and other economic benefits to the region, and lead to a host of ratepayer benefits that serve the public interest under its three-prong test for stipulations.<sup>165</sup>

Although the Commission opined that the proposed PPA “has substantial value as a financial hedge and rate stability mechanism that is based on approximately 30 percent on the cost of service of the PPA units and 70 percent on the retail market, \* \* \*”<sup>166</sup> it also used qualified language in finding that Rider PPA would, in theory, have the effect of stabilizing rates,

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<sup>164</sup> Opinion and Order, at 77.

<sup>165</sup> Opinion and Order at 84.

<sup>166</sup> Opinion and Order at 81. *See, also*, Opinion and Order at 94.

stating “[t]o the extent that the \$214 million net credit projected under AEP Ohio’s weather normalized case is realized over the PPA Rider term \* \* \*.”<sup>167</sup>

The evidence, however, shows that Rider PPA will have little or no stabilizing effect because it does not guarantee a sufficient credit to ratepayers to offset rate volatility, and the quarterly reconciliations will actually decrease rate stability, as explained below. The Commission should change its finding on this fact during rehearing.

AEP Ohio has claimed that Rider PPA will promote rate stability in several ways: by (possibly) providing credits to customers to offset increases in market-based retail prices; by keeping baseload generating plants in operation; and by providing a mechanism to stabilize the retail market when market prices rise.<sup>168</sup>

However, the evidence in this proceeding refutes those claims. In fact, Rider PPA will actually cause rate *instability*. First, retail markets in Ohio are not at the mercy of wholesale spot market prices. The power prices for a majority of retail customers are set by power procurements carried out considerably in advance of consumption.<sup>169</sup> Retail prices based on these forward market prices are much less volatile than day-to-day power prices.<sup>170</sup> As a result, SSO customers do not experience rate volatility because they have fixed contracts based on periodic blended auctions.<sup>171</sup> Likewise, shopping customers with fixed-price contracts may receive price discounts for committing to long-term purchases, and those fixed-rate contracts can extend for up to three years.<sup>172</sup>

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<sup>167</sup> Opinion and Order at 81.

<sup>168</sup> AEP Ohio Ex. 13 (Amended Application) at 4-5; AEP Ex. 1 (Vegas Direct Testimony) at 3-4.

<sup>169</sup> P3/EPSCA Ex. 8 (Cavicchi Direct Testimony) at 10-11; RESA/Exelon Ex. 1 (Campbell Direct Testimony) at 17-18.

<sup>170</sup> P3/EPSCA Ex. 8 (Cavicchi Direct Testimony) at 11.

<sup>171</sup> P3/EPSCA Ex. 8 (Cavicchi Direct Testimony) at 10; Staff Ex. 1 (Choueiki Direct Testimony) at 10.

<sup>172</sup> P3/EPSCA Ex. 8 (Cavicchi Direct Testimony) at 10-11; RESA/Exelon Ex. 1 (Campbell Direct Testimony) at 17-18.

Second, Rider PPA charges will not correspond to actual costs because (a) the initial rate will be based solely on a forecast, (b) subsequent rates will be “catching up” the difference between the forecasted revenues and the actual costs and revenues, and (c) to the extent that the Commission-imposed limit is triggered in the first two years, the subsequent rates will be “catching up” on those unrecovered amounts above the limit. The quarterly reconciliations will be out of step with the wholesale market prices that created the reconciliation.

Third, as P3/EPSC witness Cavicchi described, there is a lack of reliable evidence that Rider PPA will reduce retail price volatility. He pointed out that AEP Ohio is gambling that power prices rise enough to overcome the significant costs of the PPA generation facilities, but argued that it is “equally plausible that power prices will rise and fall numerous times.”<sup>173</sup> He noted that historically, power prices have risen and fallen numerous times.<sup>174</sup> Also, Mr. Cavicchi pointed out that, under the PPA proposal, there is no “insurance” for the ratepayers because they are “not making a small payment in order to guard against a low probability” of a potentially high-cost financial exposure. Rather, AEP Ohio is forcing ratepayers to take on *all* the risk associated with owning the PPA generating plants in the hope that PJM wholesale power prices rise to compensate those ratepayers.<sup>175</sup>

Fourth, Rider PPA reconciliations will occur quarterly and will not necessarily be countercyclical to the movements of wholesale prices.<sup>176</sup> For instance, if a period of relatively high wholesale prices occurs, and revenues for that period are in excess of the plants’ costs for the period, the subsequent Rider PPA “true-up” would be expected to take the form of a bill reduction. In other words, low wholesale prices and the Rider PPA adjustment would tend, if

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<sup>173</sup> P3/EPSC Ex. 8 (Cavicchi Direct Testimony) at 13-15 and Attachment AJC-3.

<sup>174</sup> *Id.* at 16 and Attachment AJC-2.

<sup>175</sup> *Id.* at 18-20.

<sup>176</sup> AEP Ohio Ex. 52 at Settlement Exhibit WAA-1 at 6; P3/EPSC Ex. 13 at 17-19.

anything, to reinforce each other, with the Rider PPA adjustments pushing rates down at the same time wholesale prices are soft.<sup>177</sup> Similarly, periods of relatively soft wholesale prices would tend to generate under-recovery of the plants' calculated costs, leaving consumers to bear upward Rider PPA adjustments on their bills in periods when unusually low wholesale prices have passed and wholesale markets have firmed.<sup>178</sup> Moreover, to the extent that there are sizeable amounts not recovered under the limit or a large change in wholesale power prices, the quarterly adjustments can also affect the rider's ability to function in a counter-cyclical fashion. The result is that frequent adjustments in Rider PPA rates will not guarantee rate stability.

Fifth, Rider PPA does not even provide the incremental rate stability that an aggregate or annual limit on customer charges would provide. If the forecast that the Commission found reliable as an estimate for the eight-year term proves incorrect (which the Commission acknowledges may happen), customers will be saddled with extremely high Rider PPA charges that are added to their bills. Looking at the annual results under that forecast (delineated above), small changes in power prices could result in completely different rate results for the rider.

Altogether, the record is clear that Rider PPA does not guarantee a sufficient credit to customers to offset any rate volatility that occurs. The Commission ignored this credible evidence that Rider PPA may increase rate instability and as a result, there is no evidentiary basis for the Commission's finding that Rider PPA will provide rate stability.

In addition to erroneously concluding that Rider PPA will provide rate stability, the Commission erred in concluding that Rider PPA is a "more balanced approach than relying exclusively on the market, through a diversified portfolio with a cost-based hedge, sourced from

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<sup>177</sup> P3/EPSC Ex. 5 at 28.

<sup>178</sup> *Id.*

20 generating units \* \* \*.”<sup>179</sup> The Commission’s view is that Rider PPA will supplement the existing benefits from the staggering and laddering of the SSP auctions.<sup>180</sup> However, Rider PPA will “undo,” not supplement, the mechanisms that customers have available to protect themselves against market volatility. Rider PPA will force ratepayers to pay the generation costs of AEP Ohio’s choosing (those of AEPGR and OVEC), and not the generation costs of the ratepayers’ own choosing. This is not a “more balanced approach” and is antithetical to the competitive marketplace. The Commission erred in reaching these conclusions and should reverse them on rehearing.

**Assignment of Error No. 35: The Commission erred in adopting a limitation on the first two years of Rider PPA without providing a coherent formula for the calculation of the limitation.**

In its decision, the Commission acknowledged that the projection that it adopted as reliable may not come to fruition and that the actual results under Rider PPA could be different from the adopted projection. Thus, despite its findings about the projections, the Commission is concerned that the supposed “benefits” of the rider may not be realized, as evidenced by the Commission’s decision to impose limits on the Rider:<sup>181</sup>

The Commission acknowledges that the projections presented in these cases are simply predictions of future market prices and costs; thus, even the most reliable projections may be proven wrong in the future, particularly over an eight-year timeframe. Therefore, in order to protect customers against rate volatility and price fluctuations and to provide additional rate stability for customers, the Commission will modify the stipulation to include a mechanism to limit the rate impacts of the PPA rider, consistent with the testimony of Staff witness Choueiki (Staff Ex. 1 at 19) and RESA witness Bennett (RESA Ex. 1 at 10). This mechanism will be asymmetrical; there will be no limit on the net credits that may be provided to customers under the PPA rider.

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<sup>179</sup> Opinion and Order at 83.

<sup>180</sup> *Id.* The Commission failed to mention that shopping customers also have available to them multiple fixed-price contract opportunities, which are another means by which the ratepayers can avoid any retail price volatility. RESA/Exelon Ex. 1 at 17-18; P3/EPSC Ex. 8 at 10-11.

<sup>181</sup> Opinion and Order at 81-82.

We direct AEP Ohio to limit customer rate increases related to the PPA rider at five percent of the June 1, 2015 SSO rate plan bill schedules for the remainder of the current ESP period through May 31, 2018. The five percent limit shall be determined not by overall customer rate classes, but on an individual customer-by-customer basis.

This clear concern, alone, should be enough for the Commission to realize that the risk of harm to the public from Rider PPA is not outweighed by AEP Ohio's desire for the rider. Instead, the Commission placed limits on the exposure that ratepayers would see in the first two years of the rider. As noted earlier, P3/EPSC has argued that an unlimited Rider PPA should not be approved by the Commission. However, the limit imposed on AEP Ohio by the Commission will not fulfill the alleged purpose for multiple reasons discussed earlier. Nothing in this assignment of error is intended to imply that Rider PPA should be implemented or that it should be implemented on an unlimited basis.

In addition to earlier arguments raised herein regarding the ineffectiveness of the limit, the limitation is confusing and raises multiple questions, including:

- What is the reference to "SSO rate plan bill schedules"?
- Is the Commission limiting the rate increase for Rider PPA to five percent of the SSO rate in effect on June 1, 2015?
- If the limit is based on the SSO rate plan bill schedules, how can it then be determined on an individual customer-by-customer basis?
- What rate increases from past and subsequent proceedings would be allowed to be passed through under Rider PPA?
- How will the five percent limit be "normalized for equivalent usage"?
- Could that normalization process result in a rate increase above five percent of the SSO rate in effect on June 1, 2015?

- What “revenue reduction” can result from the limit? Does this refer to dollar amounts that cannot be recovered due to the limitation?
- Will customers be informed of the rate impact and the dollar amounts that are not being recovered on their bill due to the limitation?
- Is AEP Ohio authorized to roll-over those unrecovered amounts to the next reconciliation and include those amounts in the calculation of the subsequent rider rate? If yes, does this roll-over continue beyond the two-year period during which the limit is in place? If yes, and unrecovered amounts continue throughout the eight years, does this roll-over terminate at the end of eight years?

The mechanics (and impact) of the Commission’s limitation are unclear and, as a result, its ruling is unjust and unreasonable. The Commission should implement a coherent (and effective) limitation that will benefit ratepayers and be in the public interest.

**Assignment of Error No. 36: The Commission erred in approving the Rider PPA and recovery of legacy costs because it will allow AEP Ohio to recover transition revenues or any equivalent revenues in violation of R.C. 4928.38 and because the Commission was without knowledge of what those costs entail.**

AEP Ohio proposed the PPA rider to stabilize rates for both shopping customers and SSO customers alike.<sup>182</sup> AEP Ohio also proposed the PPA rider to “reduce the likelihood of premature retirements of the relevant AEPGR generating plants due to short-term economic signals.”<sup>183</sup> Rider PPA is intended and designed to guarantee recovery of all costs of the involved AEPGR generating plants (on a cost-plus basis) over the eight-year period. This will guarantee that those PPA plants achieve a certain rate of return on their generation assets.

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<sup>182</sup> AEP Ohio Ex. 13 at 4.

<sup>183</sup> *Id.*



Included in those PPA costs are “legacy costs.” Legacy costs are existing capital costs of the PPA units, existing debt associated with the units, net book value of the units, existing contracts such as labor and fuel contracts, and retirement-related costs.<sup>184</sup> These costs include historical investment costs and the undepreciated plant-in-service balances in the PPA generating plants.<sup>185</sup> AEP Ohio proposed that PPA unit legacy costs would be accepted as prudent, as part of the Commission’s upfront determination of the PPA proposal in this case.<sup>186</sup> AEP Ohio did not separately identify or provide a list of all of the legacy costs, although it included them in its Rider PPA projections.<sup>187</sup> AEP acknowledged that the legacy costs are “a major component” of the costs to be included in Rider PPA.<sup>188</sup>

The Ohio General Assembly has barred recovery of not only transition revenue associated with costs that were stranded during the transition to a competitive market (following Senate Bill 3), but also any revenue that amounts to transition revenue by another name. R.C. 4928.38.<sup>189</sup> AEP Ohio clearly stated that AEP would receive revenues through Rider PPA so that its PPA plants can continue to operate in the competitive market.<sup>190</sup> The legacy costs included in Rider PPA are “transition revenues or any equivalent revenues” which may not be recovered.

Also, as part of its approval of the annual prudency review, the Commission implicitly accepted the PPA unit legacy costs as prudent, as part of the Commission’s upfront

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<sup>184</sup> Tr. Vol. 1 at 55-56; Tr. Vol. 7 at 1852-1853.

<sup>185</sup> P3/EPSCA Ex. 8 (Cavicchi Direct Testimony) at 20.

<sup>186</sup> AEP Ohio Ex. 10 at 10; Tr. Vol. 7 at 1850; AEP Ohio Ex. 52 (Allen Stipulation Testimony) at 10.

<sup>187</sup> Tr. Vol. 7 at 1853.

<sup>188</sup> Tr. Vol. 7 at 1853.

<sup>189</sup> R.C. 4928.38 states in pertinent part: “\* \* \* The utility’s receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.” *See, also, In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608, ¶21.

<sup>190</sup> AEP Ex. 1 at 7-8.

determination of the PPA proposal in this case. The Commission concluded that AEP Ohio must provide audited information establishing the amount of legacy costs and that, in the first annual audit of the rider, the auditor verify the information provided, but it did not otherwise state that the legacy costs were not being found prudent at this time.<sup>191</sup> This ruling permits AEP Ohio to include “legacy costs” in Rider PPA as requested, despite the fact that the legacy costs have not yet been identified to the Commission or verified. Thus, the Commission has allowed, as prudent, AEP Ohio to include unidentified and unverified costs to be flowed through Rider PPA. It is unjust and unreasonable and should be corrected on rehearing.

**Assignment of Error No. 37: The Commission erred in finding that Rider PPA does not provide a subsidy to AEP Ohio’s affiliates.**

**Assignment of Error No. 38: The Commission erred in finding that Rider PPA is not an anti-competitive benefit to AEP Ohio’s affiliates.**

The Commission rejected the argument raised by many intervenors that Rider PPA will be an anticompetitive subsidy, stating the following:<sup>192</sup>

R.C. 4928.02(H) requires the Commission to ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies. The Commission finds that the PPA rider mechanism, as modified in this Opinion and Order, is consistent with that state policy and the remainder of R.C. 4928.02. The PPA rider mechanism, as adopted herein, will avoid Ohio retail customers’ total reliance on market-based pricing and weather extremes. Accordingly, the Commission believes adoption of the PPA rider continues to be consistent with our obligation under R.C. 4928.02(A) to ensure the availability to consumers of reasonably priced retail electric service. We reject claims the PPA rider would violate R.C. 4928.02(H). Contrary to the arguments of opposing intervenors, the PPA rider mechanism does not facilitate the recovery of generation-related costs through distribution or transmission rates. *ESP 3 Case*, Opinion and Order (Feb. 25, 2015) at 26.

However, the Commission was “mindful” of concerns that AEP Ohio might enter into contracts with its affiliate (to sell the PPA plants’ power) that could provide a competitive

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<sup>191</sup> Opinion and Order at 90.

<sup>192</sup> Opinion and Order at 96.

advantage to the affiliate in violation of R.C. 4928.02(H), but it believed that its annual review process provided a sufficient “safeguard” for this issue.<sup>193</sup>

The PPA proposal is an unabashed guarantee of cost-plus recovery for the affiliates (AEPGR and OVEC), paid for by AEP Ohio’s ratepayers. As such, it provides the affiliates with extensive pecuniary assistance, which is nothing short of a long-term subsidy. As explained by Mr. Cavicchi, Rider PPA acts as a subsidy by shifting the risks of the plants to ratepayers.<sup>194</sup> The PJM Market Monitor concurred and noted that this is a subsidy analogous to other subsidies found to be inconsistent with competition in the wholesale power markets and, accordingly, should be rejected.<sup>195</sup> Moreover, the PJM Market Monitor stated that the Affiliate PPA will create an incentive for generators to present a “zero offer” in the PJM markets to maximize the revenue offset to the customers, which will have price-suppressive effects and make it difficult for generating units without subsidies to compete in the market.<sup>196</sup>

Other experienced and knowledgeable witnesses also testified in this proceeding that Rider PPA should be rejected because it will harm the competitive markets as an unjustified subsidy.<sup>197</sup> These witnesses are involved in multiple segments of the electric industry – market participants, market monitor, and industry experts. In addition, in rescinding waivers related to the PPA, the FERC stated that the “non-bypassable charges present the ‘potential for an inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility[.]’”<sup>198</sup>

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<sup>193</sup> Opinion and Order, at 97.

<sup>194</sup> P3/EPSCA Ex. 8 (Cavicchi Direct Testimony) at 20.

<sup>195</sup> IMM Ex. 1 at 3-4.

<sup>196</sup> IMM Ex. 1 at 3.

<sup>197</sup> See, e.g., Dynegey Ex. 1 and 2 (Ellis); P3/EPSCA Ex. 8 (Cavicchi); and IMM Ex. 1 and 2 (Bowring).

<sup>198</sup> *EPSCA v. AEP Generation Resources*, *supra*, at ¶57 citing Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 198.

Additionally, Rider PPA will be part of AEP Ohio's wires-only charges (collected as a distribution charge) even though it is a generation-related charge for the benefit of AEP Ohio's affiliates. It imposes the affiliates' costs on ratepayers, and when revenues exceed the affiliates' costs, it creates a subsidy from the distribution service to the affiliated generation services.

Other than the Commission's summary conclusions (quoted above) in which it disagreed with these arguments, the Commission failed to explain why an anticompetitive subsidy is not created. The money flow is unquestioned and the effect of that money flow is abundantly clear. The overwhelming weight of the evidence in this proceeding demonstrates that Rider PPA will harm the competitive markets by providing a subsidy to AEP Ohio's affiliates. The Commission failed to substantively address the arguments raised and its Findings were in error.

**Assignment of Error No. 39: The Commission erred in not ordering AEP Ohio to return all amounts collected from customers under Rider PPA in the event that Rider PPA or the PPA is struck down.**

In Section IV.D, the Stipulation contained the following severability language:<sup>199</sup>

If a court of competent jurisdiction invalidates the application of the PPA rider proposal in whole or in part, AEP Ohio will permit any part of the Joint Stipulation that has not been invalidated to continue while a good faith effort is made by the Signatory Parties to restore the invalidated provision to its equivalent value. The Signatory Parties agree to work in good faith, on an expedited basis not to exceed 60 days, to cure any court-determined deficiency. \* \* \* This commitment on severability is not intended and shall not be construed to affect the prohibition against retroactive ratemaking. **No amounts collected shall be refunded as a result of this severability provision.**"

The Commission removed the prohibition against refunds on the grounds that refunds are "a matter for determination by the Commission or reviewing court."<sup>200</sup> Although it acknowledged this possible issue for the future, the Commission did not take the next logical step of ordering AEP Ohio to return all amounts collected from customers under Rider PPA in

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<sup>199</sup> AEP Ohio Ex. 52 at Settlement Exhibit WAA-1, page 35 (Emphasis added).

<sup>200</sup> Opinion and Order at 87.

the event that Rider PPA or the PPA itself is struck down or precluded. This is a logical step because of the flurry of related legal activity that has been taking place related to the PPA.<sup>201</sup> Finally, there is the likelihood that this proceeding will be appealed to the Ohio Supreme Court, and those appeals will challenge the approval of Rider PPA.

Moreover, the necessity for such an order is clear for several reasons. First, AEP Ohio will likely begin collecting under Rider PPA before the legal issues are resolved, inasmuch as Rider PPA is scheduled to begin on June 1, 2016. It is unclear whether the pending litigation will be resolved by that time, but it is certain that any appeal of this proceeding will not begin until after June 2016. Thus, AEP Ohio will begin to collect under the rider. Second, if Rider PPA is struck down or precluded after AEP Ohio begins collecting under the rider, Ohio law would forbid customers from obtaining refunds of excessive rates that may be reversed on appeal.<sup>202</sup> The Commission should therefore take appropriate and preemptive action now to prevent any further undue harm to the ratepayers and the public interest, in the event that Rider PPA or the PPA itself is struck down or precluded.

**F. Other errors need to be corrected.**

**Assignment of Error No. 40:** The Commission erred in finding that the Stipulation as modified will modernize the grid through deployment of advanced technology and procurement of renewable energy resources.

**Assignment of Error No. 41:** The Commission erred in finding that the Stipulation as modified will promote retail competition by enabling competitive providers to offer innovative products to serve customers' needs.

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<sup>201</sup> On April 27, 2016, the FERC rescinded waivers related to the PPA and requiring the submission of the PPA for review and approval under *Edgar* and *Allegheny* in accordance with 8 C.F.R. §35.39(b). *EPSC v. AEP Generation, supra*; See also *Electric Power Supply Association et al. v. FirstEnergy Solutions Corporation, et al.*, Docket No. EL16-34-000.

<sup>202</sup> *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448 at ¶49 (February 13, 2014), 8 N.E.3d 863, 2014 Ohio LEXIS 256, 2014 WL 553174.

The Commission concluded that the Stipulation, as modified, “will protect consumers against rate volatility and price fluctuations by promoting retail rate stability for all ratepayers in this state, modernize the grid through the deployment of advanced technology and procurement of renewable energy resources, and promote retail competition by enabling competitive providers to offer innovative products to serve customers’ needs.”<sup>203</sup> The Stipulation approved in this case, however, does not modernize the grid or promote retail competition. A careful review of the terms of the Stipulation as modified shows that it only requires AEP Ohio to propose future applications relative to these topics:

- Deployment of Advanced Technology: “In Case No. 13-1939-EL-RDR, AEP Ohio will propose - though settlement efforts to commence within 90 days of adoption of the stipulation and through a filing in that docket if settlement is not achieved after another 60 days - and use best efforts to pursue approvals” for among other things, deployment of Volt/Var Optimization, a grid modernization business plan, data-sharing provisions, and full smart grid/meter deployment. (Section III.D.13 and Section III.G)
- Procurement of Renewable Energy Resources: “AEP Ohio and its affiliates will develop a total of at least 500 MW nameplate capacity of wind energy projects in Ohio” which will be subject to timely regulatory approvals, the projects will commence construction.” (Section III.I.1)
- Procurement of Renewable Energy Resources: “AEP Ohio will develop a total of at least 400 MW nameplate capacity for a solar energy project(s) in Ohio, subject to Commission approval and cost recovery (based on a PPA structure) through the PPA rider with details (except for the rate design provided for below) to be determined as part of the separate EL-RDR filing.” (Section III.I.2)
- Enabling Competitive Providers to Offer Innovative Products: “AEP Ohio will file and advocate for a pilot program that establishes a bypassable Competitive Incentive Rider (CIR) as an addition to the SSO non-shopping rate above the auction price with the purpose of incenting shopping and recognizing that there may be costs associated with providing retail electric service that are not reflected in SSO bypassable rates.” (Section III.C.12)

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<sup>203</sup> Opinion and Order at 77.

- *Enabling Competitive Providers to Offer Innovative Products:* “AEP Ohio agrees to work with Staff and the signatory parties to determine the parameters of a two-year pilot supplier consolidated billing program for any CRES provider that is a signatory party. The purpose of the pilot will be to provide the industry with data and information on the practicality of a supplier consolidated billing implementation in the Ohio electric choice market.” (Section III.D.7)
- *Enabling Competitive Providers to Offer Innovative Products:* “AEP Ohio will file a proposal for a pilot program in the comments due on January 6, 2016, in Case No. 12-3151-EL-COI. The proposal will be to establish a pilot program in the AEP Ohio service territory providing an EDU third-party agent call transfer process to educate and enroll interested customers moving and initiating service and to establish a procedure for the offering of a standard discount rate providing a guaranteed discount off the price to compare without early termination fees.” (Section III.D.8)

The plain language of the Stipulation demonstrates that the grid modernization terms and the retail competition-related terms are all contingent upon future filings from AEP Ohio that will be subject to future regulatory review and approval. The Commission itself noted the limited nature of these terms, stating that “these proposals are subject to further review in future proceedings” and “our recognition of the benefits of the proposals should not be construed as a predetermination of the outcome of those future proceedings, which will be decided based upon the record in each case.”<sup>204</sup> Regardless of the fact that none of these “improvements” are mandated, they are all changes that the company should undertake as prudent business decisions or in connection with other regulatory requirements, such as clean energy or innovative products. AEP Ohio proposed them to induce the Commission to believe that it is providing numerous consumer benefits in exchange. But, they have no real relationship to Rider PPA and, thus, are empty “promises.”

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<sup>204</sup> Opinion and Order at 84, 85.

Given that future filings must be made, and that those future filings are not being predetermined in this case, it was error for the Commission to conclude that the Stipulation as modified will modernize the grid and promote retail competition.

**Assignment of Error No. 42: The Commission erred in approving Rider PPA and approving the collection from ratepayers of generation costs based on a power purchase agreement that was not the product of a competitive process.**

The Commission has allowed AEP Ohio to collect generation costs from its ratepayers on the basis of a PPA with its affiliate (AEPGR), and that agreement was not the result of a competitive bidding process. This error should be corrected on rehearing.

There are significant inherent flaws in awarding a PPA on a no-bid basis to an affiliate. This Commission would never approve the award of an eight-year, no-bid contract to AEPGR to supply generation for AEP Ohio's SSO customers. That supply is procured through competitive retail auctions administered by the Commission.<sup>205</sup> As Staff witness Choueiki noted: "[n]ot only are the resulting SSO rates competitive, they also serve as transparent 'prices to compare to' or 'benchmarks' for customers who are considering whether to take service from a competitive retail electric service (CRES) provider."<sup>206</sup> By contrast, Rider PPA is the equivalent of allowing AEPGR to offer generation to AEP Ohio's ratepayers at a full-cost-plus price without the challenges of a competitive process. The State of Ohio itself does not operate in that fashion for sizeable supply contracts – it is the policy of the state to procure its sizeable supplies via a competitive process. Why should AEP Ohio be given a "pass" and not be required to procure power via a competitive process?

Forcing all ratepayers (because Rider PPA applies regardless of whether a ratepayer shops or does not shop) to pay AEPGR for its cost-plus recovery is contrary to this

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<sup>205</sup> Staff Ex. 1 at 10.

<sup>206</sup> *Id.* at 9, fn.17.



Commission's reliance on competitive markets to seek the lowest cost for ratepayers. The no-bid nature of the PPA on which Rider PPA will be based is contrary to Ohio's and this Commission's past and current practices, and is not a market-based outcome. Moreover, the FERC has precluded sales under the PPA until the FERC has reviewed and approved the PPA under *Edgar* and *Allegheny* standards.<sup>207</sup> The Commission should find on rehearing that, as to the retail impact, the non-bid, non-arms-length PPA proposal cannot be approved because it was not the product of a competitive process.

**Assignment of Error No. 43: The Commission erred in approving the Stipulation's severability provision when it will only be triggered when a "court of competent jurisdiction" strikes down the PPA and will not apply if the FERC strikes down the PPA.**

In Section IV.D, the Stipulation contains the following language:<sup>208</sup>

**If a court of competent jurisdiction invalidates the application of the PPA rider proposal in whole or in part, AEP Ohio will permit any part of the Joint Stipulation that has not been invalidated to continue while a good faith effort is made by the Signatory Parties to restore the invalidated provision to its equivalent value. The Signatory Parties agree to work in good faith, on an expedited basis not to exceed 60 days, to cure any court-determined deficiency. \* \* \*** This commitment on severability is not intended and shall not be construed to affect the prohibition against retroactive ratemaking. No amounts collected shall be refunded as a result of this severability provision.

The Commission approved the severability provision (except for the last sentence above which was removed). As noted earlier, there is extensive legal activity taking place in multiple forums, including the Federal Energy Regulatory Commission. This legal activity has had, and will likely have in the future, a bearing on the legality of the PPA itself and Rider PPA. The Commission is aware of these proceedings and the impact they may have. Given this "legal landscape," it was unjust and unreasonable for the Commission to approve a severability

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<sup>207</sup> *EPSA v. AEP Generation*, *supra*, at ¶¶55, 64.

<sup>208</sup> AEP Ohio Ex. 52 at Settlement Exhibit WAA-1, page 35 (emphasis added).

provision that addresses invalidation of Rider PPA in a limited fashion. The Commission should modify its decision to require that the severability provision state “[i]f a court of competent jurisdiction **or regulatory authority** invalidates **or precludes** the application of the PPA rider proposal in whole or in part \* \* \*.”

**Assignment of Error No. 44: The Commission erred in approving a Stipulation with numerous terms that are unrelated to the application, without having given due notice of modifying the ESP III and the addition of new terms for the ESP III.**

As amended, AEP Ohio initiated this proceeding to establish a PPA rider based on PPAs with AEPGR and OVEC. This case proceeded on that one issue until December 2015. Upon the filing of the Stipulation in December 2015, a whole host of *new* issues and topics were added for the Commission’s consideration. They include:

- Federal advocacy activities
- Commitments to future proposals and filings such as, extension of the IRP tariff, an automaker credit, a pilot mechanism for GS-3 and GS-4 customers, a Competition Incentive Rider, a pilot for supplier-consolidated billing, conversion of certain PPA units and possible retirement/refueling/repowering of certain PPA units, performance of analyses of certain PPA units, grid modernization proposals, new energy efficiency/peak demand reduction plan, and a carbon reduction plan
- Donations and monetary inducements
- Changes in Alternative Feed Service rates
- Fuel diversity and carbon emission reduction programs
- Battery resources
- Development of wind and solar projects, subject to regulatory approvals
- Stipulation review

A cursory review of this list demonstrates that numerous issues unrelated to the amended application were added to the second phase of this case. The second phase proceeded without

giving due notice of the potential changes and additions that, with approval of the Stipulation, would take place during the term of the AEP Ohio's ESP III (and thereafter).

Notice is required pursuant to R.C. 4928.141, which states:

(B) The commission shall set the time for hearing of a filing under section 4928.142 or 4928.143 of the Revised Code, send written notice of the hearing to the electric distribution utility, and publish notice in a newspaper of general circulation in each county in the utility's certified territory.

These new issues and topics were not part of the case before December 2015 and no notice of them was provided even though the filing of the Stipulation proposed to change AEP Ohio's ESP III. This was error and a violation of the statutory ESP requirements.

**Assignment of Error No. 45: The Commission erred in not rejecting the OVEC component of the PPA proposal, which was previously rejected by the Commission in AEP Ohio's last electric security plan proceeding.**

The Commission noted in its decision that "AEP Ohio requests approval to include, in the PPA rider, the net impacts of the Company's contractual entitlement to a 19.93 percent share of the electrical output of generating units owned by OVEC." (Opinion and Order at 21). The Commission approved recovery related to the OVEC entitlement through the PPA Rider even though the OVEC entitlement represents only 440 megawatts of the 3,111 megawatts approved for the PPA Rider mechanism. (*Id.* at 22-23).

The Commission erred in allowing cost recovery related to the OVEC entitlement through the PPA Rider for several reasons.

First, AEP Ohio presented nothing different for the OVEC component of its Rider PPA proposal for the remainder of the ESP III term and beyond. AEP Ohio presented no new cost information on the OVEC costs or market sales in this proceeding. AEP Ohio also did not address Commission required factors including the financial need for the OVEC units; a complete plan for environmental compliance and a showing that the OVEC units are required for

future reliability..<sup>209</sup> AEP Ohio witness Vegas also admitted that AEP Ohio cannot unilaterally retire or sell an OVEC unit.<sup>210</sup> The Commission failed to address and consider this evidence when finding that the PPA proposal, including the OVEC entitlement, had substantial value as a financial hedge and rate stability mechanism. (Opinion and Order at 81.)

Second, without initiating further proceedings at the FERC, AEP Ohio cannot recover costs related to the PPA units – leaving only the OVEC entitlement as part of the PPA Rider mechanism. *See EPSA v. AEP Generation Resources*, supra, at ¶ 67. (“[t]o the extent AEP Generation wishes to make sales under the Affiliate PPA, it must submit the agreement to the [FERC] under section 205 of the FPA for analysis under the *Edgar* and *Allegheny* standards.”) The Commission should not allow AEP Ohio to commence Rider PPA by only including the OVEC entitlement in that mechanism because, as acknowledged by the Commission in its decision, “[i]n the *ESP 3 Case*, the Commission was not persuaded, based on the record, that AEP Ohio's PPA rider proposal in that case, which included only the OVEC entitlement, would provide customers with sufficient benefit from the rider's financial hedging mechanism or any other benefit commensurate with the rider's potential cost.”<sup>211</sup>

For these reasons, the Commission should grant rehearing to remove the OVEC entitlement recovery from the PPA rider.

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<sup>209</sup> AEP Ohio Ex. 4 at 2; AEP Ex. 7 at 2; Tr. Vol. 6 at 1552-1153; Sierra Club Ex. 23.

<sup>210</sup> Tr. Vol 1 at 96-97; 99-100.

<sup>211</sup> Opinion and Order at 80-81 citing *ESP III* Opinion and Order (Feb. 25, 2015) at 25.

**Assignment of Error No. 46: The Commission not only erred in approving Rider PPA, it also erred in allowing it to be effective as of June 1, 2016.**

The Commission allowed for an effective date for Rider PPA of June 1, 2016 despite the opposition of many parties to the proceeding to its approval. The Commission should delay the rider's effective date for the following reasons.

By setting an effective date that is just one month away, the Commission ensured that Rider PPA would commence before there is a ruling on the applications for rehearing and would have certainly commenced before the Supreme Court of Ohio can hear and decide any appeals from the decision on rehearing. In addition, the PPA cannot be implemented until and unless it is approved by FERC.<sup>212</sup>

Accordingly, upon rehearing, the Commission should provide that Rider PPA cannot become effective until the date on which the Ohio Supreme Court issues a final decision upholding Rider PPA, *or* the date on which the FERC authorizes the PPA, whichever is later.

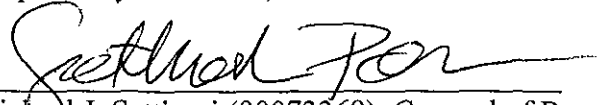
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<sup>212</sup> See *EPSA v. AEP Generation Resources*, supra, at ¶ 67. (“[t]o the extent AEP Generation wishes to make sales under the Affiliate PPA, it must submit the agreement to the [FERC] under section 205 of the FPA for analysis under the *Edgar* and *Allegheny* standards.”)

### III. CONCLUSION

For all of the foregoing reasons, the Commission should reverse and revise its decision in this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Settineri", written over a horizontal line.

Michael J. Settineri (00073369), Counsel of Record

Gretchen L. Petrucci (00046608)

Vorys, Sater, Seymour and Pease LLP

52 East Gay Street

Columbus, OH 43215

614-464-5462

[mjsettineri@vorys.com](mailto:mjsettineri@vorys.com)

[glpetrucci@vorys.com](mailto:glpetrucci@vorys.com)

*Counsel for PJM Power Providers Group and  
the Electric Power Supply Association*

## CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on this 29<sup>th</sup> day of April 2016 upon all persons/entities listed below:

  
Gretchen L. Petrucci

[stnourse@aep.com](mailto:stnourse@aep.com)  
[mjsatterwhite@aep.com](mailto:mjsatterwhite@aep.com)  
[msmckenzie@aep.com](mailto:msmckenzie@aep.com)  
[sam@mwncmh.com](mailto:sam@mwncmh.com)  
[fdarr@mwncmh.com](mailto:fdarr@mwncmh.com)  
[mpritchard@mwncmh.com](mailto:mpritchard@mwncmh.com)  
[myurick@taftlaw.com](mailto:myurick@taftlaw.com);  
[mkurtz@bkllawfirm.com](mailto:mkurtz@bkllawfirm.com)  
[dboehm@bkllawfirm.com](mailto:dboehm@bkllawfirm.com)  
[jkyler@bkllawfirm.com](mailto:jkyler@bkllawfirm.com)  
[tony.mendoza@sierraclub.org](mailto:tony.mendoza@sierraclub.org);  
[schmidt@sppgrp.com](mailto:schmidt@sppgrp.com)  
[tdougherty@theoec.org](mailto:tdougherty@theoec.org)  
[ghull@eckertseamans.com](mailto:ghull@eckertseamans.com)  
[haydenm@firstenergycorp.com](mailto:haydenm@firstenergycorp.com)  
[jmcdermott@firstenergycorp.com](mailto:jmcdermott@firstenergycorp.com)  
[scasto@firstenergycorp.com](mailto:scasto@firstenergycorp.com)  
[tobrien@bricker.com](mailto:tobrien@bricker.com)  
[jang@calfee.com](mailto:jang@calfee.com)  
[talexander@calfee.com](mailto:talexander@calfee.com)  
[jeffrey.mayes@monitoringanalytics.com](mailto:jeffrey.mayes@monitoringanalytics.com)  
[lhawrot@spilmanlaw.com](mailto:lhawrot@spilmanlaw.com)  
[dwilliamson@spilmanlaw.com](mailto:dwilliamson@spilmanlaw.com)  
[kurt.helfrich@thompsonhine.com](mailto:kurt.helfrich@thompsonhine.com)  
[scott.campbell@thompsonhine.com](mailto:scott.campbell@thompsonhine.com)  
[stephanie.chmiel@thompsonhine.com](mailto:stephanie.chmiel@thompsonhine.com)  
[ricks@ohanet.org](mailto:ricks@ohanet.org)  
[bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com)  
[William.michael@occ.ohio.gov](mailto:William.michael@occ.ohio.gov)  
[Jodi.bair@occ.ohio.gov](mailto:Jodi.bair@occ.ohio.gov)  
[Kevin.moore@occ.gov](mailto:Kevin.moore@occ.gov)  
[DStinson@bricker.com](mailto:DStinson@bricker.com)  
[laurac@chappelleconsulting.net](mailto:laurac@chappelleconsulting.net)

[gthomas@gtpowergroup.com](mailto:gthomas@gtpowergroup.com)  
[stheodore@epsa.org](mailto:stheodore@epsa.org)  
[mdortch@kravitzllc.com](mailto:mdortch@kravitzllc.com)  
[kristen.henry@sierraclub.org](mailto:kristen.henry@sierraclub.org)  
[msoules@earthjustice.org](mailto:msoules@earthjustice.org)  
[sfisk@earthjustice.org](mailto:sfisk@earthjustice.org)  
[msmalz@ohiopoveritylaw.org](mailto:msmalz@ohiopoveritylaw.org)  
[mfleisher@elpc.org](mailto:mfleisher@elpc.org)  
[cmooney@ohiopartners.org](mailto:cmooney@ohiopartners.org)  
[mhpetricoff@vorys.com](mailto:mhpetricoff@vorys.com)  
[mjsettineri@vorys.com](mailto:mjsettineri@vorys.com)  
[glpetrucci@vorys.com](mailto:glpetrucci@vorys.com)  
[werner.margard@puc.state.oh.us](mailto:werner.margard@puc.state.oh.us)  
[steven.beeler@puc.state.oh.us](mailto:steven.beeler@puc.state.oh.us)  
[twilliams@snhslaw.com](mailto:twilliams@snhslaw.com)  
[rsahli@columbus.rr.com](mailto:rsahli@columbus.rr.com)  
[charris@spilmanlaw.com](mailto:charris@spilmanlaw.com)  
[ghiloni@carpenterlipps.com](mailto:ghiloni@carpenterlipps.com)  
[sechler@carpenterlipps.com](mailto:sechler@carpenterlipps.com)  
[gpoulos@enernoc.com](mailto:gpoulos@enernoc.com)  
[chris@envlaw.com](mailto:chris@envlaw.com)  
[jennifer.spinosi@directenergy.com](mailto:jennifer.spinosi@directenergy.com)  
[jvickers@elpc.org](mailto:jvickers@elpc.org)  
[ckilgard@taftlaw.com](mailto:ckilgard@taftlaw.com)  
[rseiler@dickinsonwright.com](mailto:rseiler@dickinsonwright.com)  
[todonnell@dickinsonwright.com](mailto:todonnell@dickinsonwright.com)  
[drinebolt@ohiopartners.org](mailto:drinebolt@ohiopartners.org)  
[orourke@carpenterlipps.com](mailto:orourke@carpenterlipps.com)  
[joliker@igsenergy.com](mailto:joliker@igsenergy.com)  
[whitt@whitt-sturtevant.com](mailto:whitt@whitt-sturtevant.com)  
[campbell@whitt-sturtevant.com](mailto:campbell@whitt-sturtevant.com)  
[glover@whitt-sturtevant.com](mailto:glover@whitt-sturtevant.com)