**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**APPLICATION FOR REHEARING BY**
**THE ENVIRONMENTAL LAW & POLICY CENTER, OHIO ENVIRONMENTAL COUNCIL, AND ENVIRONMENTAL DEFENSE FUND**

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Pursuant to Ohio Revised Code ("R.C.") 4903.10 and Ohio Admin. Code 4901-1-35, the Environmental Law & Policy Center, Ohio Environmental Council, and Environmental Defense Fund hereby file this application for rehearing of the March 31, 2016 Opinion and Order ("Order") of the Public Utilities Commission of Ohio ("Commission") in this proceeding. The Commission's Order approved a Joint Stipulation and Recommendation proposing to allow Ohio Power Company ("AEP Ohio" or "Company") to charge all of its customers a non-bypassable rider to recover the costs of power purchase agreements ("PPAs") to buy the output of generation owned by its affiliate AEP Generation Resources, Inc. ("AEPGR") and by AEP Ohio itself.

The Order is unlawful and unreasonable for the following reasons, as further explained in the accompanying Memorandum in Support:

1. The Order erroneously concluded that the PPA rider is not an "anticompetitive subsidy" inconsistent with R.C. 4928.02(H).

2. The Order erroneously approved the PPA rider as reasonable and consistent with R.C. 4928.02(A), despite the lack of consideration of any alternatives or any competitive procurement process to demonstrate that the underlying noncompetitive affiliate deal will not result in unreasonable prices for customers.

3. The Order unreasonably interpreted the Stipulation as not affecting the ability of customers to opt out of AEP Ohio's energy efficiency and peak demand reduction

programs while still participating in its existing interruptible tariff prior to the resolution of the Company's next Electric Security Plan application.

May 2, 2016

Respectfully submitted,

/s/ Madeline Fleisher
Madeline Fleisher
Environmental Law & Policy Center
21 W. Broad St., Ste. 500
Columbus, OH 43215
P: 614-670-5586
F: 312-795-3730
mfleisher@elpc.org

*Counsel for Environmental Law & Policy Center*

/s/ Trent A. Dougherty
Trent A. Dougherty
Ohio Environmental Council
1145 Chesapeake Avenue, Suite I
Columbus, OH 43212
(614) 487-5823
tdougherty@theoec.org

*Counsel for Ohio Environmental Council and Environmental Defense Fund*

**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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. | ) | |

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**MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING BY THE ENVIRONMENTAL LAW & POLICY CENTER, OHIO ENVIRONMENTAL COUNCIL, AND ENVIRONMENTAL DEFENSE FUND**

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## I. INTRODUCTION

The Environmental Law & Policy Center, Ohio Environmental Council, and Environmental Defense Fund (collectively, "Environmental Intervenors") seek rehearing of the March 31, 2016 Opinion and Order ("Order") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") in this case. Among other things, the Order approved the request of Ohio Power Company ("AEP Ohio" or "Company") for retail recovery of the net impacts resulting from two cost-based power purchase agreements ("PPAs"). Those PPAs involve AEP Ohio's purchase of the output from twenty coal units ("AEP PPA Units") owned by AEP Ohio itself and its affiliate AEP Generation Resources, Inc. ("AEPGR"). Pursuant to the Order, all of AEP Ohio's distribution customers will be subject to a non-bypassable PPA rider, through which they will pay the full costs of the AEP PPA Units in addition to providing a consistent return to AEPGR of 10.38% on all fixed costs for its units. Customers will then receive the market revenues from selling the output of the AEP PPA Units. The Commission approved this PPA rider arrangement based in large part on its asserted value "as a financial hedge and rate stability mechanism" in light of the Company's forecast of rising market prices for electricity. Order at 81.

Environmental Intervenors assert that, in making this determination, the Commission unreasonably and unlawfully failed to account for the fact that the PPA rider undisputedly centers on an affiliate deal between AEP Ohio and AEPGR. The Company proposed this deal without any competitive vetting or consideration of alternatives to determine whether it would provide service to customers at a reasonable price. This type of non-competitive self-dealing is inconsistent with Ohio regulatory policy as set forth in R.C. 4928.02(H), which establishes a policy of "[e]nsur[ing] effective competition in the provision of retail electric service by avoiding  anticompetitive subsidies flowing" between a noncompetitive retail electric service and a competitive retail electric service.

More fundamentally, the Commission's approval of the PPA rider as "reasonable" is inconsistent with the stipulation review standard and R.C. 4928.02(A), absent a comparison of the PPA rider to potential alternative hedging options. The Commission failed to evaluate whether AEP Ohio's Stipulation forces its customers to take on unreasonable costs or risks in return for the asserted rate stability benefit. Without such an assessment, the Commission cannot adequately evaluate whether the price and risks that the PPA rider imposes on AEP Ohio's customers are reasonable.

Additionally, the Order unreasonably failed to address Environmental Intervenors' argument that the Stipulation violates Ohio law barring customers from receiving benefits under any of the Company's energy efficiency and peak demand reduction programs once they opt out of paying for those programs. The Commission erroneously concluded that the Stipulation reserves this issue for a future AEP Ohio proceeding, merely committing the Company to file a future application to allow opt-out customers to continue participating in one of its peak demand reduction programs. However, the Stipulation appears to definitively and immediately establish that customers may receive program benefits even after they opt out of paying for them, and therefore the Commission should address this issue on rehearing.

## II. ARGUMENT

### A. The PPA Rider Allows an Anticompetitive Subsidy Forcing AEP Ohio's Distribution Customers to Cover the Costs of AEP Generating Plants Even If Those Plants Are Uneconomic on the Competitive Market.

#### 1. R.C. 4928.02(H) Encompasses the PPA Rider Regardless of Whether the Commission Categorizes that Rider as Part of AEP Ohio's Distribution Service.

The standard for review of a stipulation requires the Commission to determine whether a proposed stipulation is "reasonable" considering three factors, including whether "as a package, [it will] benefit ratepayers and the public interest" and whether "the settlement package violate[s] any important regulatory principle or practice." Order at 48-49 (citing *In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994)). In analyzing the latter factor, the Commission unlawfully concluded that the PPA rider is consistent with R.C. 4928.02(H). That provision declares that it is state policy to:

> Ensure 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.

R.C. 4928.02(H). Further, under R.C. 4928.06, the Commission must "ensure that the policy specified in section 4928.02 of the Revised Code is effectuated."

In holding that the PPA rider is consistent with R.C. 4928.02(H), the Order relies on the rationale that "the PPA rider mechanism does not facilitate the recovery of generation-related costs through distribution or transmission rates," citing to the original approval of the PPA rider as a placeholder in AEP Ohio's most recent Electric Security Plan ("ESP") proceeding, Case No. 13-2385-EL-SSO ("*AEP ESP 3 Case*"). Order at 96 (citing *AEP ESP 3 Case*, Opinion and Order (Feb. 25, 2015) at 26). However, as Environmental Intervenors argued in our (still-pending)

Application for Rehearing in that proceeding, such a narrow reading of R.C. 4928.02(H) is inconsistent with the provision's plain language. *AEP ESP 3 Case,* Environmental Intervenors' Rehearing Application (Mar. 27, 2015) at 3-6. The statute's prohibition on anticompetitive subsidies "*including* by . . . the recovery of any generation-related costs through distribution or transmission rates" (emphasis added) is simply a specific example of one type of subsidy barred by state policy. It is not the exclusive mechanism that might qualify as an anticompetitive subsidy violating R.C. 4928.02(H).

Notably, the Ohio Supreme Court did not dwell on the precise labels for particular rate mechanisms in *Elyria Foundry Co. v. PUCO*, where it applied a prior version of R.C. 4928.02(H) (at that time codified at R.C. 4928.02(G)). That prior version of the statute similarly established a state policy of ensuring "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." *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 48. In *Elyria*, the Court rejected a utility proposal to collect increases in generation-related fuel costs through its distribution rates as violating this policy, citing the requirement for each utility service component "to stand on its own" after Ohio's transition to unbundled electric service. It is that substantive goal – ensuring that competitive and non-competitive retail electric services each "stand on their own" – that must drive the Commission's application of the statute. In this case, the Commission has approved a non-bypassable rider funding only AEP-owned plants. The rider effectively allows AEP Ohio to treat its distribution customers as a captive audience forced to pay for a purported financial hedge resting only on AEP's own generation business. The resulting anticompetitive effect is the same, regardless of how AEP Ohio labels the PPA rider, and violates the substantive policy of R.C. 4928.02(H).

The amendments to R.C. 4928.02(H) after *Elyria* do not alter this conclusion. In 2008, Senate Bill 221 added the following language to that provision's bar on anticompetitive subsidies between competitive and noncompetitive retail electric service: "including prohibiting the recovery of any generation-related costs through distribution or transmission rates." As noted above, the use of the term "including," along with the retention of the existing, broader language, reflects the legislature's intent to expand the policy against cross-subsidization through a prohibition on a particular type of cross-subsidy. There is no indication that it was meant to restrict the expansive scope of R.C. 4928.02(H) as applied in *Elyria*.

The Commission must therefore focus its inquiry under R.C. 4928.02(H) on whether the PPA rider implements an anticompetitive subsidy by effectively forcing all of AEP Ohio's distribution customers to pay to support uneconomic AEP coal plants. The Commission unlawfully failed to undertake such an inquiry, simply stopping with the premise that R.C. 4928.02(H) is not relevant where the utility does not formally designate a charge as a distribution or transmission rate.

#### 2. The PPA Rider Is an Anticompetitive Subsidy.

Analysis of the PPA rider under R.C. 4928.02(H) shows that the PPA rider does constitute an anticompetitive subsidy. AEP Ohio admits that the costs of the AEP PPA Units may not be fully covered by their market revenues, and that market revenues have not historically provided the level of profit that AEPGR will receive pursuant to the Stipulation. Co. Ex. 1 at 16-17; Co. Ex. 5 at 11. Therefore, for at least some of its eight-year span the PPA rider is likely to provide out-of-market payments from AEP Ohio customers to cover the PPA Unit costs and pay a significant profit on some of those costs to AEPGR. Not only does this arrangement provide a financial subsidy by providing AEPGR with money that it would not otherwise receive, it also insulates AEPGR from market risk that its competitors must bear. The U.S. Supreme Court itself recently characterized such payments to generators outside the PJM wholesale market as "subsidies." *Hughes v. Talen Energy Marketing, LLC*, Case No. 14-614, slip op. at 1 (U.S. Apr. 19, 2016).

The PPA rider is not just a subsidy, it is a plainly anticompetitive one, in two separate respects. First, AEP Ohio's decision not to consider any generation sources besides AEP-owned units for inclusion in the PPA rider means that no AEPGR competitors ever had the opportunity to make alternative hedging offers. If given that opportunity, other market participants might have sought the same benefits as AEPGR (potentially at a better price or on better terms for AEP Ohio customers) by offering a PPA based on non-affiliate generation or demand-side resources, or even some other hedging mechanism altogether. Thus, AEP Ohio gave only AEP-owned units this chance to be shielded from market risk, have their costs covered, and earn a guaranteed profit of 10.38% on all capital expenditures. That represents a significant competitive advantage if, as AEP Ohio has represented, the AEP PPA Units would otherwise face the risk of premature retirement due to the market forces that their competitors still face. Co. Ex. 1 at 16-17; Co. Ex. 5 at 11.

Similarly, being forced to accept the PPA rider "hedge" deprives AEP Ohio customers of the opportunity to shop freely among AEPGR's competitors for their preferred hedging service. The Commission has already recognized that it undercuts the "development of the competitive market for generation" to require customers to pay twice for a generation-related service like the PPA rider, rather than allowing them to choose whether to receive that service from a competitive supplier instead. *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, 2007 Ohio PUC LEXIS 703, at 83 (Oct. 24, 2007). In a stipulation offered by Duke regarding its SSO pricing, Duke sought Commission approval of an unavoidable charge designed to recover generation-related costs stemming from its provider of last resort obligation from all of its customers, including costs of compliance with environmental, tax, and other laws. *Id.* at 82. The Commission concluded that this proposal "would result in shoppers paying for this category of expenses [legal compliance costs] twice" since the generation service they obtained from competitive retail electric service providers would also incorporate compliance costs for the underlying plants. *Id.* at 83. Therefore, the Commission held that, "in order to continue encouraging the development of the competitive market for generation, . . . the environmental compliance, tax, and homeland security aspects of Duke's proposed POLR charge should be avoidable." *Id.* In the context of this hedging service considered here, the Commission has previously recognized that competitive suppliers are already seeking to provide some protections against price volatility. *AEP ESP 3 Case*, Opinion and Order at 24. The PPA rider thus undercuts the further development of a competitive market to provide hedges to customers who do want such a service in some form by forcing those customers to pay for the Companies' version of a hedge instead of freely choosing from among competing options.

Second, the PPA rider subsidy may have additional anticompetitive effects in the future. The Order rightly notes the Commission is "mindful" of the risk outlined by PJM in its amicus brief that, if AEP Ohio were to bid into the wholesale market below its actual costs in reliance on the PPA rider subsidy, it might "artificially suppress prices in a manner that would hurt the development of new generation in Ohio." Order at 73, 89. The Commission has asserted that it will guard against this possibility through annual reviews to determine whether AEP Ohio's bidding behavior "is consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues" and "prudent and in the best interest of retail ratepayers." Order at 89. However, this approach does not account for the fact that it might well be "in the best interest of retail ratepayers" to bid the PPA Units' output into the wholesale market below cost. AEP Ohio could argue that such bidding behavior is a prudent measure to avoid the risk that the units do not clear and therefore fail to earn at least some market revenues to defray the costs of the AEP PPA Units. This potential bidding strategy could still artificially depress market prices and deter AEPGR competitors from constructing new generation, to the extent it allows the PPA Units to continue to operate despite being more costly than potential alternative sources of energy and capacity.

The Order suggests that the same risk already exists given the ongoing participation of regulated generation with retail cost recovery in the PJM market. *Id.* However, utilities generally procure such regulated generation through some integrated resource planning ("IRP") process or competitive procurement process subject to a prudency review to ensure that the generation in question does not entail unreasonable costs beyond what the market would support. *See, e.g.*, Ohio Admin. Code 4981:5-5-01 (defining "[i]ntegrated resource plan" as a "plan or program . . . to furnish electric energy services in a cost-effective and reasonable manner consistent with the provision of adequate and reliable service, which gives appropriate consideration to supply- and demand-side resources and transmission or distribution investments . . . ."). The main example of regulated generation participating in the PJM market that AEP Ohio cited in this proceeding is that of the Dominion utility in Virginia. AEP Ohio Initial Br. at 136-137. That example perfectly illustrates the difference between the non-competitive affiliate PPA deal here and an IRP process for procuring generation resources in a regulated state, since the Virginia public utilities commission has explained that a utility must "adequately consider third-party market alternatives" as part of that state's IRP process. *In re Virginia Electric and Power Company's Integrated Resource Plan Filing*, Case No. PUE-2011-00092, 2012 Va. PUC LEXIS 537, 8 (Oct. 5, 2012) ("[W]e find that market alternatives are appropriate for consideration in cases where Dominion seeks a certificate of public convenience and necessity for specific investments."). The non-competitive affiliate deal underlying the PPA rider offers no such reassurances that the AEP PPA Units could out-compete other hedging options for customers. Rather, it is uniquely structured to offer a subsidy to AEP-owned generation alone regardless of whether the PPA rider delivers a service to customers on reasonable terms.

### 3. The PPA Rider Subsidy Supports a Competitive Retail Electric Service through Revenues from Noncompetitive Retail Electric Service Customers.

Finally, the subsidy provided by the PPA rider flows from a "noncompetitive retail electric service" to "a competitive retail electric service" within the meaning of R.C. 4928.02(H). Distribution service is a noncompetitive retail electric service, *Indus. Energy Users-Ohio v. Ohio Power Co.*, 140 Ohio St.3d 509, 2014-Ohio-4271, 20 N.E.3d 699, ¶ 4, and all of AEP Ohio's distribution customers pay the non-bypassable PPA rider regardless of whether they shop for generation service.[1] The Commission itself, in holding that it has authority to approve the PPA rider under R.C. 4928.143(B)(2)(d), has characterized the rider as a "limitation on customer

[1] The Environmental Intervenors' Application for Rehearing in the *AEP ESP 3 Case* argued that the Commission in fact erred in approving the PPA rider as a non-bypassable rider. *See AEP ESP 3 Case*, Environmental Intervenors' Rehearing Application (Mar. 27, 2015) at 6-9. That issue is still pending in light of the Commission's May 28, 2015 Second Entry on Rehearing.

shopping." Order at 94. Thus, no distribution customer may choose not to accept the PPA rider hedge, regardless of whether they "want or need" it. *Id.* at 83. Accordingly, AEP Ohio and AEPGR will receive revenue through the PPA rider by virtue of AEP Ohio's provision of noncompetitive distribution service – not as a result of customers choosing to accept this hedge as a competitive service in an open marketplace.

The funds from the PPA rider, meanwhile, flow to support a generation service that qualifies as "competitive retail electric service." Under R.C. 4928.03, all "retail electric generation . . . services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers." In approving the PPA rider as a placeholder in the *AEP ESP 3 Case*, the Commission characterized the PPA rider as "a *generation-related* hedging service that stabilizes retail electric service . . . ." *AEP ESP 3 Case*, Opinion and Order at 21 (emphasis added). Further, as a practical matter, the purported hedge offered by AEP Ohio rests directly on a contract for the output of generating units, and the Commission has stated that "construction and maintenance of an electric generating facility are fundamental to the generation component of electric service." *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station*, Case No. 10-1454-EL-RDR, Finding and Order (Jan. 11, 2012) at 16. Thus, even if no other competitive suppliers were afforded the opportunity to offer to supply the "generation-related" hedging service ostensibly being provided by AEPGR and AEP Ohio under the PPA rider, it is a competitive service under Ohio statute and precedent.[2] Moreover, the Commission has acknowledged that competitive retail electric

[2] If the "hedging" service provided by the PPA rider is in fact a noncompetitive retail electric service, then it has not been properly proposed by AEP Ohio or approved by the Commission since AEP Ohio did not file an application for approval of the PPA rider rate under

suppliers do offer a different type of hedging service in the form of fixed-price generation contracts, indicating that the PPA rider should not be treated any differently. *See AEP ESP 3 Case*, Opinion and Order at 24.

The Commission never confronted the fact that, as long as the PPA rider is structured as an unavoidable charge, effectively requiring AEP's distribution customers to subsidize AEP's generation alone, it constitutes an anticompetitive subsidy for AEP Ohio's generation affiliate. The Order thus failed to carry out the Commission's obligation to "ensure that the policy specified in section 4928.02 of the Revised Code is effectuated." Therefore, the Commission must reconsider its holding that its approval of the PPA rider is consistent with R.C. 4928.02(H).

### B. The Order Did Not Adequately Justify the Approval of This Affiliate Deal as Reasonable and Consistent with Ohio Policy.

The Order also erroneously approved the Stipulation as "reasonable" under the stipulation review standard despite the fact that its centerpiece, the PPA rider, forces customers to accept a purported hedging service based on a non-competitive affiliate deal without any analysis of alternative hedging options. The Order sanctioned the application of the PPA rider as a non-bypassable charge regardless of whether customers "want or need" the ostensible hedging service offered by AEP Ohio based on AEP-owned generation. Order at 83. Now AEP Ohio customers must accept the PPA rider "hedge" even if it duplicates a hedge they have already paid for from a competitive retail electric supplier or through the AEP Ohio Standard Service Offer, if they do not want to receive a hedge based on subsidizing coal generation, or if they simply do not place much value on the rate stability allegedly offered by the PPA rider.

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R.C. 4909.18. Under R.C. 4928.15(A), "no electric utility shall supply noncompetitive retail electric distribution service in this state on or after the starting date of competitive retail electric service except pursuant to a schedule for that service that is . . . filed with the public utilities commission under section 4909.18 of the Revised Code."

As the Order itself explains, "a rate stability proposal, such as the PPA rider, must not impose unreasonable costs on customers." Order at 78. This acknowledgment is consistent with R.C. 4928.02(A), which codifies a state policy of "[e]nsur[ing] . . . reasonably priced retail electric service." The fundamental question here is whether that reasonableness review requires some heightened scrutiny for the PPA rider since it is based on a noncompetitive affiliate transaction, in order to guard against self-dealing that results in unreasonable rates for customers. Longstanding practice in Ohio and other jurisdictions indicates that the Commission should take such an approach and require a specific showing that an affiliate deal is reasonable in light of potential alternatives.

In current-day practice, this Commission has relied on a competitive process or consideration of alternatives to demonstrate the reasonableness of an affiliate transaction. For example, the Commission has allowed generation affiliates to supply power to their sister distribution companies only through a competitive auction process that ensures affiliates participate "in the same fair and nondiscriminatory manner as all other participants" without any "competitive advantage." *In re Application of the Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case Nos. 12-426-EL-SSO *et al.*, Opinion and Order (Sept. 4, 2013) at 16; *In re Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer*, Case Nos. 11-3549-EL-SSO *et al.*, Opinion and Order (Nov. 22, 2011) at 13. Similarly, in the past the Commission has applied heightened scrutiny to affiliate fuel purchases under (now-defunct) R.C. 4905.01(F). *In re Electric Fuel Component*, No. 86-01-EL-EFC, 1986 Ohio PUC LEXIS 17, 22 (Nov. 12, 1986) ("The Commission finds it necessary to pay special attention to the cost of affiliate coal because the potential for abuse exists when the buyer and seller are essentially the same entity . . . . Ohio Power's reliance on affiliate coal heightens the amount of scrutiny that Ohio Power's affiliate operations will face with this Commission.”). In both circumstances, a utility must show that an affiliate deal is reasonable in light of alternatives available from non-affiliates.

The Federal Energy Regulatory Commission has likewise concluded that heightened scrutiny is necessary for affiliate deals, holding that a utility must demonstrate the reasonableness of such transactions by offering specific evidence to rebut the presumption that affiliate abuse has occurred – for example, by showing there was competition between an affiliate and competing suppliers on a level playing field, or that the affiliate deal is consistent with benchmark evidence of similar transactions with non-affiliates. *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 F.E.R.C. ¶ 61,382, 62,168-62,169 (1991). Other state utility commissions have also applied heightened scrutiny to affiliate deals as part of their obligation to ensure just and reasonable rates are not sacrificed in order to profit affiliate shareholders. *See, e.g.*, *Entergy Louisiana*, Docket No U-27136, 2006 La. PUC LEXIS 281, at 102-103 (Aug. 29, 2006) (noting that “heightened scrutiny” applies to affiliate transactions given concerns about protecting ratepayers and “caus[ing] long-term harm to the wholesale competitive market” by “discourag[ing] non-affiliates from adding supply in the local area”).

In this case, the Commission appears to have approved the PPA rider as reasonably priced without any heightened scrutiny, based solely on AEP Ohio’s proffered projection of the net rider impact. Order at 81. However, that reliance on the Company’s projection is unreasonable given the possibility that AEP Ohio is using this noncompetitive affiliate deal to force its customers to subsidize AEPGR where they would not otherwise choose to do so. Even the Commission acknowledges AEP Ohio’s rider projection may well prove wrong, *id.*, and AEP has itself produced a more recent 2015 market price forecast predicting much lower market prices than those it relied on in preparing the PPA rider projection. *See* Environmental Intervenors Initial Br. at 18-22. Yet the Order fails to analyze the magnitude of the risk to customers that the PPA rider does prove more costly than AEP Ohio suggests. The possibility that the PPA rider will turn out to be a significant charge is part of the merits of the deal, and the Commission's narrow focus on one potential outcome based on an outdated market price projection unreasonably disregarded that aspect of the PPA rider.

Some consideration of alternatives or competitive bidding process would have offered reassurances that the AEP Ohio rider projection does in fact constitute a credible basis for determining the reasonableness of the PPA rider impact. It might also have helped to ensure that AEP Ohio customers pay a reasonable price for the hedging service offered by the rider by revealing whether alternative options would provide better terms and prices for customers, or enabling the Company to leverage competing offers to improve the ultimate deal. The state legislature and the Commission have both recognized the benefits of such a competitive procurement process, particularly where the danger of self-dealing is present. For example, R.C. 4928.143(b) and (c) allow a utility to recover costs related to procurement of new generation to serve its customers through an ESP only where that generation is "sourced through a competitive bid process." In this very case, the Commission established a similar safeguard for AEP Ohio's procurement of renewable generation in connection with the Stipulation, "direct[ing] AEP Ohio to demonstrate that bilateral opportunities were explored and that a competitive process was utilized to source and determine ownership of any project to be built." Order at 83. Because it did not apply that same approach here, the Commission failed to ensure that the PPA rider does not result in unreasonable rates for customers consistent with the stipulation review standard and R.C. 4928.02(A).

### C. The Commission Unreasonably Failed to Clarify the Effect of the Stipulation on the Ability of Customers to Opt Out of AEP Ohio's Energy Efficiency and Peak Demand Reduction Programs While Still Participating in the Company's Interruptible Tariff.

The Environmental Intervenors' Initial Brief raised the argument that Section III.C.11 of the Stipulation violates R.C. 4928.6613. That statute provides that if a customer opts out of paying for a utility's energy efficiency and peak demand reduction programs as permitted by R.C. 4928.6611, the customer is no longer "eligible to participate in, or directly benefit from, programs arising from" the utility's energy efficiency and peak demand reduction portfolio plan. Section III.C.11 of the Stipulation circumvents this required trade-off because it purports to allow customer to opt out of the obligation to pay for AEP Ohio's energy efficiency and peak demand reduction programs but still participate in one of the Company's peak demand reduction programs, the interruptible tariff, and receive the associated credit. Environmental Intervenors Initial Br. at 57-58.

The Order declined to address this argument on the ground that "[t]he provisions that opposing intervenors cite are provisions to be included in AEP Ohio's next ESP application, as required by the stipulation, and, for that reason, ELPC/OEC/EDF's and OMAEG's arguments regarding the provisions are premature." Order at 98. However, contrary to the Commission's interpretation, the language of the Stipulation seems to indicate the parties' intent that Section III.C.11 take immediate effect, rather than solely serving as a provision to be included in a future ESP filing. Therefore, the Environmental Intervenors seek either a ruling on our original argument or a clarification that, pending resolution of this issue in a future ESP case, customers cannot opt out of paying AEP Ohio's energy efficiency and peak demand reduction rider while still receiving a credit for peak demand reduction through its interruptible tariff.

Section III.C of the Stipulation does begin with language indicating that it relates to items to be included in an application to extend AEP Ohio's current ESP term. Paragraphs 1 through 9 then list various "proposals," "analyses," "provisions," and the like that the Company commits to include in that application. However, Paragraph 11 is worded differently, referring directly to the application of the Stipulation itself:

> Signatory Parties agree that nothing in this Stipulation constitutes an amendment of the Company's existing EE/PDR plan for purposes of the uncodified provisions enacted in 2014 by Senate Bill 310 and that nothing in this Stipulation affects a customer's opt-out right under R.C. 4928.6612, as that provision was enacted in 2014 by Senate Bill 310. IRP tariff customers may opt out of the opportunity and ability to obtain direct benefits from AEP Ohio's EE/PDR Plan as provided in S.B. 310.

On its face, this language appears to be intended to take immediate effect in delineating the scope of the right of interruptible customers to opt out of AEP Ohio's EE/PDR rider under R.C. 4928.6612. Therefore, in order to reasonably resolve this issue, the Commission must address whether Paragraph 11 does take effect now, and if so whether it is consistent with R.C. 4928.6613. As discussed in our Initial Brief, the Environmental Intervenors believe that R.C. 4928.6613 does not permit customers to both opt out of paying for a utility's energy efficiency and peak demand reduction programs while still receiving the benefits of participating in one of those programs through an interruptible credit. Environmental Intervenors Initial Br. at 57-58.

## III. CONCLUSION

.No party disputes that the PPA rider rests on a non-competitive affiliate deal that provides out-of-market payments to AEP-owned generation. However, the Commission failed to carry out its obligation under R.C. 4928.02(H) to ensure that the PPA rider does not therefore constitute an anticompetitive subsidy from AEP Ohio's customers to its own affiliate competitive generation service. In fact, the non-bypassable PPA rider constitutes just such an anticompetitive subsidy. It imposes a purported hedging contract on all distribution customers, who then have no option to reject the hedge or shop for a better hedge from a competitive supplier. More broadly, the Commission's review of the PPA rider failed to account for the self-dealing nature of this transaction by requiring AEP Ohio to meet a heightened standard to demonstrate the reasonableness of the PPA transaction. For both those reasons, the Commission should reconsider its approval of the PPA rider as part of the Stipulation package. Finally, the Commission erroneously interpreted Section III.C.11 of the Stipulation as not immediately affecting the opt-out rights of AEP Ohio customers under R.C. 4928.6612, and it needs to resolve whether that provision violates R.C. 4928.6613.

May 2, 2016

Respectfully submitted,

/s/ Madeline Fleisher
Madeline Fleisher
Environmental Law & Policy Center
21 W. Broad St., Ste. 500
Columbus, OH 43215
P: 614-670-5586
F: 312-795-3730
mfleisher@elpc.org

*Counsel for Environmental Law & Policy Center*

Trent A. Dougherty
Ohio Environmental Council
1145 Chesapeake Avenue, Suite I
Columbus, OH 43212
(614) 487-5823
tdougherty@theoec.org

*Counsel for Ohio Environmental Council and Environmental Defense Fund*

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing has been electronically filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on May 2, 2016.

/s/ Madeline Fleisher
Madeline Fleisher

## PARTIES SERVED

fdarr@mwncmh.com
mhpetricoff@vssp.com
suzette.krausen@monitoringanalytics.com
bingham@occ.state.oh.us
wvorys@dickinsonwright.com
sechler@carpenterlipps.com
smith@carpenterlipps.com
glpetrucci@vorys.com
mdortch@kravitzllc.com
ghiloni@carpenterlipps.com
Debra.Hight@puc.state.oh.us
mallame@occ.state.oh.us
drinebolt@ohiopartners.org
dparram@taftlaw.com
anorris@dickinson-wright.com
orourke@carpenterlipps.com
JEFFREY.MAYES@MONITORINGANALYTICS.COM
callwein@keglerbrown.com
trent@theoec.org
twilliams@snhslaw.com
glover@whitt-sturtevant.com
Stephanie.chmiel@thompsonhine.com
gaunder@carpenterlipps.com
cmooney@ohiopartners.org
tony.mendoza@sierraclub.org
jennifer.spinosi@directenergy.com
torahood@bricker.com
cblend@porterwright.com
rseiler@dickinsonwright.com
Tonnetta.Scott@puc.state.oh.us
brigner@occ.state.oh.us
ckilgard@taftlaw.com

sandra.ritchie@pjm.com
schuhart@wrightlaw.com
bojko@carpenterlipps.com
kspencer@aando.com
CHARRIS@SPILMANLAW.COM
rsahliattomey@columbus.rr.com
joliker@igsenergy.com
schmidt@sppgrp.com
dwilliamson@spiimanlaw.com
SFISK@EARTHJUSTICE.ORG
mpritchard@mwncmh.com
Sandra.Cotfey@puc.state.oh.us
mkurt2@bkllawfirm.com
dconway@porterwright.com
felecia.burdett@puc.state.oh.us
msoules@earthjustice.org
mfleisher@elpc.org
josephclark@nisource.com
mjsettineri@vorys.com
Donielle.Hunter@puc.state.oh.us
TONY.MENDOZA@SIERRACLUB.ORG
stnourse@aep.com
jvickers@elpc.org
msmalz@ohiopovertylaw.org
sam@mwncmh.com
fdarr@mwncmh.com
talexander@calfee.com
egallon@porterwright.com
mjsatterwhite@aep.com
TERESA.RINGENBACH@DIRECTENERGY.COM
GHULL@ECKERTSEAMANS.COM
CRERlCHA@FES.COM
HAYDENM@FIRSTENERGYCORP.COM
MSWHITE@IGSENERGY.COM
sbloomfield@bricker.com
sauer@occ.state.oh.us
OHIOENERGYGROUP@BKLLAWFIRM.COM
RICK.SITES@OHIOHOSPITALS.ORG
CALLWEIN@KEGLERBROWN.COM
POULOS@OCC.STATE.OH.US