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 Purchase Agreement for Inclusion in the Power Purchase Agreement Rider.	)))))	Case No. 14-1693-EL-RDR
In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority.	))))	Case No. 14-1694-EL-AAM

OHIO POWER COMPANY'S
MEMORANDUM CONTRA APPLICATIONS FOR REHEARING

I. INTRODUCTION

In Case No. 13-2385-EL-SSO, the Commission modified and approved the application of Ohio Power Company (AEP Ohio or the Company) for an Electric Security Plan (ESP) for the period beginning June 1, 2015, through May 31, 2018. *In re Ohio Power Co., Case No. 13-2385-EL-SSO*, et al. (ESP 3), Opinion and Order (Feb. 25, 2015), Second Entry on Rehearing (May 28, 2015), and Fourth Entry on Rehearing (Nov. 3, 2016). In its Order, the Commission concluded that AEP Ohio's Power Purchase Agreement (PPA) Rider, which would operate as a retail rate stability mechanism by flowing through to customers the net impact (debit or credit) of the Company's contractual entitlements related to the Ohio Valley Electric Corporation (OVEC), satisfies the requirements of R.C. 4928.143(B)(2)(d) and, therefore, is a permissible component of ESP 3. The Commission established a placeholder PPA Rider, at an initial rate of zero, for the term of the ESP.

On October 3, 2014, AEP Ohio commenced this proceeding, which seeks the authority to implement the PPA Rider. On March 31, 2016, the Commission issued an Opinion and Order,

based upon a Joint Stipulation and Recommendation, which authorized AEP Ohio to include in the PPA Rider the net impacts of both an Affiliate PPA and the Company's OVEC entitlement. In its May 2, 2016 Application for Rehearing, AEP Ohio requested that the Commission adopt an OVEC-only PPA Rider going forward in light of an April 27, 2016 Order of the Federal Energy Regulatory Commission concerning the proposed Affiliate PPA.

Numerous parties filed applications for rehearing that raised assignments of error that addressed whether the Stipulation was the product of serious bargaining among capable and knowledgeable parties, whether the settlement package sufficiently benefits ratepayers and the public interest, and whether the settlement package violates any important regulatory principle. The Commission fully addressed all the assignments of error raised by the parties in its Second Entry on Rehearing issued on November 3, 2016, contemporaneously with the Fourth Entry on Rehearing in Case No. 13-2385-EL-SSO.

On December 5, 2016, the Ohio Manufacturers' Association Energy Group (OMAEG), the Environmental Law and Policy Center (ELPC), the PJM Power Providers Group and the Electric Power Supply Association (P3/EPSA), the Office of the Consumers' Counsel (OCC), and Buckeye Power filed applications for rehearing challenging various findings and conclusions in the Second Entry on Rehearing. AEP Ohio responds to each of the assignments of error raised in this second round of applications for rehearing. AEP Ohio urges the Commission to deny any further rehearing in this case.

II. LAW AND ARGUMENT

Ohio law allows a party to a Commission proceeding to "apply for a rehearing in respect to any matters determined in the proceeding." R.C. 4903.10. Any application for rehearing must be filed "within thirty days after the entry of the order * * *." *Id.*; *see also* Ohio Adm.Code 4901-1-35(A). An application for rehearing must "set forth specifically the ground or grounds on which

the applicant considers the order to be unreasonable or unlawful." *Id.* The party filing an application for rehearing must also file a memorandum in support that explains "the basis for each ground for rehearing identified in the application for rehearing * * *." Ohio Adm.Code 4901-1-35(A).

Ohio law does not allow parties to re-argue issues before the Commission *ad infinitum*. In particular, "Section 4903.10, Revised Code, does not allow persons who enter appearances to have 'two bites at the apple' or to file rehearing upon rehearing of the same issue." *In the Matter of the Application of Ohio Power Company for Approval of a Special Contract Arrangement with Ormet Primary Aluminum Corporation*, Case No. 96-999-EL-AEC, Second Entry on Reh'g, ¶ 10 (Sept. 13, 2006). Similarly, Ohio law does not permit parties to raise arguments in later applications for rehearing that relate to holdings in earlier orders. If the Commission issues an opinion that includes a holding adverse to an intervening party's interests, the party must address that issue in an application for rehearing within thirty days and not save it for later applications for rehearing. *See, e.g., Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand and Rider Adjustment Cases*, Case Nos. 03-93-EL-ATA et al., Third Entry on Rehearing, ¶¶ 13-16 (Nov. 5, 2008) (denying as untimely an application for rehearing of a second entry on rehearing, where the party's assignment of error related to a decision originally set out in a much earlier order and not altered by the second entry on rehearing). *Cf. In re Application of AEP Ohio for an Increase in Electric Distribution Rates*, Case Nos. 11-351-EL-AIR et al., Entry on Rehearing (Feb. 14, 2012) (holding that the issuance of an entry *nunc pro tunc* did not extend the thirty-day deadline for filing an application for rehearing because that entry did not "create[ ] additional rights" or "den[y] an existing right" and because the application for rehearing stemmed from the original judgment entry and not the entry *nunc pro tunc*). The majority of the assignments of error presented by OMAEG,

ELPC, P3/EPSA, OCC, and Buckeye Power either re-argue points previously rejected on rehearing or present new arguments that could have been included in prior applications for rehearing. Those assignments of error are procedurally improper, and the Commission should reject them as a matter of law. The remainder of the arguments provide no reason to reconsider the Commission's lengthy and well-supported Second Entry on Rehearing and also should be rejected.

A. Response to OMAEG's Second Application for Rehearing.

1. The Commission's decision to approve the OVEC-only PPA Rider was based on the record evidence and complied with R.C. 4903.09. [OMAEG AOE A.1]

OMAEG Assignment of Error No. 1 complains that the Commission violated R.C. 4903.09 by approving the OVEC-only PPA Rider without any basis in the evidentiary record. This Assignment of Error is a re-hash of contentions OMAEG previously raised, without success, in its First Application for Rehearing. In that Application, OMAEG invited the Commission to reaffirm what OMAEG called "the Commission's prior pronouncement that the OVEC PPA – on a standalone basis – was neither sufficient to promote rate stability nor in the public interest" and to hold that "no costs associated with the OVEC PPA can be flown through to retail customers." (*See* OMAEG First Application for Reh'g at 5; *see also id.* at 7-8.) The Commission declined OMAEG's invitation in its Second Entry on Rehearing, and it should deny it now.

As AEP Ohio has explained, the reasonableness of using AEP Ohio's OVEC entitlement as the basis for a financial hedging mechanism that would benefit retail customers through the PPA Rider mechanism that the Commission approved in *ESP III* is fully supported by both the existing record in this proceeding and Ohio law. (AEP Ohio Application for Reh'g at 3-8.) The Commission agreed in its Second Entry on Rehearing, noting:

> In the PPA Order, the Commission found, based on the record evidence, that the stipulation will provide numerous benefits for customers that are in the public interest and consistent with the policy of the state, as set forth in R.C. 4928.02. In

> addition to the rate stability and financial hedging benefits provided by the PPA rider, the Commission addressed the fuel supply diversity and economic development benefits of the stipulation, as well as AEP Ohio's many commitments in the stipulation to offer proposals in future proceedings that are intended to promote economic development and retail competition, facilitate energy efficiency measures, reduce carbon emissions, expand the development of renewable resources, and pursue grid modernization in the state. * * * In order to preserve the customer benefits of the stipulation, we approve AEP Ohio's request to modify the stipulation, such that the OVEC PPA is included in the PPA rider, the affiliate PPA is not included in the rider, and all other provisions of the stipulation remain in effect as approved or modified by the Commission.

(Emphasis added; Second Entry on Reh'g, ¶ 57.)

To say that the Commission's approval of the OVEC-only PPA Rider lacks any basis in the evidentiary record ignores the record citations that AEP Ohio included in its post-hearing briefs and Memorandum Contra Applications for Rehearing concerning the benefits of including the OVEC Units in the PPA Rider:

> As AEP Ohio explained in its post-hearing briefs, AEP Ohio presented ample information regarding, *inter alia*: the OVEC units' financial need (AEP Ohio Ex. 1 at 16-19; AEP Ohio Ex. 3 at 31 & tbl. 1; AEP Ohio Ex. 9 at 14-15; AEP Ohio Br. at 33-38); the need for the coal-fired OVEC Units in light of future reliability concerns, including supply diversity (*see* AEP Ohio Br. at 38-43); the OVEC Units' environmental compliance and the budgeted cost of their future compliance through 2024 (*id.* at 43-53; Tr. IV at 1029, 1033-35); and the impact that the OVEC Units' closure would have on electric prices and economic development within Ohio (AEP Ohio Br. at 53-58; AEP Ohio Ex. 10). <u>The record thus fully supports inclusion of AEP Ohio's OVEC entitlement in the PPA Rider</u>.

(AEP Ohio Mem. Contra Applications for Reh'g at 32 (emphasis added).)

OMAEG does not now dispute or challenge any of these citations to record evidence regarding the OVEC Units, which supports including the OVEC Units in the PPA Rider. Instead, OMAEG complains that AEP Ohio's application, evidentiary hearing presentation, and Stipulation were "dependent on recovering the costs of <u>both</u> the OVEC PPA and the Affiliate PPA * * * [.]" (OMAEG Second Application for Reh'g at 9.) Thus, OMAEG contends that "there could be no record evidence to support the implementation of a PPA Rider that would only recover the costs

associated with the OVEC PPA as that was never proposed to, agreed to, or litigated in the case at bar." (*Id.* at 8.) But the Commission expressly found, in its Second Entry on Rehearing, that AEP Ohio's "proposal to move forward with the implementation of the other provisions of the stipulation, which conceptually is not opposed by any of the signatory parties to the stipulation, is reasonable and should be approved." (Second Entry on Reh'g ¶ 57.) As such, all of the record evidence supporting those other provisions of the stipulation, which provisions will survive thanks to the Commission's decision on rehearing, also supports implementation of a PPA Rider that will only recover the costs associated with the OVEC PPA. As AEP Ohio addresses below with respect to OCC's Assignment of Error No. 9, approving the OVEC-only PPA in order to maintain the benefits of the Stipulation was reasonable.

2. The Commission's decision to approve on rehearing the OVEC-only PPA Rider complied with R.C. 4903.10. [OMAEG AOE A.2]

In its Second Assignment of Error, OMAEG complains that, in approving the OVEC-only PPA Rider, the Commission violated R.C. 4903.10, which states that if rehearing is granted and additional evidence is permitted, the Commission "shall not upon rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing." (OMAEG Second Application for Reh'g at 10.) OMAEG posits that the fact that FERC effectively removed the option to recover the net impacts associated with the Affiliate PPA "does not mean that AEP Ohio can now raise wholly new proposals and new evidence on rehearing in the pending case." (*Id.*)

Because OMAEG fails in this branch of its Second Application for Rehearing to identify a single shred of "new evidence" presented by AEP Ohio on rehearing or considered by the Commission in its Second Entry on Rehearing, the Commission should reject this argument. Part I of AEP Ohio's Application for Rehearing, in which AEP Ohio asked the Commission to adopt an OVEC-only PPA Rider, did not attach any new evidence or testimony of the type precluded by

R.C. 4903.10. The only "new" information AEP Ohio presented in Part I of its Application for Rehearing was its citation to the FERC's April 27, 2016 Order in Docket No. EL16-33-000. (AEP Ohio Application for Reh'g at 3.) Given the issue date of that FERC Order, months after the evidentiary hearing on the stipulation in this case, it clearly could not have been "offered upon the original hearing" in this proceeding. And AEP Ohio made it clear in that Application for Rehearing that its request for an OVEC-only PPA Rider was based on the existing record in this proceeding, not on any "new" evidence presented in conjunction with its rehearing application, saying:

> The reasonableness of using AEP Ohio's entitlement share of the costs associated with the operation of the OVEC Units and the revenues realized from the sale of its entitlement share of the OVEC units' output into PJM's wholesale capacity and energy markets as the basis for a financial hedging mechanism that would benefit retail customers through the PPA Rider mechanism that the Commission already has approved remains fully supported by the existing record in this case and Ohio law. Moreover, the same information regarding those OVEC entitlement costs and revenues will be available in connection with the PPA Rider even without the Affiliate PPA continuing in effect.

(*Id.* at 3-4 (emphasis added).) AEP Ohio went on to explain how the retail rate volatility mitigation benefit of the OVEC-only PPA could be deduced mathematically – not based on any "new" evidence proffered on rehearing, but rather "[b]ased on the record evidence." (*Id.* at 5; *see also id.* at 6 ("Thus, it is clear that the record basis for approving and implementing the PPA Rider and its financial hedging mechanism remain in place and are compelling.")) Because AEP Ohio and the Commission did not justify the OVEC-only PPA Rider based on any "new" evidence taken on rehearing that, with reasonable diligence, could have been presented at the evidentiary hearing in this case, the Commission did not violate R.C. 4903.10 and OMAEG's Second Assignment of Error should be rejected.

3. The Commission's decision on rehearing to reduce AEP Ohio's total credit commitment for the PPA Rider to $15 million was reasonable and lawful. [OMAEG AOE B.]

In its Third Assignment of Error, OMAEG complains that the Commission erred by approving AEP Ohio's request to "drastically reduce" the credit commitments that it would provide to customers under the Stipulation. (OMAEG Second Application for Reh'g at 10.) OMAEG complains that, even though the Affiliate PPA will no longer be part of the PPA Rider, the credit commitment "originally proposed and agreed to in the Stipulation" should remain in place. (*Id.* at 11.) OMAEG believes the Commission "failed to set forth a rationale" for the credit commitment reduction, that the Commission "failed to point to any record evidence" supporting the $15 million credit commitment, and that the Commission should have devoted more than a single paragraph of its decision to an $85 million reduction in that commitment. (*Id.*) Again, these arguments are baseless.

In its Application for Rehearing, AEP Ohio provided a fully reasoned justification for scaling back the $100 million credit commitment made in Section III.A.3 of the Stipulation, to reflect the fact that the Affiliate PPA would no longer be part of the PPA Rider. (AEP Ohio Application for Reh'g at 4.) Specifically, AEP Ohio explained that:

> While the terms and conditions of that provision would remain in effect, the annual and total credit commitments would be 15% of the amounts reflected in the Stipulation (OVEC's 440 MW of capacity is less than 15% of the prior total combined PPA Rider capacity of 3,111 MW). More specifically, the new credit commitment for Planning Year 2020/2021 would be $1.5 million, Planning Year 2021/2022 would be $3 million, Planning Year 2022/2023 would be $4.5 million, and Planning Year 2023/2024 would be $6 million.

(*Id.*) The Commission agreed, specifically finding that the reduced credit commitment is "reasonable and commensurate with OVEC's portion of the combined 3,111 MW of capacity from the OVEC PPA and the affiliate PPA." (Second Entry on Reh'g, ¶ 60.)

OMAEG wants to have its cake and eat it too – that is, to succeed in the removal of the impacts associated with the Affiliate PPA, while leaving AEP Ohio on the hook for the full $100 million credit commitment. (OMAEG Second Application for Reh'g at 11.) The credit commitment in the Stipulation is inextricably linked to the PPA Rider – it is described in the Stipulation as the "Additional PPA Rider Credit Commitment." (Joint Ex. 1 at 5-6.) Yet OMAEG apparently believes the credit commitment should provide "some rate relief to customers" for "other costs on customers, which are unrelated to the Affiliate PPA and which cannot be ignored." (OMAEG Second Application for Reh'g at 11.) At the same time, OMAEG utterly fails to specify those costs or any formula for calculating an appropriate credit commitment besides the one the Commission adopted on rehearing. (*Id.*) The Commission reasonably reduced the credit commitment in proportion to OVEC's MW of capacity as compared to the prior, total combined PPA Rider capacity, and OMAEG's Third Assignment of Error should be rejected.

B. Response to ELPC's Second Application for Rehearing.

ELPC again argues, as it did in post-hearing briefing and its first application for rehearing, that Section III.C.11 of the Stipulation conflicts with R.C. 4928.6613, which provides that no account properly identified in a customer's verified opt-out notice under R.C. 4928.6612 shall be subject to any cost recovery mechanism under R.C. 4928.66 or be eligible to participate in, or directly benefit from, programs arising from electric distribution utility portfolio plans approved by the Commission. (ELPC Application for Reh'g at 1-2.) ELPC attempts to justify its second application for rehearing on this issue on the basis that AEP Ohio's application for a program portfolio plan for 2017-2019 (EE/PDR Plan), in Case No. 16-574-EL-POR, "includes the IRP tariff as a peak demand reduction program." (*Id.* at 2 (citing Direct Testimony of Jon F. Williams, Ex. JFW-1, at 36, Case No. 16-0574-EL-POR).)

ELPC's citation to the Company's EE/PDR Plan obscures several important distinctions. As explained in the part of the Company's EE/PDR Plan that ELPC cites, the Company's EE/PDR Plan references the IRP-D tariff because the EE/PDR Plan "counts the IRP-D tariff participation," and demand reductions from the IRP-D tariff are "used to supplement the peak demand reductions achieved from energy efficiency programs." (*See* Direct Testimony of Jon F. Williams, Ex. JFW-1, at 36, Case No. 16-0574-EL-POR.) But the IRP-D tariff is *not* an EE/PDR Plan program akin to the "Efficient Products" Program, the "Appliance Recycling" Program, or any of the other programs listed in the EE/PDR Plan. Rather, the IRP-D tariff is just that – a *tariff*. AEP Ohio offered an interruptible tariff to customers before it created its first EE/PDR Plan. And although IRP-D costs are currently recovered through the EE/PDR Rider, no "program funds" as that term is used in the EE/PDR Plan are used on the IRP-D tariff.

Furthermore, it is important to note that the Stipulation in this proceeding proposed shifting 50% of IRP-D tariff costs to the Company's Economic Development Rider (EDR). (*See* Jt. Ex. 1 at 16.) But in the Commission's Opinion and Order (at 92), it held that this was a "proposal[] that should be included in AEP Ohio's application to extent the ESP through May 31, 2024." Accordingly, if ELPC believes that IRP-D costs should be moved to another rider so that customers who opt out of AEP Ohio's EE/PDR Rider must nonetheless contribute to IRP-D cost recovery, that is an issue that can be addressed in the Company's ESP III Extension proceeding. Here, however, ELPC raises no new basis for its substantive argument that the Commission has not already considered. (*See* Second Entry on Reh'g at 106-107.) Accordingly, the Commission should reject ELPC's request to revisit this issue.

C. Response to P3/EPSA's Second Application for Rehearing.

1. The OVEC-only PPA rider is authorized by R.C. 4928.143(B)(2)(d).

In its first assignment of error, P3/EPSA argue that the Commission erred because an OVEC-only PPA Rider is not authorized by R.C. 4928.143(B)(2)(d). P3/EPSA concede that they are not raising any new argument but are merely "once again urg[ing] the Commission to reverse its prior findings" as to this issue. (P3/EPSA Application for Reh'g at 2.) For the reasons provided above, its application for rehearing of this issue is, therefore, a nullity and should be summarily denied.

P3/EPSA attack each of the component parts of the (B)(2)(d) test. They contend that the OVEC-only PPA rider is not a "charge," does not constitute a "limitation on customer shopping," and "would not have the effect of stabilizing or providing certainty retail electric service," as required by R.C. 4928.143(B)(2)(d). P3/EPSA raised each of these points in their April 29, 2016 Joint Application for Rehearing as their assignments of error 3-5 and argued these points at length in their supporting memorandum at 8-15. They repeated their objections in their May 12, 2016 Joint Memorandum Contra at 10-12. Their current application for rehearing repeats their prior text almost verbatim at 2-4. The Commission fully considered and rejected their arguments in the Second Application for Rehearing ¶¶ 205-216. It should reject them again by declining any further rehearing.

The Commission's interpretation of the word "charges" in (B)(2)(d), to refer to a "price term, not exclusively descriptive of a debt owed by a customer, but encompassing both debits and credits that may accrue to a customer's account," is a reasonable, common-sense interpretation of the statute. (*See* Second Entry on Reh'g ¶ 207.) The suggestion that the General Assembly intended the Commission to authorize only debits that would have the effect of stabilizing retail

electric service and not credits that would have the same effect is an unreasonable – indeed absurd – interpretation of the statutory language and intent. Rate stability contemplates smoothing out the volatility of pricing, offsetting low prices against high prices, which necessarily entails both debits and credits.

The Commission's determination that (B)(2)(d) is not limited in scope to a particular type of limitation on customer shopping also is a proper reading of the statute. The Commission is required to interpret a particular statutory term in reference to the statute as a whole. Context is important. (Second Entry on Reh'g. ¶ 211.) The phrase "limitation on customer shopping" does not appear in a vacuum. It appears in the context of the broader phrase authorizing any "terms, conditions or charges relating to limitations on customer shopping . . . as would have the effect of stabilizing or providing certainty regarding retail electric service." Thus, the statute is naturally read to encompass a variety of terms, conditions, or charges relating to limitations on customer shopping, not just those terms or conditions that restrain customer shopping. The fact that the statute authorizes "charges" in addition to "terms" and "conditions" further evinces an intent to authorize financial limitations on customer shopping as would have the effect of stabilizing service.

The Commission's finding that the PPA rider is properly approved as a retail stability mechanism also is on solid ground. As the Commission aptly notes in paragraph 216 of the Second Entry on Rehearing, the "PPA rider avoids complete reliance on the retail market and, in the event that prices rise, the rider, as designed, has the potential to offset a portion of the costs of retail electric service." The record evidence, as well as common knowledge, fully supports the fact that volatility exists in the generation market and that the hedge provided by the PPA rider is a mechanism designed to combat that volatility. The fact that the PPA rider is now an OVEC-only

rider does not undermine the merit of the Commission's conclusion. The concern that an OVEC-only rider may be less effective as a retail stability mechanism than the rider as originally proposed does not negate that it is nonetheless a beneficial retail stability mechanism authorized by the statute. The impact of the OVEC-only rider, compared to the broader affiliate rider initially proposed, is a difference of degree, not kind.

2. The Commission reasonably found that the OVEC-only PPA rider will provide rate stability.

P3/EPSA's second assignment of error overlaps with the first, in that P3/EPSA again challenge the Commission's finding that the PPA rider will provide rate stability. In the first assignment of error, they alleged that the PPA rider fails to meet the statutory requirement of having a stabilizing effect. In the second assignment of error, they concede that the rider is a "financial hedging mechanism" but question whether it can provide "sufficient benefit." (P3/EPSA Application for Reh'g at 5.) P3/EPSA concede that the Commission has previously considered and rejected their argument. (*Id.* at 6, n.21.) They argue, however, that the Commission should revisit the issue in light of the fact that AEP Ohio has sought to amend its current ESP by, among other things, terminating the OVEC-only PPA rider and, beginning in June 2017, using the OVEC entitlement to serve SSO load. (*Id.* at 6-7; *see* Case No. 16-1852-EL-SSO, Amended Application at 9.)

The Commission should deny rehearing as to this issue. The merits of the current PPA rider depend on the record presented in this case and it would be improper to judge the merits of the rider based on a *proposal* to terminate the rider as part of an amended ESP 3 application. The suggestion that a proposal to terminate the PPA rider at a future date means it is a "farce" is unfounded. The journey of the PPA rider from the time it was first proposed in December 2013, to its approval in concept in February 2015, to its approval in practice in March 2016, and to its

reformation on rehearing in November 2016 demonstrates the complexity and challenges in the current energy markets and regulatory scheme. To respond to that complexity and those challenges, all stakeholders – and the Commission – must remain open to considering new programs and initiatives that will provide stability and certainty for retail electric service.

The Commission rightfully acknowledged in its Second Entry on Rehearing, at ¶¶ 61-63, that the OVEC-only PPA rider proposed in May 2016 should not be foreclosed by decisions made in February 2015, when an OVEC-only rider was first proposed, but should be judged on its own record and merit. Likewise, the PPA rider proposed in May 2016 and approved on rehearing in November 2016 should be judged on its own record and merit, and not discredited or re-examined merely because there is *a proposal* to take a new course at a future date.

The Commission's conclusion that the 2016 OVEC-only proposal should be judged independently from the 2015 proposal recognized that at neither time did the OVEC-only rider stand in isolation. Each time the rider was proposed, it was but one component of an overall ESP package. The proposal to terminate the rider in June 2017 also is part of a proposed amended ESP package that "addresses a range of issues that are broader than simply focusing on the SSO for competitive retail electric services." (*See* Amended Application, *In re Ohio Power Company,* Case No. 16-1852-EL-SSO (Nov. 23, 2016) at 3.) The Amended Application proposes that the PPA rider be replaced with two separate mechanisms that also address stabilizing and providing certainty regarding retail electric service, which, if approved, would mean that the PPA rider is no longer needed. (*See* Case No. 16-1852, Direct Testimony of William Allen at 7, 11-12.) The fact that the PPA rider may be replaced by two alternative mechanisms in the future does not mean that the rider as designed and now performing is unreasonable.

3. The Commission reasonably authorized AEP-Ohio to defer and recover any OVEC costs incurred during the period June 2016 through December 2016.

P3/EPSA's final assignment of error alleges that the Commission's directive that AEP Ohio defer any OVEC costs incurred during the period of June 2016 through December is unlawful and unreasonable in that it fails to impose any regulatory oversight of cost recovery or make the deferred costs net of any revenues. (P3/EPSA Application for Reh'g at 7.) Neither alleged error has merit because the Order in this case already provides that there will be oversight of any cost recovery and that the deferred costs will be net of revenue. For its oversight, the Commission will conduct an annual prudency review of any retail charges flowing through the PPA rider. (*See* Order at 88-89.) Because the deferred costs flow through the PPA Rider, they will necessarily be net of any revenues and will be passed through as costs only to the extent that the costs exceed revenues. That is the fundamental premise of the approved PPA rider and it did not change merely because the rider is now an OVEC-only rider. The Entry on Rehearing did not negate either of the prior requirements in the Order. And the Company's recent tariff filing confirms that the rider will recover costs net of any revenues. *See* Revised Tariff PUCO No. 20 (filed Dec. 7, 2016); Staff's Review and Recommendation (filed Dec. 12, 2016).

C. Response to OCC's Second Application for Rehearing.

1. The Commission reasonably and lawfully applied its three-part test to the Stipulation and concluded that it was appropriate to adopt that settlement agreement as the basis for its orders in this proceeding.

OCC's Second Application for Rehearing repeats several arguments about the stipulation process and the Commission's application of its well-established test for stipulations. (*See* OCC Second Application for Reh'g at 3-12 (OCC AOE 1-6).) The Company has responded to these arguments on multiple occasions. (*See* AEP Ohio Initial Br. at 25-32; AEP Ohio Reply Br. at 18-

29; AEP Ohio Mem. Contra First Applications for Reh'g at 16-30.) And the Commission has already rejected all of OCC's contentions. (*See* Opinion & Order at 51-53; Second Entry on Reh'g at 8-22.) OCC raises no new grounds for rehearing concerning the Stipulation process or the application of the three-part test, and the Commission should reaffirm its previous conclusion that the Stipulation satisfies the test.

a. The Stipulation is not limited to the issues raised in the original Application. [OCC AOE 1, 4]

OCC criticizes the Second Order on Rehearing on the ground that the Commission approved a Stipulation containing provisions that OCC claims lack a "sufficient nexus to the original Application/Amended Application." (OCC Second Application for Reh'g at 3.) Relatedly, OCC claims that it was "unforeseeable" that the Stipulation would contain these provisions. (*Id.* at 8-9.)

As OCC expressly concedes (at 3, 9), OCC made these arguments in it is first application for rehearing and the Commission expressly rejected them. (*See* Second Entry on Reh'g at 9-10.) As for the alleged lack of a "nexus," the Commission correctly held that "no nexus or connection is required to be a condition precedent to a provision of a stipulation." (*Id.* at 9.) As for the claim that provisions of the Stipulation were "unforeseeable," the Commission correctly reasoned that "the PPA rider is a provision of an ESP and ESPs, pursuant to R.C. 4928.143, may include and have included, as approved by this Commission, a vast array of terms, conditions, charges, and provisions." (*Id.* at 9.) Accordingly, the Commission found that "it was not unreasonable to expect that the parties would propose and negotiate provisions to be included in an ESP." (*Id.* at 10.)

OCC raises no new grounds for the Commission to second-guess its previous conclusions on these issues. OCC repeatedly insists that "[t]his is not an ESP case" but rather "is an RDR case." (OCC Second Application for Reh'g at 3, 9.) But OCC fails to explain the import of this

formalistic observation. As the Commission has recognized (*see, e.g.*, Opinion & Order at 52), all parties, including OCC, fully participated in the settlement process and were well aware of the provisions being discussed, and once the Stipulation was filed, OCC had every opportunity to present evidence and argument opposing the Stipulation, and did so. The Commission has broad authority and discretion to manage its dockets. Thus, the Commission often "has considered and approved stipulations that address a wide variety of issues, often resolving several pending proceedings at the same time." (Opinion & Order at 77 (citing several cases).) And the Commission "has repeatedly found value in the parties' resolution of pending matters through a stipulation package" as "an efficient and cost-effective means of bringing their issues before the Commission." (*Id.*) OCC asks the Commission to abandon this long line of precedent but offers no new grounds for doing so. Its application for rehearing on this issue should be denied.

b. The Stipulation was the product of serious bargaining. [OCC AOE 2, 6]

OCC again contends that the Stipulation was not the product of serious bargaining under the first prong of the three-part test. As OCC admits (Application for Reh'g at 5), the Commission has rejected its arguments and has repeatedly held that the Stipulation "is the product of serious bargaining among capable, knowledgeable parties." (Opinion & Order at 53; *see also* Second Entry on Reh'g at 21.) OCC offers no reason for the Commission to abandon its conclusion that the Stipulation was the product of serious bargaining.

First, OCC claims (at 6) that the burden of proof for supporting the Stipulation lies with the Signatory Parties, but the Commission recognized that the Signatory Parties have the burden of proof and thus did not err in applying the standard of review. (*See, e.g.*, Opinion & Order at 18 (noting that Signatory Parties have the "evidentiary burden to support the stipulation"); Second Entry on Reh'g at 40 (noting that the Commission did not "shift the burden of proof to the opposing

intervenors"). Moreover, as the Commission properly found, the Signatory Parties submitted substantial evidence showing that the Stipulation was the product of serious bargaining. (*See, e.g.*, Opinion & Order at 52 ("The evidence of record *conclusively demonstrates* the participation of signatory and non-signatory parties in the negotiation sessions and demonstrates the knowledge and experience of the parties." (emphasis added)).

Second, OCC (at 6) cites *Time Warner AxS v. Public Utilities Commission*, 75 Ohio St. 3d 229, 233 n.2 (1996), for the proposition that "the PUCO is required to review the negotiation process," and OCC claims that the Commission "did not conduct such a review." (OCC Second AFR at 6.) But as the Commission previously explained, the *Time Warner* case involved a stipulation in which "an entire customer class was intentionally excluded." (Opinion & Order at 53 (citing *Time Warner*, 75 Ohio St. 3d at 233 n.2.) Here, the Commission *did* ensure that no customer class was excluded, finding that the "record in these proceedings demonstrates that representatives of each of the customer classes, including the residential class, participated in the settlement negotiations," and that "[t]here is no evidence in the record that an entire class of customers was excluded from the settlement negotiations." (*Id.*)

Third, OCC argues that the "best time to develop extrinsic evidence" concerning a hypothetical "dispute" over the meaning of certain unspecified Stipulation terms "is now." (OCC Second Application for Reh'g at 6-7.) As an initial matter, it is unclear how this is a ground for rehearing, because this argument does not appear to call for overturning the Commission's approval of the Stipulation, but rather calls for further proceedings to litigate a hypothetical, unspecified "dispute" that OCC believes is likely. More importantly, however, although OCC "anticipates" that there may be a dispute in the future concerning the Stipulation's terms, the Commission has correctly recognized that this "is not the situation at this time," and thus OCC's

argument is "premature." (Second Entry on Reh'g at 13.) If a dispute arises, the Commission can address it at that time. (*See id.* (citing precedents).) It would be improper and a waste of all parties' resources to deny approval of the Stipulation based on OCC's unilateral conjecture about "the possibility that there will be a dispute" sometime in the future. (*Id.*)

Fourth, OCC again raises the global settlement agreement between AEP Ohio and IEU, arguing that the Stipulation fails the first prong of the test because this agreement was not disclosed until discovery. The Commission has fully considered and rejected this argument on multiple occasions. As the Commission correctly reasoned, the IEU/AEP Ohio agreement "was acknowledged in the letter filed by IEU-Ohio on December 22, 2015" and "was provided to all parties in the course of discovery." (Opinion & Order at 51.) Thus, all parties were made aware of the agreement and were afforded an opportunity to present evidence and argument concerning the agreement. That clearly distinguishes this case from *Consumers' Counsel v. Public Utilities Commission*, 111 Ohio St. 3d 300 (2006). Further, as the Commission correctly noted, "there is no indication that IEU-Ohio's agreement not to oppose the stipulation unduly influenced another party to these proceedings to sign or not to sign the stipulation." (Opinion & Order at 51.) The Commission has repeatedly found that the global settlement agreement "d[id] not adversely affect whether serious bargaining occurred." (*Id.* at 51; Second Entry on Reh'g at 22.) OCC offers no new grounds for the Commission to reconsider those findings.

c. The Commission adequately considered the value of the Company's commitments regarding the ESP III Extension. [OCC AOE 3]

OCC again argues (at 7-8) that the Company's commitment, in the Stipulation, to make various proposals in its ESP III Extension proceeding lacks sufficient detail for the Commission to evaluate. As OCC acknowledges, however, the Commission has already rejected this argument twice, concluding that it is "not necessary to have all the details" concerning the ESP III Extension

riders because "AEP Ohio has the duty to present information regarding the proposed rider and OCC and other intervenors will have an opportunity to evaluate the proposal." (Second Order on Reh'g at 13; *see also* Opinion & Order at 52.) In response, OCC claims that "[a]lthough some of the [ESP III Extension] riders may be subject to more analysis in the ESP extension case, they are part of the 'package' included in the instant Stipulation." (OCC Secord AFR at 8.) But OCC again confuses evaluation of a *commitment to propose certain riders* with evaluation of *the riders themselves.* As the Commission has repeatedly noted, the Stipulation terms relating to the ESP III Extension proceeding only reflect the Company's commitment to propose riders (and make various other proposals) in that proceeding. The Commission will decide whether to *adopt* the riders (and other commitments) only after fully considering those proposals in the ESP III proceeding, where OCC will have every opportunity to submit evidence and argument concerning rate impacts and other issues. The Commission should reject this argument as it has correctly done twice before. (Second Order on Reh'g at 13; Opinion & Order at 52.)

d. OCC's "unequal bargaining power" argument is meritless. [OCC AOE 5]

OCC again claims that "AEP Ohio, and utilities in ESPs generally, have unequal bargaining power" in ESP cases and thus the "three-part test is meaningless." (OCC Application for Reh'g at 10.) If OCC dislikes the ESP statute, R.C. 4928.143, that is a matter to take up with the General Assembly, not this Commission, which is required to apply the statute and presume that it is in the public interest. Moreover, the Commission's three-part test is well-established and endorsed by the Ohio Supreme Court, and it has been repeatedly applied in numerous contexts, including in ESP cases. (Second Order on Reh'g at 17-18 (citing *In re FirstEnergy*, Case No. 12-1230-EL-SSO (*FirstEnergy ESP 3 Case*), Opinion and Order (July 18, 2012) at 24).) Further, as the Commission correctly noted, the "General Assembly did not include any * * * prohibition [on

settlement] in the ESP statute," and therefore "it would be improper to impose any such limitation." (Second Order on Reh'g at 18.) OCC offers no basis for the Commission to reconsider this holding, which was correct. This ground for rehearing should be denied.

2. The Commission reasonably approved the OVEC-only PPA in order to maintain the Stipulation's benefits. [OCC AOE 7]

In OCC Assignment of Error No. 7, OCC argues that the Commission's decision to grant AEP Ohio's first request for rehearing was "unreasonable and unlawful" because it failed to evaluate the stipulation minus the Affiliate PPA "as a package." (OCC Second Application for Reh'g at 12-13.) OCC claims the Commission "said that it was approving the OVEC PPA to preserve the Stipulation's *other* benefits," and chastises the Commission for failing to "evaluate[ ] the overall package inclusive of the OVEC PPA." (Emphasis added; OCC Second Application for Reh'g at 12-13.)

OCC misreads the Second Entry on Rehearing. When the Commission agreed to remove the Affiliate PPA from the PPA Rider, the Commission included the OVEC-only PPA Rider in its evaluation of the benefits of the remaining portions of the stipulation. The Commission found that those provisions, including the OVEC-only PPA Rider, would "provide numerous benefits for customers":

> In addition to the rate stability and financial hedging benefits provided by the PPA rider, the Commission addressed the fuel supply diversity and economic development benefits of the stipulation, as well as AEP Ohio's many commitments in the stipulation to offer proposals in future proceedings that are intended to promote economic development and retail competition, facilitate energy efficiency measures, reduce carbon emissions, expand the development of renewable resources, and pursue grid modernization in the state.

(Emphasis added; Second Entry on Reh'g at 28, citing PPA Order at 82-86.) The Commission went on to note that the OVEC-only PPA "is projected to provide ratepayers with a net credit of approximately $110 million" between October 31, 2015, and December 31, 2024, and noted that

AEP Ohio was required "to fund ratepayer credits of up to $15 million over four years * * *." (*Id.* at 31.) Thus, the Commission evaluated the overall package, including the OVEC PPA. Because OCC's Assignment of Error No. 7 is based on a misreading of the Commission's Second Entry on Rehearing, the Commission should reject it.

3. The Commission should reject, again, OCC's argument that the Commission should have adopted its modifications to the PPA Rider Rate Impact Mechanism. [OCC AFR 8]

In the PPA Order, the Commission modified the parties' stipulation to add a "Rate Impact Mechanism" that would "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[,]" to "provide additional rate stability for customers." (PPA Order at 81.) The Order explained that the limit applied "on an individual customer-by-customer basis" and should be "normalized for equivalent usage." (*Id.*) The Order also directed AEP Ohio to include any revenue reduction resulting from the Rate Impact Mechanism in its "calculation of the PPA rider's over/under-recovery balance for recovery in AEP Ohio's next quarterly update filing." (*Id.* at 82.)

OCC's initial Application for Rehearing asked the Commission to clarify whether "five percent" meant "five percent of the *total* monthly bill or the *total generation* piece of the bill." OCC suggested the Commission adopt the latter position. (OCC Application for Reh'g at 25.) OCC also asked the Commission to modify the Rate Impact Mechanism to prevent AEP Ohio from recovering *after* May 31, 2018, any revenue lost as a result of the Mechanism. (*See id.* at 25-26.) And OCC asked the Commission to modify the Mechanism "so that reduced revenue sought to be included in the calculation of the PPA rider's over/under-recovery balance for recovery in AEP Ohio's next quarterly update filing is subject to the rate impact mechanism's five percent cap." (*Id.* at 26.) The Commission rejected those suggestions, finding that OCC's request for

"clarification" really sought a redesign of the Rate Impact Mechanism. (Second Entry on Reh'g at 44.)

OCC refuses to take "no" for an answer. In Assignment of Error No. 8, OCC now argues that the Commission's Rate Impact Mechanism is unreasonable because it only lasts through May 2018. After May 2018, OCC argues, "consumers will face large and volatile charges." (OCC Second Application for Reh'g at 13.) But OCC cites no evidence to support this projection. And the Commission's Chairman disagrees. In a concurring opinion, Chairman Haque opined that, based on his review of the rider projections and other record evidence, "the PPA riders will result in a charge to consumers for at least the first 2-3 years of the riders." (PPA Order, Haque Concurrence, at 4.) OCC's contrary belief that "the riders will continue to create charges" past those first few years, which Chairman Haque noted and rejected, provides no basis for reconsidering this issue a second time. OCC also offers no justification for waiting until its Second Application for Rehearing to raise this argument. For both of these reasons, the Commission should deny Assignment of Error No. 7.

4. OCC's request for clarification regarding refunds of the PPA Rider is unnecessary. [OCC AOE 9]

OCC Assignment of Error No. 9 requests "clarification" of an issue – the refundability of PPA Rider revenues – that the Commission has already decided twice. The stipulation filed in this proceeding on December 14, 2015, contained a severability provision. (*See* PPA Order at 46.) The severability provision generally stated, in part, that if a court of competent jurisdiction struck down any portion of the stipulation, the remainder would stay in effect while the signatory parties made a good-faith effort to "restore the invalidated provision to its equivalent value" and, if successful, filed a modification to the PPA Rider. (*Id.*) The stipulation further stated that "[t]his 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." (*Id.*) In the PPA Order, the Commission held that this latter provision "should be removed from the stipulation, as it is a matter for determination by the Commission or reviewing court * * *." (*Id.* at 87.)

On rehearing, OCC, P3/EPSA, RESA, and OMAEG argued that the Commission should have made PPA Rider charges subject to refund in case "a court determines that the Commission does not have jurisdiction to authorize the PPA rider * * *." (Second Entry on Reh'g at 76; *see also id.* at 77.) The Commission rejected those arguments, holding that making the PPA rider subject to refund would be "unnecessary and inappropriate." (*Id.* at 78.) The Commission further held that its order modifying the stipulation to "eliminate its prohibition on refunds * * * strikes a proper balance among the parties' interests." (*Id.*)

OCC now claims to be confused about whether "the revenues collected under the PPA Rider are being collected subject to refund" or whether such a refund is "permissible." (OCC Second Application for Reh'g at 14.) There is nothing confusing about the Commission's orders on this issue. AEP Ohio is not collecting PPA Rider revenues subject to refund. The Commission should deny OCC's Assignment of Error No. 9.

5. AEP Ohio's customers are not captive, because they may select a CRES provider or the SSO. [OCC AOE 10]

OCC Assignment of Error No. 10 also repeats an argument that the Commission has already rejected twice. In the PPA Order, the Commission held that AEP Ohio may include the PPA Rider in its ESP because the PPA rider meets the requirements of R.C. 4928.143(B)(2)(d). (*See* PPA Order at 93.) Among other things, the Commission concluded that the PPA Rider "would operate as a financial limitation on customer shopping for retail electric generation service." (*Id.* at 94.) But the Commission noted that the PPA Rider would prevent neither existing

SSO customers from deciding to shop for electric service nor currently shopping customers from returning to the SSO. Thus, the Commission commented, "Shopping and SSO customers are not captive customers." (*Id.* at 95.)

OCC, in its initial Application for Rehearing, challenged the Commission's finding that AEP Ohio's customers are not "captive." OCC pointed to FERC's decision in *Electric Power Supply Association*, which held "AEP Ohio's retail ratepayers are captive to the extent they are subject to the non-bypassable charge associated with the Affiliate PPA." *Electric Power Supply Association v. AEP Generation Resources, Inc.*, FERC Docket No. EL16-33-000, Order Granting Complaint, at 22 (Apr. 27, 2016) (cited in OCC Application for Reh'g at 48). OCC argued that because the PPA Rider charge is non-bypassable, AEP Ohio's customers are "captive" under FERC regulations. (*See* OCC Application for Reh'g at 48.) The Commission rejected this argument again, reiterating that AEP Ohio's "shopping and SSO customers * * * continue to have the ability to select a CRES provider or return to the SSO." (Second Entry on Reh'g at 88.) The Commission also held that OCC's argument was "moot" because it related to AEP Ohio's proposed affiliate PPA, and AEP Ohio had chosen not to proceed with that PPA. *Id.*

OCC Assignment of Error No. 10 offers no new arguments regarding these points. It simply points again to the FERC Order in *Electric Power Supply Association* and asks the Commission to reconsider its prior opinion. But, as noted above, the Commission's governing statute does not allow a party to make the same rehearing argument repeatedly until it gets the answer it wants. And OCC has not responded to the Commission's holding that OCC's argument is moot. As OCC explained in its initial Application for Rehearing, whether AEP Ohio's customers are "captive" for FERC purposes is relevant only to determining whether FERC must authorize a wholesale power or capacity sale between a public utility and its affiliate. (*See* OCC

Application for Reh'g at 47.) Because the OVEC-only PPA does not involve any sales to an affiliate of AEP Ohio, whether AEP Ohio's customers are "captive" is irrelevant to any question still before the Commission. For both of these reasons, the Commission should deny OCC Assignment of Error No. 10.

6. The OVEC-only PPA does not result in the collection of "transition charges" by AEP Ohio. [OCC AFR 11]

OCC Assignment of Error No. 11 argues that the Commission erred when it held the PPA rider charges are not "transition charges" prohibited by R.C. 4928.38. (OCC Second Application for Reh'g at 15-17.) OCC argues that calling the PPA rider a "rate stability" charge "elevat[es] form over substance." (*Id.* at 16.) OCC further argues that, because the 1953 Inter-Company Power Agreement for OVEC (the "OVEC Agreement") entitled the Agreement's parties to purchase excess power not used by the U.S. Department of Energy or its predecessors, that OVEC Agreement "falls within R.C. 4928.39(B) and (D)" and the PPA Rider unlawfully "allows AEP Ohio to charge customers for transition costs * * *." (*Id.* at 17.)

OCC asserted a similar Assignment of Error (No. 15) in its first Application for Rehearing. (*See* OCC Application for Reh'g at 43-44.) So did P3/EPSA, RESA, and OMAEG. (*See* Second Entry on Reh'g at 98.) The Commission rejected that argument and reaffirmed its holding in the *ESP 3* case that "the PPA rider constitutes a rate stability charge related to limitations on customer shopping for retail electric generation service * * *." (*Id.* at 99.) It is improper for OCC to attempt to relitigate this argument a third time.

And although OCC now improperly argues, for the first time, that the 1953 Agreement "facilitated AEP Ohio buying power from OVEC to serve its customers [before 2001]," (OCC Second Application for Reh'g at 17), OCC's evidence does not support its argument. The witness testimony on which OCC relies does not show that AEP Ohio bought power from OVEC to serve

its customers before 2001; it simply says the 1953 OVEC Agreement "provide[d] for excess energy sales to the Sponsoring Companies of power not utilized by the DOE or its predecessors." (Emphasis added; AEP Ohio Ex. 10 (Williams Testimony) at 4:22-23.) Nor has OCC explained why evidence actually showing AEP Ohio purchased excess power from OVEC to serve its customers before 2001, if such evidence were in the record, would mean the PPA rider "allow[s] AEP Ohio to charge customers for transition costs * * *." (OCC Second Application for Reh'g at 17.) Transition costs are generally "generation costs that [a] utility incurred to serve its customers that would have been recovered through regulated rates before competition began, but that are no longer recoverable from customers who have switched to another generation provider." (Citation omitted.) *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608, ¶ 15. OCC makes no effort to explain why the costs to be recovered through the PPA rider would meet that definition.

In an attempt to bolster its argument, OCC attaches a copy of a fraction of the 1953 Inter-Company Power Agreement to its Second Application for Rehearing and asks the Commission, in a footnote, to "take administrative notice" of that Agreement. (*See* Second Application for Reh'g at 17 n.53.) This is surprising, given OCC's impassioned argument just last month, in another Commission proceeding, that it is unfair for "parties to include in their post-hearing briefs information that is outside the evidentiary record." *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of Demand Side Management Program for its Residential and Commercial Customers*, Case No. 16-1309-GA-UNC, Motion to Strike Portions of the Post-Hearing Briefs of Ohio Partners for Affordable Energy and Columbia Gas of Ohio by the Office of the Ohio Consumers' Counsel, Mem. Supp. at 1 (Nov. 10, 2016). In that case, OCC argued that allowing parties "to cite information in their briefs that they (or others) did not enter into the

evidentiary record" was "unfair and highly prejudicial to OCC and the consumers it represents." *Id.* at 10. Now, OCC is asking the Commission to take administrative notice of a 30-page *excerpt* from a 335-page contract, to support an argument on a legal question that the Commission has already resolved against OCC *twice*, in a second application for rehearing filed almost a year after the most recent evidentiary hearing.

AEP Ohio recognizes that "[t]here is neither an absolute right for nor an absolute prohibition against the commission taking administrative notice of facts outside the record of a case." *In re Ohio Edison Co.*, 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218, ¶29, citing *Canton Storage & Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 8, 647 N.E.2d 136 (1995). "Rather," "each case must be resolved on its facts * * * ." *Id.* But given that OCC's "transition charge" arguments are not properly before the Commission, that the OVEC Agreement does not support those arguments, and that the OCC argued just last month that taking administrative notice of facts outside the evidentiary record is unfair and prejudicial, AEP Ohio respectfully asks the Commission to disregard Attachment 1 to OCC's Second Application for Rehearing and deny Assignment of Error No. 11.

Lastly, OCC's argument that the PPA rider results in the unlawful recovery of transition charges completely ignores the fact that terms, conditions and charges approved under R.C. 4928.143(B)(2)(d) are expressly exempt from the prohibition in R.C. 4928.38. R.C. 4928.143(B) states upfront that the provisions listed in subsections (B)(1) and (B)(2) are permissible components of an electric security plan "[n]otwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section4928.64, and section 4928.69 of the Revised Code." Section 4928.38 of the Revised Code is not one of the statutory provisions that survived the

passage of S.B. 221 in 2008 and continue to impose limitations on provisions that are permissibly included in an ESP. The Commission should deny rehearing on the grounds that OCC's argument lacks legal merit in addition to the other deficiencies noted above. *See In re Application of Columbus S. Power Co*., Slip Opinion No. 2016-Ohio-1608, ¶¶ 75-79 (C.J. O'Connor dissenting).

7. The Commission properly rejected OCC's arguments regarding evidentiary rulings. [OCC AFR 12]

OCC Assignment of Error No. 12 challenges "certain [unidentified] evidentiary rulings" that purportedly "denied OCC (and all intervenors and the PUCO) the ability to effectively and fully cross-examine Signatory parties and to use written discovery responses * * *." (OCC Second Application for Reh'g at 17-18.) Because OCC does not specify the evidentiary rulings it is challenging, the Commission should reject this Assignment of Error. Under Ohio statute, applications for rehearing must "set forth *specifically* the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." (Emphasis added.) R.C. 4903.10(B). OCC Assignment of Error No. 12 does not meet these requirements and, thus, fails as a matter of law.

To the extent OCC is attempting to reargue Assignment of Error No. 1 from its first Application for Rehearing, Assignment of Error No. 12 is doubly improper. In that earlier Assignment of Error No. 1, OCC argued that that the Attorney Examiners had misapplied the "settlement discussion confidentiality privilege," thereby preventing OCC from obtaining necessary information. (OCC First Application for Reh'g at 4-6.) The Commission rejected this argument in its original PPA Order and rejected it again in its Second Entry on Rehearing, holding the Attorney Examiners had not misapplied Ohio Adm.Code 4901-1-26(E) or prevented OCC from effectively cross-examining AEP Ohio witnesses. (*See* Second Entry on Reh'g at ¶ 288.) OCC's initial Assignment of Error No. 1 further argued that Attorney Examiners erred in quashing OCC's subpoenas to Sierra Club, IGS, and Direct Energy for testimony regarding the stipulation filed in

this matter. (*See* OCC First Application for Reh'g at 6-8.) But the Commission rejected that argument twice before as well – once in the PPA Order, and again in its Second Entry on Rehearing, where it explained it did not want "to * * * dissuade a party from joining a stipulation, out of a concern that the party may be compelled to offer a witness to testify in support of the stipulation." (Second Entry on Reh'g at ¶ 289.) OCC's Second Application for Rehearing acknowledges the Commission has already rejected OCC's arguments. (*See* OCC Second Application for Reh'g at 17.)

Because the Commission's Second Entry on Rehearing already rejected OCC's arguments regarding the Attorney Examiners' evidentiary rulings, and because OCC has provided no new reason to reconsider the Commission's prior rulings, the Commission should disregard and reject OCC Application for Rehearing No. 12.

8. The Commission's determination that AEP Ohio may potentially recover the cost of future solar and wind projects was reasonable and lawful. [OCC AFR 13]

OCC's final Assignment of Error, like most of its prior Assignments of Error, reargues a point on which it has already repeatedly lost. In the PPA Order, the Commission found that the stipulation would benefit the public interest and support Ohio's energy policy. In particular, the Commission indicated that "the procurement of additional renewable energy resources in Ohio," along with other efforts to increase renewable energy generation in the state, would "play[ ] an integral role in promoting a reliable and cost-effective grid." (PPA Order at 82.)

OCC's initial Application for Rehearing repeated (almost verbatim) the arguments it had made in its post-hearing brief against the stipulation's renewable energy resource provisions. OCC suggested that subsidizing the construction of renewable energy resources was contrary to Ohio policy and that the General Assembly no longer supported renewable energy. (*See* OCC Initial Post-Hearing Br. at 52 and OCC Application for Reh'g at 49.) OCC further argued that any benefit

from future projects to build new renewable energy resources was too uncertain, that solar installations do not create "permanent manufacturing jobs," and that the solar panels in those future renewable energy projects might be purchased from Chinese manufacturers. (*See* OCC Initial Post-Hearing Br. at 52 and OCC Application for Reh'g at 49-50.)

The Commission rejected OCC's arguments that renewable energy generally, or cost recovery for the construction of renewable energy resources specifically, is contrary to public policy. (Second Entry on Reh'g at ¶ 136.) The Commission repeated its earlier holding that "renewable energy plays an integral role in promoting a reliable and cost-effective grid * * *." *Id.* The Commission held that "OCC's concerns regarding the potential costs associated with any renewable energy project to be proposed are premature * * *." *Id.* And, in response to AEP Ohio's Application for Rehearing, the Commission clarified that "nothing in the PPA Order would preclude AEP Ohio or its affiliates from owning up to 50 percent of solar projects and 50 percent of wind projects on an aggregate net basis based on installed capacity." (*Id.* at ¶ 135.)

Having had no success with its initial rehearing arguments, OCC tries a different tack in its Second Application for Rehearing. First, OCC argues it is unreasonable for the Commission to support generation reliability, because ensuring reliability is PJM's duty. (*See* OCC Second Application for Reh'g at 19.) OCC waived this argument by failing to raise it in its first Application for Rehearing. And OCC is simply mistaken as a matter of law. The Energy Policy Act of 2005 preserved the "authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State." 16 U.S.C. § 824*o*(i)(3). Ohio also expressly retained jurisdiction over the adequacy and reliability of electric service. *See* R.C. 4928.02(A) ("It is the policy of this State to * * * Ensure the availability * * * of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.").

Second, OCC argues that Ohio does not need additional renewable energy resources to maintain generation reliability because PJM has adequate generation reserves. (*See* OCC Second Application for Reh'g at 19.) OCC waived this argument, too, by failing to present it in its first Application for Rehearing. The Commission concluded in its March 31st PPA Order that adding renewable energy resources in Ohio would help promote a reliable and cost-effective grid. OCC failed to appeal that determination until its Second Application for Rehearing – seven months past the statutory deadline. *See* R.C. 4903.10 (applications for rehearing must be filed within 30 days). Additionally, OCC improperly relies in part on information pulled from PJM's website, which is not in the evidentiary record, to support its reliability argument. *See id.* at 19, n. 61-62. In other proceedings, the Commission has granted OCC's motions to strike post-hearing references to reports not in the evidentiary record (*see In the Matter of the Application of Ohio American Water Company to Increase its Rates for Water and Sewer Services Provided to its Entire Service Area*, Case No. 09-391-WS-AIR, Opinion and Order at 8-9) and should do so again here. Neither this evidence, nor this portion of Assignment of Error No. 13, is properly before the Commission. Regardless, OCC's argument ignores the role this Commission has traditionally played in resource planning. The Commission's resource planning role at the retail level is complementary to PJM's resource planning role at the wholesale level. The fact that PJM believes it has an adequate reserve margin to maintain reliability does not mean the Commission must defer to PJM's conclusions where, as here, it is setting retail rates.

Third, OCC prophesizes that FERC will eventually "decide to prevent renewable resources funded by a PPA from clearing PJM's BRA [Base Residual Auction] because they would distort PJM markets and/or are not necessary to maintain reliability." (OCC Second Application for Reh'g at 20.) Based on this projected future FERC ruling, OCC predicts AEP Ohio will have to

recover "the entire cost of these potentially unnecessary facilities" through the PPA Rider, harming consumers. (*See id.*) Alternatively, if AEP sells these renewable energy resources into PJM's electricity markets, OCC predicts those sales will drive down prices throughout PJM, interfere with the markets, put other CRES providers at a disadvantage, and "[u]ltimately" harm customers. (*Id.* at 21.) Again, if OCC were going to raise such arguments against the Stipulation's renewable-energy resource provisions, it was required to do so in its initial Application for Rehearing, not in a Second Application seven months later. Nevertheless, OCC's arguments are baseless and entirely speculative. AEP has not yet even filed applications for any renewable energy resources under the stipulation. And OCC cites no evidentiary support for its theorized chain of catastrophe. The unsupported scare stories offered by OCC's counsel provide no basis for rehearing.

Finally, OCC argues that allowing AEP Ohio to recover the costs of its proposed renewable energy resources will not further state policy to ensure "diversity of electricity supplies and suppliers." (OCC Second Application for Reh'g at 21.) Again, this argument is untimely and unlawful. And like OCC's other arguments, it is unsupported. OCC does not explain why allowing AEP Ohio to seek cost recovery for constructing new renewable energy resources would not encourage diversity of electricity supplies. And OCC offers no evidence demonstrating that the stipulation's renewable energy resources will prevent other companies from constructing renewable energy resources in Ohio. For all of these reasons, the Commission should deny OCC's Application for Rehearing No. 13.

D. Buckeye Power's Application for Rehearing and Withdrawal from the Stipulation should be rejected.

Buckeye Power, Inc. (Buckeye) argues on rehearing that the Commission should not have granted AEP Ohio's rehearing request to adopt the OVEC-only PPA Rider proposal. Consequently, Buckeye withdraws from the Stipulation on that basis. (Buckeye AFR at 1-

3.) Buckeye is late in raising this rehearing argument, because it never responded to AEP Ohio's May 2, 2016 rehearing request that put forth the OVEC-only proposal. As discussed *supra* at 3, Buckeye was required to respond and oppose AEP Ohio's rehearing request by May 12, 2016, and failed to do so. Conversely, Buckeye is premature in withdrawing from the Stipulation because the remedy for an unacceptable modification under Section IV.G of the Stipulation is to file for rehearing and then consider withdrawing *after* the Commission issues a rehearing decision.

Even setting aside Buckeye's failure to timely raise its concerns and follow the appropriate procedure, the Commission should nonetheless proceed to reaffirm the Stipulation without Buckeye's support as a Signatory Party, as modified in the November 3 Entry on Rehearing. Buckeye's withdrawal from the Stipulation is not a "game changer" and it should not affect the robustly debated and thoroughly considered decision already rendered by the Commission.

Buckeye advances two primary arguments in support of its position. First, Buckeye asks in the name of fuel diversity that the Commission remove provisions in the Stipulation whereby AEP made commitments to refuel, repower or retire units owned by AEP. (Buckeye AFR at 7-19.) As a threshold matter, Buckeye mischaracterizes this commitment (at 9) as AEP being "content to abandon the PPA Units" when the reality is that the actual commitment made by AEP was to refuel, repower or retire Cardinal Unit 1 in 2030. Buckeye proceeds (at 10-11) to second-guess the need for the provisions. The reality is that Buckeye identified its adversity to these provisions from the outset and did not join in them as part of the initial unmodified version of the Stipulation, which it otherwise supported notwithstanding the provisions of which it now complains. Indeed, Buckeye explicitly admits on rehearing (at 8) that "it did not agree with and did not participate in the Stipulation's mandatory retirement, refueling, or repowering

provisions." Buckeye should have registered its concerns as part of the initial rehearing process in order for the Commission to consider them in a timely fashion. Buckeye's claims are untimely and lack merit.

Buckeye's current position also ignores the fact that the Stipulation was the balanced outcome of negotiation, which included environmental interests that placed value on the challenged provisions. While AEP Ohio could have abandoned the Stipulation after the affiliate PPA was struck down by FERC, it chose to forge ahead with the balance of the Stipulation and pursue the remaining benefits. That decision, to leave the Company's commitments undisturbed as part of the OVEC-only proposal, was AEP Ohio's to make, not Buckeye's. But Buckeye candidly admits in the middle of its rehearing argument (at 11-12) that its real interest is finding a new buyer for Cardinal Unit 1 "that could partner with Buckeye on investments" at the Cardinal plant, in order to avoid or mitigate Buckeye's own economic view of running the plants in the future. While the Commission may be sympathetic to the potential future economic constraints on Buckeye, those potential constraints are of no concern to the Commission, because the Commission does not economically regulate Buckeye.

In the final portions of its rehearing, Buckeye asks (at 20-21) the Commission to force AEP to sell the PPA Units and forbid retirement while also forcing AEP to make investments in the PPA Units even without cost recovery. The Commission has long ago disavowed any authority over retirement of legacy generation. *See In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No.10-14540EL-RDR, Finding and Order (Jan.11, 2010) at 25-27. And it simply makes no sense to suggest that investments be made without cost recovery – even if the Commission has a basis to order AEP's non-utility affiliate to make such investments

(which it does not). In short, Buckeye's last-ditch arguments should be ignored or rejected. The Commission should reaffirm the modified Stipulation on rehearing without Buckeye's participation as a Signatory Party.

III. CONCLUSION

For the foregoing reasons, the Commission should deny OMAEG, ELPC, P3/EPSA, OCC, and Buckeye Power's Applications for Rehearing and affirm the Commission's Second Entry on Rehearing.

Respectfully submitted,

/s/ Steven T. Nourse

Steven T. Nourse
Matthew S. McKenzie
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1608
Fax: (614) 716-2950
Email: stnourse@aep.com
msmckenzie@aep.com

Daniel R. Conway
Porter Wright Morris & Arthur, LLP
41 S. High Street, 30th Floor
Columbus, Ohio 43215
Telephone: (614) 227-2270
Fax: (614) 227-2100
Email: dconway@porterwright.com

Christopher L. Miller
Ice Miller LLP
250 West Street
Columbus, Ohio 43215
Telephone: (614) 462-2339
Fax: (614) 222-4707
Email: christopher.miller@icemiller.com

Counsel for Ohio Power Company

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Ohio Power Company's Memorandum Contra Applications for Rehearing* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 15th day of December 2016, via electronic transmission.

/s/ Steven T. Nourse
Steven T. Nourse

EMAIL SERVICE

campbell@whitt-sturtevant.com
charris@spilmanlaw.com
ckilgard@taftlaw.com
chris@envlaw.com
Christopher.Miller@icemiller.com
cmooney@ohiopartners.org
dstinson@bricker.com
drinebolt@ohiopartners.org
dclark1@aep.com
dboehm@BKLlawfirm.com
dconway@porterwright.com
dwilliamson@spilmanlaw.com
dborchers@bricker.com
evelyn.robinson@pjm.com
fdarr@mwncmh.com;
gaunder@CarpenterLipps.com
glpetrucci@vorys.com
Greta.see@puc.state.oh.us
haydenm@firstenergycorp.com
perko@carpenterlipps.com
jeffrey.mayes@monitoringanalytics.com
jkylercohn@BKLlawfirm.com
jlang@calfee.com
jmcdermott@firstenergycorp.com
Jodi.bair@occ.ohio.gov
Sechler@carpenterlipps.com
joliker@igsenergy.com
Allison@carpenterlipps.com
jvickers@elpc.org
Katie.johnson@puc.state.oh.us
Kevin.moore@occ.ohio.gov
Bojko@carpenterlipps.com
Kristin.henry@sierraclub.org
Kurt.Helfrich@ThompsonHine.com
Larry.sauer@occ.ohio.gov
laurie.williams@sierraclub.org
lhawrot@spilmanlaw.com
whitt@whitt-sturtevant.com
msmckenzie@aep.com
MWarnock@bricker.com
mdortch@kravitzllc.com
mfleisher@elpc.org
msoules@earthjustice.org
mjsettineri@vorys.com
mkurtz@BKLlawfirm.com
mpritchard@mwncmh.com
msmalz@ohiopovertylaw.org
rseiler@dickinsonwright.com
glover@whitt-sturtevant.com
rsahli@columbus.rr.com
ricks@ohanet.org
sam@mwncmh.com

Sarah.Parrot@puc.state.oh.us
scasto@firstenergycorp.com
schmidt@sppgrp.com
Scott.Campbell@ThompsonHine.com
sfisk@earthjustice.org
sasloan@aep.com
Stephanie.Chmiel@ThompsonHine.com
steven.beeler@ohioattorneygeneral.gov
stnourse@aep.com
talexander@calfee.com
tdougherty@theOEC.org
todonnell@dickinsonwright.com
twilliams@snhslaw.com
tony.mendoza@sierraclub.org
Werner.margard@ohioattorneygeneral.gov
William.michael@occ.ohio.gov
william.wright@ohioattorneygeneral.gov

Summary: Memorandum - Memorandum Contra Applications for Rehearing on Behalf of Ohio Power Company electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company