

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Long-Term Forecast	)	
Report of Ohio Power Company and	)	Case No. 18-501-EL-FOR
Related Matters	)	
In the Matter of the Application Seeking	)	
Approval of Ohio Power Company's	)	
Proposal to Enter into Renewable Energy	)	Case No. 18-1392-EL-RDR
Purchase Agreements for Inclusion in the	)	
Renewable Generation Rider	)	
In the Matter of the Application of Ohio	)	Case No. 18-1393-EL-ATA
Power Company to Amend its Tariffs	)	

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**MEMORANDUM CONTRA THE OHIO POWER COMPANY'S  
MOTION TO STRIKE OR DEFER CERTAIN INTERVENOR TESTIMONY  
BY  
THE KROGER CO.**

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**I.     INTRODUCTION.**

In this consolidated proceeding, the Ohio Power Company (“AEP Ohio”) is seeking a finding of need for at least 900 MW of renewable generation projects, as well as for two specific renewable projects known as Highland Solar and Willowbrook Solar.<sup>1</sup> R.C. 4928.143(B)(2)(c) requires a threshold showing that “there is need for the facility **based on resource planning projections** submitted by the electric distribution utility” (emphasis added). Resource planning

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<sup>1</sup> See *In the Matter of the 2018 Long-Term Forecast Report on Behalf of Ohio Power Company and Related Matters*, Case No. 18-501-EL-FOR (“Forecast Case”), Amendment to the 2018 Long-Term Forecast Report of Ohio Power Company (September 19, 2018); *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into Renewable Energy Purchase Agreements for Inclusion in the Renewable Generation Rider, et al.*, Case No. 18-1392-EL-RDR, et al. (“Tariff Cases”), Application at 1-2 (September 27, 2018).

projections consider whether the projected supply meets the projected demand of customers.<sup>2</sup> However, AEP Ohio admits that it is not “proposing through this filing that it has a traditional integrated resource planning (IRP) need for generation.” *See* Amendment to the 2018 Long-Term Forecast Report of Ohio Power Company at 3 (Sept. 19, 2018) (“Amended LTFR”). Further, AEP Ohio admits that the “wholesale markets are adequately supplying capacity and energy to the AEP Ohio load zone.” *Id.* Thus, there can be no showing here by AEP Ohio that projected supply cannot meet the projected demand. The Staff of the Public Utilities Commission of Ohio (“Commission”) agrees no such showing has been made here.<sup>3</sup>

Unable to show need as required by law and Commission precedent,<sup>4</sup> AEP Ohio instead invites the Commission to consider various alleged economic benefits and impacts, as well as alleged customers’ desire for in-state renewable energy, as justifications of need.<sup>5</sup> Indeed, in his January 8, 2019 deposition, Company Witness William Allen confirmed that his prefiled testimony includes a definition of need that the Company relies upon (and wants the Commission to adopt) that requires an evaluation of the following:

Q. How did the Company evaluate need for renewable energy in Ohio?

A. First, the Company prepared an IRP, as discussed in detail in the testimony of Company witness Torpey, which demonstrates that the addition of economically beneficial renewable projects will

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<sup>2</sup> *See* R.C. 4935.04(C)(1) (referring to the “resource planning projections to meet demand”); Ohio Adm. Code 4901:5-5-01(L); *Vectren Energy Delivery of Ohio, Inc. v. PUCO*, 113 Ohio St.3d 180, 183 (2007) (“The purpose of a long-term forecast report is to project customers’ future demands for [commodity] and to determine how to acquire sufficient commodity . . . to meet demand”).

<sup>3</sup> *See* Testimony of Timothy Benedict in the Forecast Case, at 8 (“Having determined that supply is sufficient to meet the needs of Ohio Power’s customers and to ensure that resource adequacy is maintained, Staff therefore finds that the Company has not demonstrated a need to construct any additional resources at this time”).

<sup>4</sup> *See* R.C. 4928.143(B)(2)(c); *see also In the Matter of the Long-Term Forecast of Ohio Power Company and Related Matters*, Case Nos. 10-501-EL-FOR, et al., Opinion and Order at 25-27 (Jan. 9, 2013).

<sup>5</sup> The Staff of the Commission agrees with Kroger and other parties that such benefits do not relate to need. *See* Benedict Testimony in Forecast Case at 11 (“Staff believes that the purported benefits associated with the proposed projects do not relate to need as Staff would define them.”).

lead to lower energy costs for Ohio customers. Securing low cost energy sources meets a need of our customers. Second, as supported by the Navigant VOC report addressed in the testimony of Company witness Horner, there is a strong desire on the part of AEP Ohio customers for in-state renewable power. Many corporate entities, including those that may consider investment in Ohio, have initiatives to have their energy needs met by renewable products.

Testimony of Company Witness William Allen (“Allen Testimony”), Case No. 18-0501-EL-FOR, et al. (“Forecast Case”), at 7-8.<sup>6</sup> In addition, AEP Ohio invited the Commission to consider need in conjunction with specific renewable projects, including Highland Solar and Willowbrook Solar projects. *Id.* at 4: (“If the Commission consolidates that filing with this need case, the Commission may choose to consider the need question in conjunction with specific renewable projects.”)<sup>7</sup>

Notwithstanding the foregoing, on January 7, 2019, AEP Ohio filed a motion to strike or defer certain intervenor testimony, including excerpts from the testimony submitted by Justin Bieber on behalf of The Kroger Co. (“Kroger”).<sup>8</sup> In essence, AEP Ohio essentially wants the Commission to “issue a finding of need for at least 900 MW of **economically beneficial** renewable energy projects[,]”<sup>9</sup> without hearing or considering Mr. Bieber’s or any other witnesses’ challenges and rebuttals to those purported and inflated “economic benefits,” “lower energy costs,” or “customer desires.” Such a one-sided presentation of evidence is contrary to the law and fundamentally unfair and prejudicial. AEP Ohio has opened the door to these issues by relying

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<sup>6</sup> During his January 8, 2019 deposition, Company witness Mr. Allen added to the definition of need the need for diverse fuel services and state policy objective considerations. The transcript for the deposition is not yet available, but will be filed when it becomes available.

<sup>7</sup> During his January 8, 2019 deposition, Company witness Mr. Allen agreed that economic benefits to customers for generic projects could be considered by the Commission is deciding need as well as economic benefits from specific projects. Mr. Allen went on to testify that economic benefits for the specific projects bolster the threshold need finding for the generic 900 MW of renewable projects.

<sup>8</sup> That same day, Kroger, The Ohio Manufacturers’ Association Energy Group, the Office of the Ohio Consumers’ Counsel, the Ohio Coal Association, Interstate Gas Supply, Inc. and IGS Solar, LLC filed a Motion in Limine to Exclude Evidence Purporting to Show Need Based on Economic Impact and Customer Surveys, or, in the Alternative, Motion to Strike Irrelevant Testimony of AEP Ohio Witnesses (“Motion in Limine”). If the Motion in Limine is granted, this motion to strike is moot because the testimony AEP Ohio is seeking to strike herein responds to and rebuts the evidence and testimony regarding economic impact and customer surveys.

<sup>9</sup> See Allen Testimony in Forecast Case at 4 (emphasis added).

upon them to justify need and cannot now ask the Commission to shut the door before opposing parties have the opportunity to rebut those justifications. Simply stated, Kroger, and the other parties, are entitled to challenge AEP Ohio's attempts to establish need through the consideration of these factors unrelated to the statutorily required "resource planning projections." Accordingly, to the extent the Commission allows AEP Ohio to present these alleged "economic benefits" and customer desires as justifications for need – which it should not for the reasons set forth in the pending Motion in Limine – this motion to strike should be denied, and the Commission should decide the issue of need on a full record.

## **II. RELEVANT PROCEDURAL BACKGROUND.**

On September 19, 2018, AEP Ohio filed its Amended LTFR and testimony from six witnesses supporting the assertions made, and relief sought, in the Amended LTFR ("Forecast Case").<sup>10</sup> Therein, AEP Ohio asked the Commission to find that there was a need for the development of at least 900 MW of renewable generation and for the Commission to grant AEP Ohio authority to develop that generation.<sup>11</sup>

Through its testimony, AEP Ohio suggested that it intended for this proceeding surrounding the proposed Amended LTFR to be consolidated with a then-forthcoming proceeding regarding specific renewable projects.<sup>12</sup> Thereafter, on September 27, 2018, AEP Ohio filed an application to enter into Renewable Energy Purchase Agreements ("REPAs") and for authority to amend its tariffs in Case Nos. 18-1392-EL-RDR, et al. ("Tariff Case").<sup>13</sup> Along with that Tariff Cases Application, AEP Ohio filed the testimony of six additional witnesses, as well as additional

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<sup>10</sup> See Amended LTFR; *see also* Direct Testimony of William A. Allen, Karl R. Bletzacker, Kamran Ali, John F. Torpey, Trina Horner, and Nicole Fry in the Forecast Case (September 19, 2018).

<sup>11</sup> See Amended LTFR.

<sup>12</sup> See Allen Testimony in the Forecast Case at 4.

<sup>13</sup> See Application, Case Nos. 18-1392-EL-RDR, et al. (September 27, 2018) (Tariff Cases Application).

testimony from Mr. Allen in support of the Tariff Cases Application, and a motion to consolidate the Tariff Cases with the Forecast Case.<sup>14</sup>

On October 22, 2018, the Commission granted AEP Ohio's Motion to Consolidate on October 22, 2018.<sup>15</sup> In granting the Motion to Consolidate, however, the Commission also determined that the proceeding would be bifurcated such that the Commission would address the consolidated cases in two phases. The first phase would address the resource planning need for AEP Ohio's proposed generation facilities, and then, if a resource planning need is found, the Commission would proceed to a second phase, which would consider the Tariff Cases Application.<sup>16</sup> In its Amended LTFR in the Forecast Case and through supporting testimony, AEP Ohio claims that the renewable projects are needed because they will provide various economic benefits to customers and are desired by customers.<sup>17</sup>

After the bifurcation, AEP Ohio filed notice that it would be offering the testimony of two witnesses who only filed testimony in the Tariff Cases during the first phase of the proceeding to address the need determination.<sup>18</sup> Specifically, AEP Ohio stated that it "wishes to bring one additional **issue** from the *Tariff Cases* forward into the need hearing: the economic impact study performed by The Ohio State University (OSU) Professor Stephen Buser and co-authored by Regionomics LLC's Bill LaFayette. . . The economic impact study, **as a supplement** to the Long-Term Forecast Report Amendment and supporting testimony filed on September 27, 2018 in the LTFR Case, will provide additional evidence of the need for renewable projects being addressed

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<sup>14</sup> See Tariff Cases, Direct Testimony of Daniel R. Bradley, Stephen Buser, Steven M. Fetter, Joseph A. Karrasch, Bill LaFayette, Jon F. Williams, and William A. Allen (September 27, 2018); Motion to Consolidate (September 27, 2018).

<sup>15</sup> See Entry at ¶ 40 (October 22, 2018).

<sup>16</sup> See *id.* at ¶ 32.

<sup>17</sup> Amended LTFR at 6-9.

<sup>18</sup> See Ohio Power Company's Notice of Additional Witnesses (October 26, 2018); Ohio Power Company's Amended Notice of Additional Witnesses (November 1, 2018).

in these consolidated cases and will assist the Commission in developing a complete record to decide that issue.”<sup>19</sup> Intervenor’s objected to the inclusion of the testimony of the two witnesses that address the purported economic impact and benefits of the renewable generation plants as irrelevant to the determination of whether “there is need for the facility based on resource planning projections” as required by R.C. 4928.143(B)(2)(c).<sup>20</sup> The intervenors requested that the Commission prohibit AEP Ohio from expanding the definition of need and requested to limit Phase I of the hearing to a need tied to resource planning projections as delineated in the statute and as interpreted by prior Commission precedent.<sup>21</sup> The Commission has not yet ruled upon that request.

Therefore, on January 2, 2019, pursuant to the procedural schedule established by the November 13, 2018 Entry, many parties, including Kroger, filed testimony for Phase I of the consolidated proceedings responding to the testimony filed by AEP Ohio in the Forecast Case, including the two additional pieces of testimony that AEP Ohio noticed would also be presented in this phase of the proceeding.<sup>22</sup> Specifically, Kroger filed the testimony of Justin Bieber to address the issue of need and AEP Ohio’s reliance upon alleged economic benefits and impacts as justifications for need.

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<sup>19</sup> Ohio Power Company’s Notice of Additional Witnesses at 1 (October 26, 2018) (emphasis added) (citations omitted).

<sup>20</sup> See Objection to Ohio Power Company’s Notice to Present Additional Witnesses by the Office of the Ohio Consumers’ Counsel and The Ohio Manufacturers’ Association Energy Group and the Kroger Co (November 5, 2018).

<sup>21</sup> *Id.* at 3.

<sup>22</sup> Entry at ¶ 39 (November 13, 2018).

### **III. LAW AND ARGUMENT.**

#### **A. AEP Ohio has Opened the Door to Challenges to Its Claimed Economic Benefits and Customer Desires by Presenting those Claims as Justification of Need.**

It is well-established Ohio law that if a party presents evidence and testimony about particular issues that party has opened the door for opposing parties to present evidence and testimony in response. *See, e.g., Sheets v. Norfolk S. Corp.*, 109 Ohio App.3d 278, 286 (3<sup>rd</sup> District 1996) (holding that based on the totality of the opening statement and trial testimony, “defendants clearly opened the door” to competing evidence and testimony); *see also State v. Johnson*, 2003-Ohio-3241, ¶ 33 (holding that “[h]aving opened the door, the defense waived any right to object to the admission of the witness’ testimony regarding those photos on redirect.”) (in criminal context).

Here, AEP Ohio opened the door to opposing testimony challenging its definition of, and justifications for, need. Specifically, AEP Ohio attempts to rely upon lower costs to customers, increased savings, economic development benefits, and other economic benefits and impacts to justify need for the at least 900 MW of renewable energy projects, and further invites this Commission to “consider the need question in conjunction with specific renewable projects.” *See Allen Testimony in the Forecast Case at 4.* Yet, AEP Ohio wants to silence Mr. Bieber (and other witnesses) from presenting evidence demonstrating that the lower costs and increased savings are artificial insofar as AEP Ohio did not include all of the costs involved, including debt equivalency costs. Likewise, AEP Ohio does not want the Commission to consider Mr. Bieber’s testimony establishing that the economic benefits are overstated, both for the generic and specific projects.

However, AEP Ohio has opened the door on these issues. As such, Kroger, by and through Mr. Bieber’s testimony and at hearing, as well as other parties, are entitled to challenge the basis,

calculation, analysis, and assertions forming the basis of the purported justifications AEP Ohio claims support a finding of need in this consolidated proceeding.

**B. Mr. Bieber’s Challenged Testimony is Directly Related to AEP Ohio’s Claimed Economic Benefits to Justify Need.**

Kroger witness Justin Bieber narrowly tailored his testimony in this phase of the proceeding to the issue of need and to AEP Ohio’s purported justifications of need relating to alleged economic benefits, lower costs, and customer interest to which AEP Ohio opened the door. In so doing, Mr. Bieber expressly reserved “the right to file additional testimony regarding cost recovery and other issues raised by AEP Ohio in AEP Ohio’s application filed in the tariff cases as set forth in the procedural schedule adopted by the Commission on October 20, 2018, as subsequently modified.” Bieber Testimony in the Forecast Case at 5.

As an initial matter, Mr. Bieber’s testimony is replete with limitations on his testimony, stating that he is addressing the various alleged economic benefit and cost issues, including those relating to the REPAs and the specific Highland Solar and Willowbrook Solar generation projects, and customer desires, only to the extent AEP Ohio relies upon those factors as justification of need. For example:

- Page 4, line 18-19: Stating he is addressing the REPAs and debt equivalency costs for the Highland Solar and Willowbrook Solar generation projects only “**as it relates to the demonstration of need and AEP Ohio’s claimed economic benefits in an attempt to justify need.**” (emphasis added).
- Page 5, lines 17-18: Stated that “[t]he Company’s alleged **need relies on factors such as ‘customer interest’ and the claimed economic benefit of additional renewable generation.**” (emphasis added).
- Page 6, lines 4-8, 12-13: “More specifically, the Company’s alleged need for 900 MW of renewable generation and the specific Highland Solar and Willowbrook Solar REPAs **is dependent in part on the claimed economic benefits to its customers. Given the Company’s reliance on the purported economic benefits of these REPAs to justify its proposal . . .** Additionally, **as it relates to AEP**



**Ohio’s claim of economic benefits for customers to justify need . . .**” (emphasis added).

- Page 21, lines 9-21: Discussing how “the requirement for a fixed price REPA bid **impact[s] the purported economic benefits to customers.**” (emphasis added).
- Page 26, lines 6-7: “to the extent the Commission determines there is a need based upon the **purported economic benefits . . .**” (emphasis added).

Simply stated, Mr. Bieber’s testimony makes it clear that his analyses and opinions are responding to AEP Ohio’s various justifications of need.

With respect to the specific passages of Mr. Bieber’s testimony cited in the motion to strike, they fall generally into four categories: (1) analysis of AEP Ohio’s claimed economic benefits as justification of need, including those claimed as to the REPAs and Highland Solar and Willowbrook Solar projects;<sup>23</sup> (2) analysis of AEP Ohio’s claim of lower customer costs as justification of need and AEP Ohio’s overstated calculation of those lower costs;<sup>24</sup> (3) analysis of Mr. Torpey’s testimony and IRP which, as Mr. Allen testified, is part of AEP Ohio’s definition of need being presented here;<sup>25</sup> and (4) analysis of AEP Ohio’s claim of customer desires for in-state renewable power as justification for need.<sup>26</sup> In each instance, AEP Ohio opened the door by attempting to re-define or broaden the definition of need from what is prescribed in R.C. 4928.143(B)(2)(c) and Commission precedent. As such, Mr. Bieber is entitled to challenge AEP Ohio’s claims in this regard. To shut down such challenges would leave this Commission with an incomplete and one-sided presentation of the evidence. Such an outcome would be unfair and substantially prejudicial to Kroger and other parties contesting AEP Ohio’s claimed need.

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<sup>23</sup> See Bieber Testimony in the Forecast Case, at p. 4, lines 14-22; p. 5, lines 11-16, 22-23; p. 6, line 4 through p. 7, line 2; p. 14, lines 6-7; p. 15, lines 9-14; p. 16, lines 12-18; p. 18, line 1 through p. 26, line 11 (including exhibits); p. 26, lines 15-17, 21-22; p. 27, lines 1-4.

<sup>24</sup> *Id.* at p. 5, lines 11-16, 22-23; p. 6, line 4 through p. 7, line 2; p. 15, lines 9-14; p. 16, lines 12-18; p. 18, line 1 through p. 26, line 11 (including exhibits); p. 26, lines 15-17, 21-22; p. 27, lines 1-4.

<sup>25</sup> *Id.* at p. 18, line 1 through p. 26, line 11 (including exhibits).

<sup>26</sup> *Id.* at p. 14, lines 6-7.

#### IV. CONCLUSION.

The Commission should not allow AEP Ohio to “have it both ways” – present its purported justifications of need while stymieing Kroger (and other parties) from challenging that need. Accordingly, for the foregoing reasons, to the extent the Commission is going to allow AEP Ohio to attempt to show need based on economic benefits and customer desires justifications, Kroger respectfully requests that the Commission deny this motion to strike and afford Kroger (and other parties) the opportunity to challenge and rebut AEP Ohio’s claimed justifications of need.

Respectfully Submitted,

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### **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 Memorandum Contra The Ohio Power Company's Motion to Strike or Defer Certain Intervenor Testimony by The Kroger Co. was sent by, or on behalf of, the undersigned counsel to the following parties of record this 9<sup>th</sup> day of January 2019, via electronic transmission.

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Summary: Memorandum MEMORANDUM CONTRA THE OHIO POWER COMPANY'S MOTION TO STRIKE OR DEFER CERTAIN INTERVENOR TESTIMONY BY THE KROGER CO. electronically filed by Mrs. Angela Whitfield on behalf of The Kroger Co.