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

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| In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters. | ) ) ) | Case No. 18-501-EL-FOR |
| 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. | ) ) ) ) ) | Case No. 18-1392-EL-RDR |
| In the Matter of the Application of Ohio Power Company to Amend its Tariffs. | ) ) | Case No. 18-1393-EL-ATA |

# INITIAL BRIEF OF DIRECT ENERGY, LP

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## I. INTRODUCTION

This is a long-term forecast proceeding involving Ohio Power Company's (AEP or the Company) 2018 long-term forecast reports (LTFR). AEP filed two LTFRs in 2018, the first in April and an "amended" filing in September. Both show that energy and capacity resources within the PJM region are more than sufficient to meet the needs of AEP and its customers.

AEP's "amended" LTFR asks for an additional finding—that there is a "need" for AEP to develop up to 900 MW of new, in-state renewable generation. Ratepayers would finance these resources through Rider RGR. AEP is not suggesting that new generation is necessary to keep the lights on or to meet renewable portfolio standards (RPS). By "need," AEP means what college students mean when they tell their parents they "need" to go on Spring Break—provided their parents pay for it. In both contexts, the claim of "need" is merely the expression of a preference to get something at someone else's expense.

Preferences reflect motives. AEP's motive is to maximize profits and minimize risk for the benefit of its parent company.[1] AEP's parent can profit from the competitive market for renewable generation in two ways: by developing projects through its regulated subsidiary with ratepayer funds, or by having an unregulated subsidiary develop projects with shareholder funds. AEP has made clear that the "need" to develop renewable generation is contingent on ratepayer funding. If these projects are contingent on ratepayer funding, they cannot be "necessary;" if the projects are not "necessary," there is no "need" for them. AEP's preference to gamble with ratepayer money instead of its own is not a "need" this Commission should indulge.

The very point of an LTFR proceeding is to objectively and critically analyze any claim of need for new generation resources. The regulatory process gives utilities an incentive to spend money on anything the regulator will permit cost recovery for in rates. The consumers who pay

[1] All of the AEP witnesses who testified are employees of AEP Service Corporation, *see* Tr. I at 162.

these rates must be protected from imprudence and wasteful spending. Competitors like Direct Energy are entitled to protection against cross-subsidies and favoritism. The competitive market as a whole must be permitted to function. All stakeholders have preferences, but no stakeholder's preferences are controlling. Resource planning is an objective exercise, and AEP's own data proves there is no *objective* need for the Company to develop 900 MW of renewable energy projects. The final order should find accordingly.

## II. BACKGROUND

AEP is required to provide consumers within its certified territory "a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service."[2] AEP has provided SSO service through successive ESPs, the most recent of which was approved in April 2018.[3]

AEP does not meet its SSO obligation through Company-owned generating plants. The Company procures energy and capacity for its SSO customers by conducting a competitive auction several times a year, in which potential suppliers bid to provide tranches of the SSO load.[4] These suppliers secure energy from capacity resources within the PJM region. There is no dispute over the ability of PJM to continue to meet the Company's energy and capacity needs, including the need for renewable energy.[5]

Ohio law provides a mechanism to address any wholesale market failure or other unforeseen event that threatens reliability. Resource planning allows the Commission to constantly monitor and verify that the market is meeting (and will continue to meet) Ohioan's

[2] R.C. 4928.141(A).

[3] *In re Application of Ohio Power Co.*, Case No. 16-1852-EL-SSO, Opin. & Order (Apr. 25, 2018) (*ESP IV* Order).

[4] Company Ex. 3 (Direct Testimony of William A. Allen) at 8.

[5] Staff Ex. 2 (Direct Testimony of Timothy W. Benedict) at 7-8; Company Ex. 3 at 8; Direct Ex. 2 (Direct Testimony of Frank Lacey) at 6-7.

needs for energy and capacity.[6] If this process reveals a shortcoming in the market, the Commission can evaluate the need for new utility-owned generation.[7] If a need is found in an LTFR proceeding, the EDU may initiate an ESP and request a surcharge under R.C. 4928.143(B)(2)(c). The statute allows a surcharge for costs associated with "an electric generation facility" if there is a "need or the facility based on resource planning projections submitted by the electric distribution utility."[8]

The Commission approved such a surcharge in the *ESP IV* proceeding.[9] Rider RGR is a mechanism to recovery renewable generation costs. The Commission did not find a need for renewable generation when it approved this surcharge. It did not review any LTFR documenting such a need. The Commission set the initial rate at $0 and directed AEP to make a separate filing for specific renewable projects. "[I]n making EL-RDR filings under the RGR to seek approval for specific renewable projects, AEP Ohio will demonstrate that the criteria in R.C. 4928.143(B)(2)(c) are met."[10]

AEP claims that its 2018 LTFRs demonstrate a need for "at least" 900 MW of renewable generation.[11] The 900 MW figure did not materialize from thin air. A December 2015 stipulation in the *PPA Rider* case includes a commitment by AEP to develop up to 900 MW of renewable generation, subject to the Company's ability to receive cost recovery.[12] The Commission

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[6] Staff Ex. 2 at 3-7; *see also* R.C. 4935.04.

[7] Staff Ex. 2 at 7.

[8] R.C. 4928.143(B)(2)(c).

[9] *ESP IV* Order at ¶ 227.

[10] *Id*. at ¶ 51.

[11] Company Ex. 1 at 1, 4.

[12] *In re Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Purchase Power Agreement*, Case No. 14-1693-EL-RDR, Joint Stipulation and Recommendation at 30-32 (Dec. 14, 2015) (*PPA Rider* Case).

approved the stipulation in March 2016.[13] The signatory parties never disclosed how they came up with the 900 MW figure, nor did the Commission ask.

Between the time AEP committed to developing 900 MW of renewable generation in 2015 and approval of Rider GRG in April 2018, no resource planning projections had ever been conducted to determine how 900 MW of renewable generation would fit into AEP's resource planning. No planning or analysis was performed to determine whether existing resources were sufficient to meet RPS requirements. No surveys of customer preferences were performed, no economic impact analyses undertaken, nor any cost-benefit or other economic analyses performed. The LTFRs filed each April in 2015, 2016, 2017 and 2018 all showed the same thing: that energy and capacity resources within the PJM region are more than sufficient to meet the needs of AEP and its customers.[14]

In September 2018, AEP Ohio filed an amended LTFR and IRP. AEP did not make this filing to comply with R.C. 4935.04—the statutory requirement to file an annual report had already been met with the April 2018 filing. AEP had failed to engage in any resource planning *before* Rider RGR was approved, so the amended 2018 filing attempts to backfill this requirement. In the amended LTFR, AEP makes clear that "[t]he Company is not proposing specific renewable projects in this case."[15] The amended LTFR confirms AEP's plan to continue meeting its SSO supply obligation through PJM.[16]

AEP filed separate applications for approval to enter into two solar PPAs.[17] Those case dockets were consolidated with the LTFR proceeding, but the projects proposed in the

[13] *PPA Rider* Case, Opin. & Order at 106 (Mar. 31, 2016).

[14] *See* LTFRs filed in Case Nos. 15-501-EL-FOR; 16-501-EL-FOR; 17-501-EL-FOR; 18-501-EL-FOR.

[15] Company Ex. 3 at 4.

[16] *Id.*

[17] Case Nos. 18-1392-EL-RDR and 18-1393-EL-ATA.

application will be addressed in Phase 2. The issue in this first phase of the proceeding is whether the 2018 LTFRs demonstrate a "generic" need for 900 MW of renewable generation.

## III. ARGUMENT

### A. AEP has not demonstrated an objective "need" for renewable capacity.

There is no bright-line rule or definition of "need" in R.C. 4935.04. The guiding principle is that "need" is an *objective* determination. AEP has not and cannot point to any *objective* criteria demonstrating a need for 900 MW of renewable generation.

#### 1. "Need" must be objective.

The Commission has recognized since the statutory enactment of resource planning that the planning process is "intended to provide a systematic framework for the *objective consideration* of the adequacy and reasonableness of electric utilities' long-term forecasts[.]"[18] R.C. 4935.04 and the Commission's rules require reporting entities to "prospectively plan for a sufficient supply based on projected demand and to demonstrate that such a process has been adequately implemented by the reporting utility."[19]

R.C. 4928.143(B)(2)(c) requires that "need" be shown by "resource planning projections." "Resource planning projections" include annual LTFRs and IRPs.[20] These resource planning documents are developed from objective forecasts of demand and available resources.[21] Because need must be "based on" resource planning projections and resource planning projections are in turn based on objective data, Section (B)(2)(c) requires an objective demonstration of need before a surcharge may be authorized.

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[18] *Revision & Promulgation of Rules for Long-Term Forecast Reports*, No. 88-816-EL-ORD, 1989 WL 1735787, at *1 (Oct. 31, 1989) (emphasis added).

[19] *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 2006-Ohio-1386, ¶ 23, 113 Ohio St. 3d 180, 184–85.

[20] *See* R.C. 4935.04(C)(1) (requiring LTFR to include "resource planning projections").

[21] *See generally* R.C. 4935.04(C)(1-6).

AEP's claim of "need" expressly pertains to renewable generation. In the *Turning Point* proceeding, the Commission found that the statutory RPS requirements establish the relevant and objective standard of "need."[22] Because the signatory parties "have not demonstrated that the Turning Point project is *necessary* for AEP-Ohio to comply with its SER benchmarks," there was no "need" for the proposed project.[23]

Neither law nor logic show any need to deviate from this standard here. If AEP cannot show that it is "necessary" to develop 900 MW of renewable generation in order to comply with RPS requirements, then it cannot show "need" under R.C. 4935.04 or 4928.143.

**2. AEP offers no objective basis for a finding of "need."**

AEP cannot point to any objective evidence of need. By any objective measure, there is no "need" for AEP to develop new renewable capacity.

**a. AEP admits that its "need" is not based on resource planning.**

It is undisputed that AEP's energy and capacity requirements are being met, and will continue to be met, through PJM. AEP disclaims that "it has a traditional integrated resource planning (IRP) need for generation," and confirms that it "is not proposing to alter the process through which it procures SSO supply through this Amended LTFR filing."[24]

There is an abundant record supporting the adequacy of PJM resources. PJM procures generation resources, including a reserve margin, three years forward of the forecasted need. PJM levies financial penalties against a capacity resource that fails to be available when called upon. PJM allows for "Planned" resources to participate in its capacity auctions, allowing a developer to determine if there is an economic need before it constructs its facility. Funds from

[22] *In re Long Term Forecast Report of Ohio Power Company*, Case No. 10-501-EL-FOR, Opin. & Order at 25-26 (Jan. 9, 2013) (*Turning Point*).

[23] *Turning Point* Order at 26. (Emphasis added.)

[24] Company Ex. 3 at 8.

the capacity auction can be used to help finance the development of the facility.[25] A recent study critically analyzed over 300 scenarios and concluded that the PJM system would remain reliable "under all but the most extreme scenarios."[26] PJM's interconnection queue shows that more than 2,000 MW of solar resources are currently planned for AEP's territory.[27]

The Commission cannot find that AEP is able to meet its energy and capacity needs through PJM and *also* find that there is a "need" for AEP to develop 900 MW of new renewable generation resources. The two findings are mutually exclusive. If AEP's needs can be met through PJM—and they can—it follows that AEP does not "need" to independently develop additional generation resources. Commission Staff agree. "[T]he Company has not demonstrated a need to construct any additional resources at this time."[28]

**b. AEP is meeting its RPS requirements.**

It is undisputed that AEP has met, and will continue to meet, its RPS requirements through existing and planned renewable resources within PJM. AEP witnesses acknowledge that existing PPAs with the Timber Road, Power Ridge, and Wyandot facilities "are sufficient for AEP Ohio to meet is RPS requirements."[29] Moreover, according to the Commission's most recent Renewable Portfolio Standard Report to the General Assembly, *all* energy suppliers (including the utilities) were in compliance and achieved their renewable goals for 2016 (the most recent year available).[30]

As in the *Turning Point* proceeding, AEP is once again proposing a solution in search of a problem. The *Turning Point* project involved less than 50 MW, yet the Commission found no

[25] Direct Ex. 2 at 6.

[26] *Id*. at 7.

[27] *Id*. at 15.

[28] Staff Ex. 2 at 8.

[29] Tr. I at 165-66; Company Ex. 3 at 8.

[30] Direct Ex. 2 at 10.

need for the project. The RPS requirements were being met. To the extent circumstances have changed since 2013, they have not changed in a way that is favorable to AEP's proposal. If there was no need for a 50 MW solar project in 2013, there certainly is no need for projects totaling 400 MW today.

**c. AEP admits that the market is providing renewable products.**

The competitive market is meeting customer demand for renewable energy. As Staff explained, over 1,500 customers are on AEP's net metering tariff.[31] The Apples to Apples website "consistently demonstrates the existence of a multitude of CRES provider offerings that are, in whole or in part, renewable products."[32] Staff counted at least 29 CRES offerings for a 100% renewable product.[33] Mr. Lacey counted 45 offerings.[34] Whether the number today is 29 or 45 or something in between, there can be no dispute that renewable energy is available to retail customers.

**3. AEP's subjective claim of "need" fails.**

AEP cannot show an objective basis of need, so it floats three subjective "benefits" and equates "benefits" to "needs." There are many things AEP could do to "benefit" the public and ratepayers, but cataloguing all of them is not the purpose of an LTFR. The "benefits" claimed by AEP, even if real, are irrelevant.

**a. "Lower costs"**

AEP first claims that "the addition of economically beneficial renewable projects will lead to lower energy costs for Ohio customers."[35] This is an utterly meaningless statement. An

[31] Staff Ex. 2 at 10.

[32] *Id*.

[33] *Id*.

[34] Direct Ex. 2 at 10.

[35] Company Ex. 3 at 7:13-17.

"economically beneficial" project should, by definition, "lead to lower energy costs." But there are no specific projects on the table in this proceeding. Absent information about specific projects and associated costs, whether any project would be "economically beneficial" is unknown and unknowable. The record before the Commission does not offer the slightest hint of (a) the costs involved in adding 900 MW of renewable generation to AEP's supply portfolio or (b) whether the benefits of this expenditure (if any) would exceed the costs.

The only cost-related information AEP has provided is a back-of-the-envelope calculation purporting to show that an increase in the supply of renewable energy would lower the spot market clearing price of energy in the AEP zone.[36] If the entirety of the spot market reduction were flowed through to end-users, an average residential customer would save a whopping $0.60 per year—literally a nickel per month.[37] This "savings" will most certainly be offset by Rider RGR charges. Putting money into one pocket and taking it out of the other is not a "savings." There is no basis in the record—or even grounds to speculate—whether adding 900 MW of renewable generation would be "economically beneficial" to anyone other than AEP.

**b. Customer surveys**

AEP next argues, "there is a strong desire on the part of AEP Ohio customers for in-state renewable power."[38] Customer desire lots of things. The issue in this case is not what anyone wants; the issue is what is "needed" for AEP to meet its RPS requirements.

More to the point, it is disingenuous for AEP to ask the Commission to heavily weigh customer preferences when AEP ignored them. AEP did not take a survey and then decide it should develop more renewable generation. AEP volunteered to develop 900 MW of renewables

[36] Direct Ex. 2 at 19.

[37] *Id*.

[38] Company Ex. 3 at 19-20.

in 2015.[39] It issued a solar RFP in October 2017.[40] The customer surveys were not conducted until mid-August 2018—over eight months later (and, conveniently, less than a month before the September 2018 LTFR filing).[41] These "surveys" merely sought to bolster the decision AEP had already made.[42] The surveys are worthless and entitled to no weight. The vast majority of customers who ignored the survey apparently felt the same.[43]

Relying on surveys as the basis for Commission decision is a slippery slope. One must question whether AEP would argue that survey evidence should have the same probative value in a rate proceeding, or any other proceeding where AEP is at the other side of popular opinion. Customer surveys are neither a rationale or appropriate way to decide whether there is an *objective* need for AEP develop ratepayer-funded renewable energy facilities.

The need for renewable generation is based on law, not customer preferences. The law defines an objective standard of "need." The law allows this need to be met with in-state or out-of-state resources.[44] Commission proceedings are not a forum for advocating changes that can only be made by the legislature.

**c. "Economic development"**

No proposal would be complete without a claim of "economic development."[45] AEP and its supporters promise that utility-sponsored renewable projects are a sure bet. A "multiplier effect" will create money from nothing. It's the same line offered to sell the public on projects

[39] *PPA Rider* Stipulation at 30-32.

[40] Direct Ex. 2 at 20.

[41] Tr. II at 656.

[42] Tr. I at 172 (Company witness Allen explaining that survey results "provide further support for a finding of need [.]").

[43] Tr. II at 666 (Company witness Horner explaining the 120,000 surveys were distributed but only 7,500 completed and returned).

[44] R.C. 4928.64(B)(3).

[45] Company Ex. 3 at 9.

like Nationwide Arena, every casino in Ohio, the lottery, charter schools; the list goes on. These taxpayer-funded deals always pay for themselves—until they don't.

To be clear, Direct does not oppose renewable generation. Direct is happy to develop as many renewable projects as the market will bear. The key is "market." If the Commission is interested in *real* economic development, it should allow the market to function. The renewable market cannot function properly if it is cornered by AEP and other regulated EDUs.

The cost of renewable energy at any given time is a function of supply and demand. Rising prices are usually the result of tight supply. High prices send a cost signal to increase supply. Project developers respond to this signal by building more generation. If supply eclipses demand, prices will fall and a new price signal is sent—slow down on new project development. Whatever imperfections may exist with this market structure, it is fulfilling its intended purpose. Suppliers and EDUs have been able to meet their RPS requirements without ratepayer support.

As Mr. Lacey explained, the developers of the current fleet of existing and planned renewable capacity made investment decisions based on projections and assumption about supply and demand, assumptions about market prices for renewable energy, and assumptions about a competitive economic framework under which they would be operating long-term.[46] The market is providing the level of renewable capacity needed, but AEP Ohio is proposing to develop resources outside of that competitive market construct. The capacity that AEP Ohio proposes to add could push the price of renewable energy below a price that would otherwise be signaled by the competitive market.[47] Project developers who expected to receive a market price for renewable energy will receive something less. The rational, economic response for these developers is to develop projects where they can earn a market price for renewable energy, rather

[46] Direct Ex. 2 at 22.

[47] *Id*.

than the below-market, ratepayer-subsidized price that would result from AEP Ohio's proposal.[48] Allowing AEP Ohio to develop unnecessary renewable projects and recover the costs from ratepayers could ultimately result in fewer renewable energy resources in Ohio, not more.

AEP does not need to be a project sponsor to support economic development. As Mr. Lacey explained:

> AEP Ohio should work with developers, improve its internal interconnection processes, and invest in transmission and distribution infrastructure necessary to support the delivery of renewable energy." Granting AEP Ohio the right to invest in generation and to recover its costs from captive customers is not going to incentivize investment in renewable energy resources and economic development in Ohio. It is going to push investments into neighboring states or possibly disincentivize regional investments in renewable energy from the private sector altogether.[49]

If there is truly a market for 900 MW of additional renewable capacity, the market will meet this demand. Jobs will be created, taxes will be paid, and all of the other alleged benefits will accrue. AEP offers no evidence or other reason to believe that any economic development benefits would diminish if someone other than AEP Ohio developed, owned or operated the renewable facilities it claims are needed.

**B. Even if AEP could demonstrate need, it cannot recover the cost of renewable generation through Rider RGR.**

AEP's requested finding of "need" does not raise a hypothetical question. AEP is seeking this finding in order to ultimately recover renewable project costs through Rider RGR. But if Rider RGR is ultimately declared unlawful, the issue of "need" becomes irrelevant. Direct understands that the Commission has already addressed challenges to Rider RGR, but these challenges must be renewed in order to avoid waiving them. If the Commission ultimately

[48] *Id*. at 23.

[49] *Id*.

decides there is no "need" for new renewable facilities, then the legality of Rider RGR becomes moot—in this proceeding, at least.

**1. The Commission violated R.C. 4928.143.**

The Commission had no authority to approve Rider RGR first and allow AEP to demonstrate "need" later. Setting the surcharge at an initial rate of $0 and requiring AEP to demonstrate "need" in subsequent proceedings does not remedy this fatal error.

R.C. 4928.143(B)(2)(c) authorizes an ESP to include a "nonbypassable surcharge for the life of an electric generating facility" that meets certain criteria. Before the Commission may approve a surcharge, however, it must find there is a need for the facility:

> However, no surcharge shall be authorized unless the commission *first determines in the proceeding* that there is need for the facility based on resource planning projections submitted by the electric distribution utility.

"It is a basic tenet of statutory construction that 'the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute it is inserted to accomplish some definite purpose.'"[50] The purpose of Section (B)(2)(c) is clear. The Commission must "*first* determine[] *in the proceeding* that there is a need for the facility." "The proceeding" can only mean the ESP proceeding in which a surcharge is proposed. The Commission must make this determination "first," before "authoriz[ing]" a surcharge.

The *ESP IV* Order cites prior orders where the Commission "determined that the statute requires that a proceeding be held before any recovery is authorized and, therefore, does not restrict the determination of need to the time at which the ESP is approved."[51] The Commission

[50] *State v. Wilson*, 77 Ohio St. 3d 334, 336 (1997), quoting *State ex rel. Cleveland Elec. Illum. Co. v. Euclid*, 169 Ohio St. 476, 479 (1959).

[51] *ESP IV* Order at ¶ 227.

reached this conclusion based not on the controlling statute, but on "the Commission's broad discretion to manage its dockets."[52]

The Supreme Court will "generally defer to the commission's statutory interpretation, but only if it is reasonable."[53] The Commission's authority to "manage its dockets" does not permit the Commission to "legislate in its own right."[54] "The PUCO, as a creature of statute, has no authority to act beyond its statutory powers."[55] A Commission order "is unlawful if it is inconsistent with relevant statutes or with the state or federal constitutions."[56]

R.C. 4928.143 does not say that "need" may be determined in "a proceeding" or "any proceeding." This finding must be made in "the proceeding," and in context this can only mean the ESP where surcharge approval is sought.[57] The "need" determination must be made "first;" otherwise, "no surcharge shall be authorized." In claiming authority to "first" authorize a surcharge and defer a finding a need from "the proceeding" to some later proceeding, the Commission's interpretation "nullifies the clear purpose" of R.C. 4928.143.[58]

The evident purpose of R.C. 4928.143 is to incorporate the resource planning requirements of R.C. 4935.04, to ensure that a demonstrable need exists for new generation. The ESP statute links "need" to "resource planning projections," and "resource planning projections"

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[52] *Id*.

[53] *In re Application of Ohio Power Co*., 2015-Ohio-2056, ¶ 28, 144 Ohio St.3d 1, 8 (finding commission's interpretation of RC 4928.143(C) unreasonable).

[54] *Office of Consumers' Counsel v. Pub. Utilities Comm'n*, 67 Ohio St.2d 153, 166 (1981) ("[T]he commission may not legislate in its own right. This, however, is what the commission has attempted to accomplish in the case at bar.")

[55] *Disc. Cellular, Inc. v. Pub. Util. Comm.,* 2007-Ohio-53, ¶ 51, 112 Ohio St.3d 360, 373.

[56] *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 2006-Ohio-5853, ¶ 44, 111 Ohio St.3d 384, 393.

[57] *See* R.C. 1.42 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage.")

[58] *See In re Application of Ohio Power Co.*, 2015-Ohio-2056, ¶ 30, 144 Ohio St.3d 1, 8 ("The commission's interpretation nullifies the clear purpose of R.C. 4928.143(C)(2)(a), namely, to allow a utility to withdraw its proposed ESP if it dislikes the commission's modifications.").

is a term carried over from R.C. 4935.04(C)(1). The Commission could not consider any "resource planning projections" when it approved Rider RGR because none existed.

"Need" should be decided in the first instance in an LTFR proceeding, *before* requesting a surcharge in an ESP. If AEP had complied with Commission rules requiring it to submit information demonstrating need "in the forecast year *prior to* any filing for an allowance" under Section (B)(2)(c), the Commission could have conducted an LTFR hearing *prior to* issuance of the *ESP IV* Order. The *ESP IV* Order could have relied on the LTFR hearing record as the basis for considering need, just as the Commission *must* consider an LTFR hearing record in a base rate or financing proceeding.[59]

Setting the surcharge at an initial rate of $0 does not cure the Commission's error. Section (B)(2)(c) prohibits the "establishment" of a surcharge unless certain criteria are met. Regardless of whether the initial rate was set at $0 or $100, the *ESP IV* Order "establish[ed]" a surcharge. The surcharge was "establish[ed]" not to recover the cost of "an electric generating facility" for which plans have been drawn up, but any unknown number of projects or facilities that AEP Ohio might propose in the future.

Nor does allowing AEP to demonstrate "need" in future proceedings satisfy the statute. The *Commission* is responsible for ensure that an ESP is "more favorable in the aggregate" than the expected results of a market-rate offer (MRO).[60] The Commission cannot meaningfully compare an ESP to an MRO when the ESP contains an open-ended surcharge for the future recovery of unknowable costs. The Commission was required to "first" determine need "in the

[59] R.C. 4935.04(H) provides that the LTFR hearing record "shall be considered in the commission's determinations with respect to the establishment of just and reasonable rates," as well as proceedings involving the financing of facilities and issuance of securities.

[60] R.C. 4928.143(C)(1).

[*ESP IV*] proceeding" for precisely this reason—so that a meaningful comparison with the expected results of an MRO could be made.

**2. Rider RGR violates R.C. 4928.64(E).**

The General Assembly did not intend to permit utilities to recover the costs of renewable resources through a Section (B)(2)(c) surcharge. This presents another problem for Rider RGR.

R.C. 4928.143(B) lists the features an ESP must or may include, "[n]otwithstanding any other provision of Title XLIX of the Revised Code to the contrary," except for certain listed statutes. R.C. 4928.64(E) is one of the excepted statutes, and this statute requires the bypassability of RPS compliance costs.[61] Section (B)(2)(c), however, requires a "nonbypassable" surcharge. The question arises whether the otherwise-bypassable costs for renewable energy become nonbypassable if—and only if—the costs are recovered through a Section (B)(2)(c) surcharge.

"The primary goal of statutory construction is to give effect to the intent of the legislature."[62] The legislature did not have to "expressly exclude" renewable facilities from the scope of one section of the statute because the statute as a whole does so by implication. "In reviewing a statute, a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body."[63]

R.C. 4928.143(B)(2)(c) allows a surcharge for "an electric generating facility." This term is not defined in Chapter 4928. The legislature presumably had a reason for separately defining "renewable energy resources" and including wind and solar in this definition. If the legislature had intended for a surcharge to apply to "renewable energy resources," it would have included

[61] "All costs incurred by an electric distribution utility in complying with the requirements of this section shall be bypassable by any consumer that has exercised choice of supplier under section 4928.03 of the Revised Code."

[62] *State v. Wilson*, 77 Ohio St.3d 334, 336 (1997).

[63] *Id*.

this defined term in the statute. It did not. The statute allows a surcharge for "an electric generating facility" but not "renewable energy resources."

The legislature went to great lengths to outline the RPS requirements and exemptions in R.C. 4928.64. R.C. 4928.143(B) expressly recognizes and incorporates the RPS bypassability provision. Interpreting Section (B)(2)(c) as a mechanism for converting bypassable costs to nonbypassable costs would create a conflict within two separate provisions of the same statute. Statutes must be construed to avoid conflicts, not create them.[64] One must therefore conclude that the legislature did not intend to allow cost recovery for renewable resources through a Section (B)(2)(c) surcharge.

Interpreting the ESP statute as overriding the RPS statute would lead to absurd results.[65] AEP Ohio admits that it does not need new renewable generation to comply with its RPS requirements. The Company's compliance costs will remain bypassable. Any costs the Company recovers through Rider RGR would be nonbypassable. The legislature could not possibly have intended for the cost of renewable *compliance* to be bypassable, but the costs of *overcompliance* to be nonbypassable.

The purpose of a Section (B)(2)(c) surcharge is to keep the lights on, not to subsidize a foray into the competitive market for renewable generation. The statute is an insurance policy in the event of a wholesale market failure or other unforeseen event that threatens the availability or reliability of electricity within an EDU's service territory. The statute applies to firm resources needed to maintain reliability, not intermittent renewable resources. Moreover, even if "an electric generating facility" could include renewable facilities, a renewable PPA is not the same

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[64] *Id.*

[65] "We must also construe statutes to avoid unreasonable or absurd results." *State ex rel. Cincinnati Post v. Cincinnati,* 76 Ohio St.3d 540, 543 (1996).

thing as a renewable "facility," and a 20-year term is not the same thing as "the life of the facility."[66] PPAs are addressed separately in Section (B)(2)(a), which allows provisions for "the cost of purchased power supplied under the offer, including the cost of energy and capacity [.]"[67] The ESP statute contemplates recovery of PPA costs, but not within the context of a Section (B)(2)(c) surcharge.

The Commission should not have sanctioned a resource planning process that ran in reverse. The process should start with a resource plan that identifies a need. Once a need is determined, cost recovery can be addressed in a base rate proceeding or ESP. Here, AEP voluntarily committed to develop 900 MW of renewable generation, then sought cost recovery, then filed an LTFR purporting to demonstrate "need"—all before a single, specific project has been fully evaluated. This is not reflective of an objective, transparent resource planning process.

## IV. CONCLUSION

The inability of AEP and supporters to demonstrate need should not be construed as a value judgment about renewable energy. One may assume that renewable energy offers all the benefits its proponents claim. But one must also face the reality that these benefits come with a cost. The legislature has already weighed these costs and benefits in developing the RPS requirements. The RPS define an objective "need" for renewable generation and that need is being met. The Commission's job is done. Any argument that Ohio should require EDUs and suppliers to deliver more renewable energy must be directed to the legislature.

[66] R.C. 4928.143(B)(2)(c).

[67] R.C. 4928.143(B)(2)(a).

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Post-Hearing Brief was served by electronic mail this 6th day of March, 2019, to the following:

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