

**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)	

REPLY BRIEF OF THE KROGER CO.

Angela Paul Whitfield (0068774)
Stephen E. Dutton (0096064)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: paul@carpenterlipps.com
dutton@carpenterlipps.com
(willing to accept service by email)

Counsel for The Kroger Co.

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I. INTRODUCTION.

Despite the eleven days of the Phase I hearing, and the more than 500 pages of post-hearing briefing, the dispositive issue before the Public Utilities Commission of Ohio (“Commission”) is a simple legal question: has the Ohio Power Company (“AEP Ohio” or the “Company”) satisfied the requirement of R.C. 4928.143(B)(2)(c), demonstrating “that there is need for the facilit[ies] based on resource planning projections submitted by” the Company?¹ The resounding answer is no. Despite the best efforts of AEP Ohio (and a handful of Supporting Intervenors²) to obfuscate this straightforward legal question and overwhelm the record and the briefing with irrelevant issues and discussions, the fact remains that AEP Ohio simply has not met its burden in this case. Based upon the express and unambiguous language of R.C. 4928.143(B)(2)(c), Commission precedent,³ and the numerous admissions in the record by AEP Ohio, the only conclusion the Commission can reach is that AEP Ohio failed to establish that there is need for the at least 900 MW of renewable generation projects based upon resource planning projections.

Unable to overcome this legal conclusion under R.C. 4928.143(B)(2)(c), AEP Ohio asks the Commission to ignore the clear language of the statute and skirt its obligation to follow the controlling law. Specifically, AEP Ohio contends that the applicability and controlling nature of R.C. 4928.143(B)(2)(c) is a mere “policy debate, not a legal one.”⁴ However, as a matter of law,

¹ See R.C. 4928.143(B)(2)(c).

² See Initial Brief of Natural Resources Defense Council, Ohio Environmental Council, And Sierra Club (“Conservation Groups’ Post Hearing Brief”); Initial Post-Hearing Brief of Ohio Partners For Affordable Energy (“OPAE’s Post Hearing Brief”); Initial Brief Of Mid-Atlantic Renewable Energy Coalition (“MAREC’s Post Hearing Brief”); Post-Hearing Brief Of The [] Ohio Energy Group (“OEG’s Post Hearing Brief”). Collectively, these parties are referred to herein as “Supporting Intervenors” and the briefs are referred to herein as the “Post Hearing Briefs In Support.”

³ See *In the Matter of the Long-Term Forecast of Ohio Power Company and Related Matters* (“Turning Point”), Case Nos. 10-501-EL-FOR, et al., Opinion and Order (January 9, 2013).

⁴ See Initial Post Hearing Brief Regarding Its Amended Long-Term Forecast Report And The Issue Of Need (March 6, 2019) at 1 (“AEP Ohio’s Post Hearing Brief”).

it is not a mere “policy debate” as to whether the Commission must uphold and apply the clear language of R.C. 4928.143(B)(2)(c). It is the law.

In sum, despite the efforts of AEP Ohio and the Supporting Intervenors to obscure the issues and muddle the record, this case is not about the benefits of renewable energy in general.⁵ Nor is this case about the purported desires of roughly 0.588% of AEP Ohio customers.⁶ Rather, this case is simply about whether AEP Ohio has demonstrated “that there is need for the facilit[ies] based on resource planning projections” it submitted. It has not. Thus, consistent with Ohio’s policy advancing competition in the generation markets and repudiating efforts by regulated distribution utilities (like AEP Ohio) to develop generation with customer funds, the Commission should follow Ohio law, its own precedent, and the indisputable record evidence, in concluding that AEP Ohio has failed to satisfy its burden, thereby requiring the denial of the Amended LTFR.⁷

II. LAW AND ARGUMENT.

A. The Commission Has Already Rejected AEP Ohio’s Argument, And AEP Ohio Admitted It Cannot Establish “Need” Under The Commission’s Binding Precedent.

From the very first paragraph of AEP Ohio’s Post Hearing Brief, AEP Ohio does not attempt to hide its true motivation in this proceeding. Despite the Commission’s clear directive to focus Phase I of this proceeding on the threshold determination of whether there is a resource planning need for AEP Ohio’s proposed generation facilities under R.C. 4928.143(B)(2)(c), AEP Ohio used the hearing, and now is using the briefing, as a venue for a “policy debate, not a legal

⁵ As set forth in its Initial Post-Hearing Brief, The Kroger Co. (“Kroger”) is a long-term supporter and user of renewable energy. *See* Kroger’s Post-Hearing Brief at 1.

⁶ *See* AEP Ohio Ex. 6, EX. TH-1 at 16 of 41 (showing only 7,498 Residential Non-PIPP customers, 660 Residential PIPP customers, and 664 Small C&I customers responded to AEP Ohio’s “Voice of the Customer” survey, out of AEP Ohio’s approximately 1.5 million customers).

⁷ *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) (“Amended LTFR”).

one.”⁸ Recognizing that the law is not on its side, AEP Ohio has admitted to the Commission that the only way it can prevail is if the Commission bucks its own precedent, and the plain language of the law passed by the General Assembly, to create a new exception for AEP Ohio.

AEP Ohio’s attempt to turn this threshold legal determination into a “policy debate” is inappropriate and should be rejected on its face. The fact is, the sole legal issue underlying this hearing is not complicated, and it is not new. AEP Ohio already litigated the same legal question before the Commission, only six years ago, and the Commission rejected AEP Ohio’s position then as well. The subject underlying this legal determination has changed, but the law has not changed, and the Commission’s interpretation of R.C. 4928.143(B)(2)(c) has not changed either. The Commission issues opinions to ensure predictability and stability within Ohio’s utility market,⁹ not so that, six years later, it can relitigate every issue because the aggrieved party wishes to open a “policy debate.” As a result, the Commission’s approach in this proceeding is simple: the Commission should reject, again, AEP Ohio’s position, and find that AEP Ohio has not demonstrated need under R.C. 4928.143(B)(2)(c).

1. The Commission’s Decision In *Turning Point* Did Not “Merely Represent The Policy Views Of A Prior Commission,” It Interpreted The Plain Language Of R.C. 4928.143(B)(2)(c), And The Commission’s Statutory Interpretation Is Still Binding On AEP Ohio Under These Analogous Circumstances.

In AEP Ohio’s Post Hearing Brief, AEP Ohio recognizes the significance of the *Turning Point* case, but at the same time implicitly concedes that it cannot prevail under that Commission precedent, arguing that the Commission should ignore *Turning Point* because it “merely represents

⁸ See AEP Ohio’s Post Hearing Brief at 1.

⁹ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52 (2011), citing *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431, 71 O.O.2d 393, 330 N.E.2d 1 (1975), superseded on other grounds by statute as recognized in *Babbitt v. Pub. Util. Comm.*, 59 Ohio St.2d 81, 89, 13 O.O.3d 67, 391 N.E.2d 1376 (1979).

the policy views of a prior Commission.”¹⁰ Evidently, according to AEP Ohio, reliance on **any** previous Commission decision is “questionable,” because the appointment of new Commissioners results in constantly-changing policy views which necessitate relitigation of the Commission’s legal determinations.¹¹ According to AEP Ohio’s strained reading of Staff’s testimony, the Commission “can do what it wants,”¹² so while the Commission may recognize the earlier decision it is under no legal duty to give it any weight. This, of course, is an absurd position, and it is not how the law works in Ohio. As the Commission is well aware, **the Supreme Court of Ohio has instructed the Commission to “respect its own precedents** in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.”¹³ Predictability is the bedrock of jurisprudence, and it would make no sense for every reconfigured Commission to review, *de novo*, legal issues it decided long ago, just because a new Commissioner may have slightly different policy preferences.

In an effort to make its position convincing, AEP Ohio misconstrues Supreme Court precedent, arguing “[t]he Commission can change its policy views or modify the rationale from a prior decision by simply explaining why it is doing so.”¹⁴ Neither of the cases cited by AEP Ohio, however, support this inaccurate statement of law. While the Supreme Court of Ohio has made

¹⁰ See AEP Ohio’s Post Hearing Brief at 19.

¹¹ *Id.*

¹² *Id.* at 18.

¹³ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52 (2011), citing *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431, 71 O.O.2d 393, 330 N.E.2d 1 (1975), superseded on other grounds by statute as recognized in *Babbitt v. Pub. Util. Comm.*, 59 Ohio St.2d 81, 89, 13 O.O.3d 67, 391 N.E.2d 1376 (1979).

¹⁴ See AEP Ohio’s Post Hearing Brief at 19, citing *In re Duke Energy Ohio, Inc.*, 150 Ohio St.3d 437, 2017-Ohio-5536, ¶ 23, citing *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 52.

clear that “if the [Commission] departs from precedent, it must explain why,”¹⁵ it has **never** held that the Commission is free to let the individual policy leanings of a given Commission at any given time override an earlier Commission’s statutory interpretation. Needless to say, the Ohio Supreme Court likewise has never held that there is a presumption that Commission precedent is “questionable,” as AEP Ohio suggested. Certainly, this Commission is not reviewing this proceeding with an understanding that, in the future, it will have to do so again from scratch because AEP Ohio filed another proposal. While the Commission is capable of reversing its past precedent, there is no reason why the Commission should not “respect its own precedent” here, as the Supreme Court of Ohio has instructed, given that this case is factually analogous to the *Turning Point* proceeding the Commission confronted only six years ago.

In *Turning Point*, AEP Ohio’s request concerned the “need” for renewable generating facilities (then, the Turning Point solar facility). Now, only six years later, AEP Ohio has renewed its request from *Turning Point*, albeit for different renewable generating facilities (now, the Highland Solar and Willowbrook Solar projects and/or a generic 900 MW of renewable generation). The subject of the request has changed, but the relevant law has not changed, and the Commission’s interpretation of that law has not changed. As a result, the legal analysis should be the same as well – there is no reason for the Commission to depart from the four corners of *Turning Point* when it analyzes AEP Ohio’s more recent request.

AEP Ohio evidently “believes the Turning Point decision can be distinguished from the circumstances presented in the current case,”¹⁶ but AEP Ohio’s Post Hearing Brief fails to identify

¹⁵ See *In re Application of Duke Energy Ohio, Inc.*, 150 Ohio St.3d 437, 2017-Ohio-5536, 82 N.E.3d 1148, ¶ 23 (2017), *reconsideration denied sub nom. In re Duke Energy Ohio, Inc.*, 150 Ohio St.3d 1446, 2017-Ohio-7843, 82 N.E.3d 1177, ¶ 23 (2017).

¹⁶ AEP Ohio’s Post Hearing Brief at 19.

how the two are legally distinguishable. Of course, AEP Ohio cannot distinguish *Turning Point*, because both proceedings revolve around the interpretation of the demonstration of need as required by R.C. 4928.143(B)(2)(c). While AEP Ohio argues that “the Commission’s findings [in *Turning Point*] regarding market conditions (lack of market failure at that time, etc.) are fact-intensive and based on the record in that case,”¹⁷ that is completely irrelevant to the Commission’s interpretation of R.C. 4928.143(B)(2)(c) from *Turning Point*, which is the dispositive issue before the Commission in this proceeding. AEP Ohio would like to distinguish the holding of *Turning Point* (the statutory interpretation of R.C. 4928.143(B)(2)(c)) with the application of that holding in that case (AEP Ohio failed to meet R.C. 4928.143(B)(2)(c)), but that is not the point. Additionally, neither this case nor *Turning Point* focuses on market failures – that is not the point either. Rather, both proceedings are focused on resource planning projections and, specifically, whether AEP Ohio has established “need” under R.C. 4928.143(B)(2)(c) (then, a resource planning need for Turning Point solar facility, and now, a resource planning need for the Highland Solar and Willowbrook Solar projects and/or a generic 900 MW of renewable generation).

The Commission’s decision in *Turning Point* was not a “policy” determination, as AEP Ohio suggests. It was a legal determination, an interpretation of a statute, and the Commission faces that same interpretation question here.¹⁸ Most importantly, AEP Ohio cannot articulate any legal reason why the Commission should depart from this binding precedent. As a result, the Commission should ignore AEP Ohio, and instead follow the instructions of the Supreme Court

¹⁷ *Id.*

¹⁸ *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 23 (2014) (Characterizing a statutory interpretation challenge of R.C. 4928.143(B)(2)(d) as a “legal” challenge, not a “factual” challenge.).

of Ohio, by following *Turning Point*, “to assure the predictability which is essential in all areas of the law, including administrative law.”¹⁹

Because *Turning Point* is factually analogous to this proceeding, the Commission does not need to reinvent the wheel. As it did in *Turning Point*, the Commission needs only to look to the plain language of R.C. 4928.143(B)(2)(c), which reads:

The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. **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.** Additionally, if a surcharge is authorized for a facility pursuant to plan approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.²⁰

Interpreting this unambiguous language, the Commission correctly held that need is to be determined by measuring supply versus demand, as reflected in the utility’s resource planning projections.²¹ OCC agrees, observing that “[n]either AEP nor the intervenors who support the project have shown that the PUCO’s *Turning Point* decision was in error.”²² It is true – instead of

¹⁹ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52 (2011), citing *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431, 71 O.O.2d 393, 330 N.E.2d 1 (1975), superseded on other grounds by statute as recognized in *Babbitt v. Pub. Util. Comm.*, 59 Ohio St.2d 81, 89, 13 O.O.3d 67, 391 N.E.2d 1376 (1979).

²⁰ *Id.* (emphasis added).

²¹ *See Turning Point*, Opinion and Order at 25-27 (January 9, 2013).

²² *See* OCC’s Post Hearing Brief at 13.

attempting to distinguish *Turning Point*, most Supporting Intervenors ignored it entirely.²³ On the other hand, all of the Opposing Intervenors (including Staff)²⁴ acknowledged its significance, and reached the same conclusion as Kroger – that the Commission should follow *Turning Point* and conclude AEP Ohio has not demonstrated need under R.C. 4928.143(B)(2)(c).²⁵

2. In *Turning Point*, The Commission Rejected AEP Ohio’s Arguments That “Need” Involves Consideration Of Factors Such As Job Creation And Economic Investment, And Confirmed That Those Factors Are Only To Be Considered After “Need” Has Been Determined.

The *Turning Point* decision is instructive not only for how the Commission interpreted what R.C. 4928.143(B)(2)(c) says, but also for what the Commission determined R.C. 4928.143(B)(2)(c) **does not** say. Specifically, in determining that need under the statute is to be

²³ Supporting Intervenor OEG also recognized the relevance of *Turning Point*, but, inexplicably, neither the Conservation Groups’ Post Hearing Brief, OPAE’s Post Hearing Brief, nor MAREC’s Post Hearing Brief even acknowledged *Turning Point*. Such omissions are clearly intentional, as all parties are well aware of *Turning Point* and its significance, and speak to these Supporting Intervenors’ inability to distinguish *Turning Point* from this proceeding.

To that end, it also should be noted that OPAE’s 35-page Post Hearing Brief is completely devoid of any citations to Commission or Supreme Court precedent. While it may be more persuasive to submit argument without legal support, OPAE’s decision to rely exclusively on legally unsupported arguments also should be construed as an implicit concession that the law favors the position of Kroger and the other Opposing Intervenors.

²⁴ See Initial Brief Submitted On Behalf Of The Staff Of The Public Utilities Commission Of Ohio (“Staff’s Post Hearing Brief”); Initial Post-Hearing Brief Of The Kroger Co. (“Kroger’s Post Hearing Brief”); Initial Brief Of The Office Of The Ohio Consumers’ Counsel (“OCC’s Post Hearing Brief”); Post-Hearing Brief Of The Ohio Manufacturers’ Association Energy Group (“OMAEG’s Post Hearing Brief”); Initial Brief Of Intervenor Ohio Coal Association (“OCA’s Post Hearing Brief”); Initial Brief Of Industrial Energy Users-Ohio (“IEU’s Post Hearing Brief”); Initial Brief Of Interstate Gas Supply, Inc. And IGS Solar, LLC (“IGS Energy’s Post Hearing Brief”); Initial Brief Of Direct Energy, LP (“Direct Energy’s Post Hearing Brief”). Collectively, these intervenors are referred to herein as the “Opposing Intervenors” and the briefs are referred to herein as the “Post Hearing Briefs In Opposition.”

²⁵ See Staff’s Post Hearing Brief at 5-7 (“Thus it appears that the Commission’s view of ‘need’ within the statute is exactly the same as Staff’s.”); OMAEG’s Post Hearing Brief at 27-28 (“The law still requires the resource planning need to be analyzed as discussed above, and given that AEP Ohio has again failed to submit a proposal that survives such analysis, the Commission should follow the same course that it followed in the *Turning Point* case.”); OCC’s Post Hearing Brief at 9-13 (“Applying the *Turning Point* case as precedent should lead the PUCO to conclude there is no need for the solar projects. The PUCO should reject sweeping assertions that need equates to customer wants, jobs, or economics, just as it did in *Turning Point*. ‘Need’ as defined under Ohio law relates to resource planning. The PUCO should find no need here for the proposed solar projects.”); IEU’s Post Hearing Brief at 13-14; OCA’s Post-Hearing Brief at 6-7 (“The Commission has held that ‘need’ is established only when, based on resource planning projections, generation needs cannot be met through the competitive market.”); Direct Energy’s Post Hearing Brief at 6 (“Neither law nor logic show any need to deviate from [the *Turning Point*] standard here.”).

determined by measuring supply versus demand, as reflected in the utility's resource planning projections, **the Commission rejected arguments by AEP Ohio and others that need involves consideration of other factors, such as job creation and economic investment.** In fact, the Commission expressly confirmed that those factors are **only** to be considered **after** need has been determined: “[n]either can we find that the Turning Point provision of the stipulation benefits ratepayers and the public interest, given that there has been no demonstration of need for the Turning Point project.”²⁶ This conclusion is appropriate, because it does not depart from the plain language of R.C. 4928.143(B)(2)(c). As a result, where (as here) a utility fails to demonstrate statutory need, any discussions of the purported public benefits are moot. AEP Ohio knows this better than anyone, because it was the party which failed to meet its burden in *Turning Point*.

Of course, AEP Ohio and the Supporting Intervenors disagree, but they conspicuously fail to produce any support for their position. While AEP Ohio notes that it “believes the Turning Point decision can be distinguished from the circumstances presented in the current case,”²⁷ the **only** support AEP Ohio provides for that belief is to say “reliance on Turning Point is questionable” because Turning Point was (obviously) “based on the record in that case.”²⁸ This position, however, misses the point because the Commission went out of its way in *Turning Point* to say that the record in that case, at least as it related to purported customer benefits and public interest, had no impact on the need determination because of how the Commission interprets R.C. 4928.143(B)(2)(c). According to the Commission, the only evidence from *Turning Point* that factored into the need determination was the resource planning projections; because the

²⁶ See *Turning Point*, Opinion and Order at 27 (January 9, 2013).

²⁷ *Id.*

²⁸ *Id.*

Commission found that the resource planning projections did not demonstrate “need,” it did not consider the other evidence AEP Ohio admitted into the record.

The same should be true here. Without a demonstration of need, AEP Ohio’s other evidence regarding purported customer preference and economic benefits is irrelevant. According to the Commission, whether customers desire something, or whether something will be economically beneficial, has no impact on whether the generating facility is “need[ed]” under the law. For this reason, there is no reason for the Commission even to consider over fifty pages of AEP Ohio’s (and the Supporting Intervenors’) briefing, as AEP Ohio spends an overwhelming amount of its briefing focusing on these irrelevant issues.²⁹

To the extent AEP Ohio determines it is a good business decision to invest in renewable resources on its own—through an affiliate or with shareholder dollars—it still may do so, and the Commission would support it, but AEP Ohio cannot demonstrate a resource planning need under R.C. 4928.143(B)(2)(c) to authorize the establishment of a non-bypassable surcharge for customers to pay for such facility. The fact is, nothing is stopping AEP Ohio from pursuing renewable resources; the law simply states AEP Ohio cannot go about it in this way, since – as it admits – it cannot demonstrate need under R.C. 4928.143(B)(2)(c).

3. Witness After Witness, For Both AEP Ohio And The Supporting Intervenors, Confirmed That AEP Ohio Cannot, As A Matter Of Law And Undisputed Fact, Show A “Need” For The Facility Based On Resource Planning Projections.

Despite AEP Ohio’s efforts to pollute the record with irrelevant testimony and evidence, all of the relevant testimony and evidence confirms that AEP Ohio cannot show a need under R.C. 4928.143(B)(2)(c), as its LTFR has not demonstrated a capacity and energy deficit. This is not

²⁹ See, e.g., *id.* at 26-79 (Section V).

surprising, as AEP Ohio **admits** that it is not “proposing through this filing that it has a traditional integrated resource planning (IRP) need for generation.”³⁰ Further, AEP Ohio **admits** that the “wholesale markets are adequately supplying capacity and energy to the AEP Ohio load zone.”³¹ While these admissions should close the case against AEP Ohio, the record of the 11-day evidentiary hearing in this matter is replete with additional admissions and acknowledgments by AEP Ohio and the Supporting Intervenors that AEP Ohio cannot, as a matter of law and undisputed fact, show a “need for the facility based on resource planning projections[.]”³² This conclusion aligns with those from the Opposing Intervenors. Most significantly, the Staff of the Public Utilities Commission of Ohio (“Commission”) agreed no such showing has been made here:

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.**³³

Staff’s assessment of AEP Ohio’s proposal is most significant because in *Turning Point*, Staff believed AEP Ohio had met its burden in demonstrating “need,” but the Commission disagreed. Here, Staff believes AEP Ohio’s showing is even weaker than what the Commission rejected in *Turning Point*.

In addition to Staff, other Opposing Intervenors’ witnesses came to the same conclusion: there has been no showing of the threshold requirement of “need” as mandated by R.C.

³⁰ See Forecast Case, Amendment to the 2018 Long-Term Forecast Report of Ohio Power Company at 3 (September 19, 2018) (“Amended LTFR”).

³¹ *Id.*

³² R.C. 4928.143(B)(2)(c); see also Kroger’s Post Hearing Brief at 3-4.

³³ Staff Ex. 2, Benedict Direct Testimony at 8 (emphasis added); see also Staff’s Post Hearing Brief at 2 (“There is, therefore, no ‘need,’ in a traditional forecasting sense, for the addition of the generating facilities that [AEP Ohio] proposes.”).

4928.143(B)(2)(c).³⁴ As a result, all of the other Opposing Intervenor concluded that AEP Ohio's Amended LTFR should be rejected.³⁵

Thus, it is undisputed, and indeed, indisputable, that AEP Ohio failed to meet its burden to demonstrate that its projected supply cannot meet the projected demand. As such, there is no need based on resource planning projections for the at least 900 MW of renewable generation projects,

³⁴ See Kroger Ex. 4, Bieber Direct Testimony at 5 (“The Commission should find that AEP Ohio has not demonstrated that there is a general need for at least 900 MW of new, renewable generation in the state of Ohio...”); *id.* at 12-13 (“in its resource planning projections, AEP Ohio has failed to demonstrate that at least 900 MW of economical renewable generation is needed to meet demand, peak load, or reserves as required for the authorization of a non-bypassable surcharge under R.C. 4928.143(B)(2)(c)”); *see also* Staff Ex. 1, Siegfried Direct Testimony at 4 (“I am simply confirming the Company’s conclusion that it does not need the additional 900 MWs of renewable projects to comply in the near term with Ohio’s RPS.”); OCC Ex. 18, Lesser Direct Testimony at 6 (“The PUCO should find that AEP Ohio has not demonstrated that its customers need their utility to build 900 MW of generation generally or renewable generation specifically.”); OCC Ex. 25, Sioshansi Direct Testimony at 7 (“AEP Ohio has failed to demonstrate, in regard to its proposed projects, that customers’ generation needs cannot be met in the competitive market.”); OMAEG Ex. 16, Seryak Direct Testimony at 5 (“I conclude that AEP Ohio has not demonstrated a resource planning need, or any other need, that would satisfy Ohio law and justify establishing a cost and crediting mechanism via RGR for the proposed 900 MW of renewable energy projects in Ohio or for the two specific solar projects.”); OCA Ex. 2, Brown Direct Testimony at 4 (“AEP Ohio does not need Hecate and Willowbrook based on resource planning projections. Therefore, the RGR does not meet the ‘need’ requirement of the Electric Security Plan statute.”); OCA Ex. 3, Medine Direct Testimony at 3 (“AEP Ohio did not demonstrate a ‘need’ for these projects.”); IGS Ex. 10, Haugen Direct Testimony at 2-3 (“The purpose of my testimony is to recommend that the Commission find that [AEP Ohio] has not demonstrated a need to own or operate 900 [MW] of renewable generation resources including the two solar power purchase agreements.”); IGS Ex. 11, White Direct Testimony at 14 (“While AEP may want to have all customers cover its costs to build solar projects, by any standard, AEP has not established a need to require all customers to pay for 400 MW of solar generation.”); IGS Ex. 12, Murray Direct Testimony at 5 (“Q: Is there a need for additional electrical capacity within the regional power market operated by PJM Interconnection (‘PJM’)? A: No.”); Direct Energy Ex. 2, Lacey Direct Testimony at 15 (“Instead of demonstrating ‘need,’ AEP Ohio has presented a case based on consumer ‘wants,’ and its analysis supporting consumer ‘wants’ is very weak. AEP Ohio claims that customers ‘need’ low cost energy and that customers are ‘demanding’ renewable energy. These consumer desires do not reflect a resource ‘need.’”).

³⁵ See Staff’s Post Hearing Brief at 2 (“There is, therefore, no ‘need,’ in a traditional forecasting sense, for the addition of the generating facilities that [AEP Ohio] proposes.”); Direct Energy’s Post Hearing Brief at 5 (“AEP has not and cannot point to any *objective* criteria demonstrating a need for 900 MW of renewable generation.”); OMAEG’s Post Hearing Brief at 7 (“Thus, under any definition of need, AEP Ohio failed to demonstrate that need exists and its request to develop at least 900 MW of renewable energy projects should be rejected.”); IGS’ Post Hearing Brief at 49 (“[B]ased upon the plain language of the ESP statute, the balance of Chapter 4928, and historical context regarding the passage of SB 221, it is clear that AEP Ohio’s proposal to construct 900 MWs of renewable generation lacks merit.”); OCC’s Post Hearing Brief at 23 (“Under R.C. 4928.143(B)(2)(c), AEP has not shown there is need for the renewable projects, based on resource planning projections.”); IEU’s Post Hearing Brief at 15 (“Based on the concessions offered by AEP Ohio and the uncontested record that there is no need for additional capacity to serve the customers of AEP Ohio, AEP Ohio has not and cannot demonstrate a need for 900 MWs of renewable generation resources.”); OCA’s Post Hearing Brief at 12 (“In short, by AEP Ohio’s own admission and as unequivocally confirmed by the Staff and Intervenor, AEP Ohio cannot demonstrate any ‘need’ for the projects based on resource planning projections.”).

as well as for the two specific renewable projects known as Highland Solar and Willowbrook Solar, as required by R.C. 4928.143(B)(2)(c). The inquiry in this proceeding should end there as a matter of law and undisputed fact, given the overwhelming record evidence put forth by witnesses from AEP Ohio, the Supporting Intervenors, and the Opposing Intervenors. The parties do not agree on much in this proceeding, but there is no dispute that AEP Ohio has failed to demonstrate need as required.

B. Even Under AEP Ohio’s Interpretation Of R.C. 4928.143(B)(2)(c), AEP Ohio Failed To Produce Evidence That Supports A Finding Of “Need” For At Least 900 MW Of Additional Renewable Resources.

As discussed above, there is no dispute about whether AEP Ohio demonstrated a resource planning need. It has not. The only dispute is over whether the Commission should create a new exception for AEP Ohio and expand the definition of need to consider other factors. As AEP Ohio and the Supporting Intervenors argue, the only way for the Commission to consider evidence AEP Ohio believes is favorable is if the Commission adopts a new interpretation of R.C. 4928.143(B)(2)(c) that is contrary to the express statutory language and Commission precedent. Once again, however, AEP Ohio is mistaken – even if the Commission construes R.C. 4928.143(B)(2)(c) to permit AEP Ohio’s evidence, it will see that the evidence produced by AEP Ohio and the Supporting Intervenors is not actually favorable to AEP Ohio’s position. AEP Ohio, even under its novel, unsupported interpretation of R.C. 4928.143(B)(2)(c), still has not demonstrated “need.”

1. AEP Ohio’s customers do not “need” 900 MW of additional renewable resources.

The centerpiece of AEP Ohio’s case is a customer survey conducted by Navigant Consulting, Inc. (“Navigant”), an independent consulting firm. AEP Ohio and the Supporting Intervenors produced two witnesses to support the customer survey during the Phase I hearing,

and AEP Ohio spent eighteen pages in its Post Hearing Brief attempting to demonstrate how the customer survey “demonstrates that customers desire additional, Ohio-sited renewable energy resources.”³⁶ Additionally, AEP Ohio repeatedly references public testimony from the Public Hearing on December 4, 2018, as well as comments filed in the Commission’s docket for this proceeding.³⁷ AEP Ohio believes this evidence proves “there is no question that the general populace wholeheartedly supports [AEP Ohio’s] effort.”³⁸ AEP Ohio is wrong.

a. AEP Ohio’s customer survey is fundamentally flawed and unreliable.

Even assuming AEP Ohio could demonstrate a different type of need under R.C. 4928.143(B)(2)(c) – which the Commission has stated it cannot – the customer survey relied upon by AEP Ohio does not show that customers need the proposed 900 MW of additional renewable resources. Despite AEP Ohio’s contention that the survey was “statistically valid [and] expertly-designed and –administered,”³⁹ AEP Ohio spent more time in its Post Hearing Brief challenging the credentials and testimony of the Opposing Intervenor’s witnesses than defending the credentials and testimony of its own witnesses.⁴⁰ While AEP Ohio argued that its witnesses, Trina Horner and Nicole Fry, “were the only expert witnesses qualified to design, implement and evaluate a customer survey of this nature,”⁴¹ AEP Ohio failed to substantiate that argument and the record proves the exact opposite.

³⁶ See AEP Ohio’s Post Hearing Brief at 27-45.

³⁷ See, e.g., *id.* at 4, 26, 40-45.

³⁸ *Id.* at 45.

³⁹ *Id.* at 33.

⁴⁰ *Id.* at 33-39.

⁴¹ *Id.* at 33.

To be clear, the burden of proof is on AEP Ohio, so AEP Ohio's complete lack of support for the credentials of its key witnesses is glaring, as every Opposing Intervenor identified reasons to doubt AEP Ohio's customer survey. Ms. Horner and Ms. Fry's testimony only confirmed the Opposing Intervenors' doubts. For example, AEP Ohio designated Ms. Horner as the "expert" tasked with supervising the survey, but she admitted during the hearing that she had **no previous experience designing or implementing customer surveys in her 28+ year career.**⁴² AEP Ohio provided no explanation for why it chose a consultant with no experience to supervise its survey. Instead, AEP Ohio drowned its Post Hearing Brief with attacks against Opposing Intervenors' experts, who did not design or implement the survey, in yet another naked attempt to distract the Commission from the more important point. Even if, *arguendo*, AEP Ohio was entirely correct about Opposing Intervenors' experts (which it is not), the fact would remain that its own expert admitted she had no background or experience in the sole issue for which she was being presented as an expert. For this reason alone, the Commission cannot trust Ms. Horner's testimony, or the evidence (the Navigant customer survey) she supports.

There are far more reasons, however, for the Commission to distrust Ms. Horner's testimony and the Navigant customer survey. Not surprisingly given her complete lack of experience with such surveys, Ms. Horner's testimony revealed some of the various shortcomings of the survey, including the fact that she "did not have in mind a specific number" which constituted a "statistically significant" survey size.⁴³ As OMAEG observed, Ms. Horner was being offered as an expert in customer surveys, yet "was unable to actually define what would constitute

⁴² Tr. Vol. III at 627-631 (discussing her lack of experience in customer surveys in her roles at the California Public Utilities Commission, TAH Associates, and Pacific Gas & Electric Company)

⁴³ *Id.* at 700.

a statistically significant survey size.”⁴⁴ If that does not cast doubt on the reliability of the Navigant survey, perhaps nothing will.

In that vein, Ms. Horner conceded that the “Voice of the Customer” Report contained responses from only approximately 0.68% of AEP Ohio’s residential non-PIPP customers, and Navigant received similarly low response rates for PIPP customers and commercial and industrial customers.⁴⁵ AEP Ohio failed to demonstrate how such a small sample size was sufficient to support its position that customers across Ohio “need” development of renewable generation. As IGS recognized, it was not just the small sample size that was problematic, it was the type of customers selected that dooms the survey: “[i]ndeed, the only large commercial and industrial customers that Navigant contacted were those that had already indicated support for the development of renewables. Thus, Navigant gathered data based upon a biased sample.”⁴⁶

While AEP Ohio witness Allen admitted that the survey formed the basis for his testimony on customer preference,⁴⁷ witness after witness testified that the survey was wholly incapable of supporting a claim of need:

- Kroger Witness Bieber: “While certain customers that were surveyed may have expressed a desire for renewable energy, the survey results do not demonstrate a need based on resource planning projections. The survey conclusions include caveats, including that customers are supportive of competitively-priced renewable energy.”⁴⁸
- Staff Witness Benedict: “Staff recognizes that customers increasingly have preferences about the resources from which their electricity is sourced, both environmental and otherwise. . . However, Staff believes that Ohio Power is

⁴⁴ See OMAEG’s Post Hearing Brief at 36.

⁴⁵ Tr. Vol. III at 635-637 (noting that of approximately 1,100,000 residential non-PIPP customers, only 7,498 (approximately 0.68%) responded to the survey; of approximately 100,000 PIPP customers, only 660 (approximately 0.66%) responded to the survey, and that of approximately 150,000 commercial and industrial customers, only 664 (approximately 0.44%) responded to the survey).

⁴⁶ See IGS’ Post Hearing Brief at 18.

⁴⁷ Tr. Vol. I at 204-05.

⁴⁸ Kroger Ex. 4, Bieber Direct Testimony at 15.

conflating customer preferences with customer needs. The Company provides insufficient evidence that customer preferences are not being adequately met, even as these preferences increase and change over time.”⁴⁹

- OCC Witness Dormady: “The Survey clearly suffers from framing bias, hypothetical bias, and social desirability bias. And, it very likely suffers from selection bias. Accordingly, the Survey is unreliable.”⁵⁰
- OCC Witness Lesser: “The result of the survey should not be used as a basis to determine if AEP Ohio’s customers do indeed support renewable energy and are willing to pay the full costs of renewable energy if offered. The survey suffers from inherent bias based on self-selection of respondents and poorly-designed questions.”⁵¹

Even during the Phase I hearing, one of AEP Ohio’s two witnesses supporting the survey testified that **the survey did not even attempt to determine how customer desires feed into the issue of customer need:**

Q: But my question, Ms. Horner, is you did not ask whether the customers needed any renewable energy; isn’t that true?

A: The survey did not include the question about whether customers need renewable energy. It asked about their support for and expectations for renewable energy.

Q: You understand there’s a difference between customer preference and a customer need, correct?

A: Yes.

Q: Can you tell me what is – tell me what you think the distinction is.

A: I think what this – what our survey focused on was and report focused on was customers’, again, expectations and desires around renewable energy. How that – **how that feeds into their customer need is not an issue that we explored in the survey.**⁵²

⁴⁹ Staff Ex. 3, Benedict Direct Testimony at 9-10.

⁵⁰ OCC Ex. 24, Dormady Direct Testimony at 13.

⁵¹ OCC Ex. 18, Lesser Direct Testimony at 88.

⁵² Tr. Vol. III at 641 (emphasis added).

Given that the survey was not designed to measure customer need, it is not controversial to conclude that AEP Ohio may not rely on the survey to measure customer need. As Direct Energy put it, the Navigant survey “merely sought to bolster the decision AEP had already made,” so it is “worthless and entitled to no weight.”⁵³

These fundamental (albeit fatal) errors do not tell the whole story, as the survey was so poorly designed that no reasonable conclusions can be gleaned from it. For example, OCC witness Dormady (who himself is an expert on the use of survey methods of economic measurement,⁵⁴ despite AEP Ohio’s suggestion to the contrary) testified extensively about the various implicit and explicit biases which plagued the survey, resulting in a reverse-engineered conclusion that AEP Ohio wanted the survey to find.⁵⁵ As IEU noted in its Post Hearing Brief, Mr. Dormady provided a long list of methodological errors which plague the survey.⁵⁶ IEU also compiled in its Brief several examples from the hearing in which AEP Ohio’s own witnesses testified to specific examples which highlighted how AEP Ohio’s methodology doomed the survey:

- Navigant did not ask if customers would be satisfied if companies other than AEP Ohio invested in renewable energy.⁵⁷
- Commercial and industrial customers could have been double counted.⁵⁸

⁵³ See Direct Energy’s Post Hearing Brief at 10.

⁵⁴ See OCC Ex. 24, Dormady Direct Testimony at 2.

⁵⁵ *Id.* at 10-28.

⁵⁶ See IEU’s Post Hearing Brief at 21-22, citing OCC Ex. 24 at 4 (“The Survey was poorly designed. It is biased in multiple ways. It is designed to support a particular policy conclusion—namely that AEP Ohio customers are eager to support development of the proposed renewable projects and would overwhelmingly welcome paying higher electricity bills to support their development. The Survey has many inherent biases, including ... Framing Bias, Hypothetical Bias, Social Desirability Bias, and likely has Selection Bias. The Survey’s underlying approach to estimating customers’ willingness to pay for renewable installations has long been acknowledged by experts to result in biased estimates. The methodology utilized is known to result in survey estimates that greatly diverge from what customers are actually willing to pay. There is no evidence that the Survey designers took these biases into consideration or attempted to mitigate them.”).

⁵⁷ *Id.* at 22, citing Tr. Vol. 3 at 563.

⁵⁸ *Id.*, citing Tr. Vol. 3 at 570.

- The large customer survey was inherently biased because only those customers that had expressed some interest in renewables were surveyed.⁵⁹
- Contrary to the claim of Navigant that customers overwhelmingly support renewables, more than half of the small commercial and industrial respondents indicated that they were unwilling to pay or unsure whether they would pay an additional amount for renewable generation.⁶⁰
- Navigant did not attempt to check the representativeness of its email sampling and there was no attempt to seek a geographically representative sample. It did not investigate willingness to pay based on either bill size or household income.⁶¹
- Navigant did not disclose to respondents that customers were already paying \$2.07 for alternative energy, an amount higher than the bracketed amounts in the survey.⁶²
- The survey did not inform customers that the cost of the state renewable requirement would likely continue to increase.⁶³
- Navigant listed the benefits of renewable energy before asking questions regarding willingness to pay.⁶⁴
- Navigant did not ask whether respondents were already securing renewable energy or renewable energy credits.⁶⁵
- AEP Ohio employees were not excluded from the small commercial and residential customer survey and Navigant does not know how many employees responded.⁶⁶

Because of these infirmities, IEU and others argued that the Navigant survey was “ridiculously biased.”⁶⁷

Beyond those problems, even where the survey allowed customers to provide subjective feedback, the survey results were manipulated to conceal or misrepresent customer comments and

⁵⁹ *Id.*, citing Tr. Vol. 3 at 575.

⁶⁰ *Id.*, citing Tr. Vol. 3 at 590-591.

⁶¹ *Id.*, citing Tr. Vol. 3 at 583, 621-627, and 746-747.

⁶² *Id.*, citing Tr. Vol. 3 at 611-612.

⁶³ *Id.*, citing Tr. Vol. 3 at 614.

⁶⁴ *Id.*, citing Tr. Vol. 3 at 618-619.

⁶⁵ *Id.*, citing Tr. Vol. 3 at 706-707.

⁶⁶ *Id.*, citing Tr. Vol. 3 at 725.

⁶⁷ *Id.*; see also OCA’s Post Hearing Brief at 47-49.

positions.⁶⁸ In addition to the examples cited in Kroger’s Post Hearing Brief, OMAEG also identified several additional examples of mischaracterized comments, which were strategically designed to misrepresent customer choice.⁶⁹ Likewise, as IGS noted, a closer examination on the actual quantitative data provided by the Navigant survey reveals “that many customers do not support AEP Ohio’s proposal.”⁷⁰ IGS is correct: the survey shows that small C&I customers are generally split on whether they would be willing to pay 1.25% to 1.5% more, and more than 50% of small C&I customers are not willing or not sure if they would pay 1.5% to 1.75%, or 2.25% to 2.5%, more.⁷¹ As IGS pointed out, only slightly more than half of the residential class of customers surveyed disagreed that maintaining their current bill amount was more important than investing in solar and wind.⁷² OCA observed that, according to OCA witness Medine, these numbers indicate that “the Navigant Survey actually indicates that customers care more about maintaining bill amounts than having AEP Ohio invest in renewables.”⁷³ To quote IGS, this is “[n]ot exactly a landslide in favor of AEP Ohio’s misleading proposal,” and far from the “overwhelming support” AEP Ohio touts.⁷⁴

In sum, the Phase I testimony confirmed that every decision behind the design and implementation of the Navigant survey was calculated to ensure the results AEP Ohio supposedly wanted, instead of presenting an accurate picture of how AEP Ohio’s customers feel about certain topics. As OCC witness Lesser noted, “[t]he Navigant survey is ... a typical ‘feel-good’ survey,

⁶⁸ See Kroger’s Post Hearing Brief at 44-48.

⁶⁹ See OMAEG’s Post Hearing Brief at 38-40.

⁷⁰ See IGS’ Post Hearing Brief at 20-22.

⁷¹ *Id.* at 21.

⁷² *Id.*

⁷³ See OCA’s Post Hearing Brief at 49.

⁷⁴ See IGS’ Post Hearing Brief at 21.

which asked questions about the benefits of renewable energy, development of renewable energy within the state, and so forth of a biased and unrepresented sample of residential, commercial, and industrial customers.”⁷⁵ Unfortunately for AEP Ohio, its customers caught onto this gamesmanship, with one customer comment reading:

- “To the average AEP distribution customer, this survey conflates the role of the AEP utility with the (competitive) AEP power supplier. Is the provision of renewable energy only limited to the standard service offer, or would there be some mechanism at the utility level, such as a rider, which would apply to customers taking power through a competitive supplier? This survey does not feel "right" and is potentially misleading.”⁷⁶

Of course, this was always AEP Ohio’s intention, as AEP Ohio filed its LTFR in April 2018 before realizing that it would need to manufacture some documentation of “need” to support availing itself of the cost-recovery mechanism approved by the Commission in the ESP IV case.⁷⁷ As a result, it was not until mid-August of 2018 – four months later – that AEP Ohio began conducting the Navigant survey.⁷⁸ AEP Ohio filed its Amended LTFR one month later, having manipulated an insincere and deeply flawed survey in an attempt to bolster its case with regard to the statutory “need” that the Commission is required to determine under R.C. 4928.143(B)(2)(c).⁷⁹

For these reasons, even if it were appropriate to consider such factors in the R.C. 4928.143(B)(2)(c) analysis – which it is not under the plain language of the statute and Commission precedent – it is clear that AEP Ohio has failed to provide any viable evidence in support.

⁷⁵ See OCC Ex. 18 at 80.

⁷⁶ *Id.* at 87.

⁷⁷ See Tr. Vol. V at 1371.

⁷⁸ See Tr. Vol. III at 656.

⁷⁹ See Company Ex. 6, Horner Direct Testimony at Exhibit TH-1 at 5.

b. AEP Ohio cannot demonstrate “need” by relying on unchallenged and notoriously unreliable public comments.

Apparently recognizing the weakness of its Navigant customer survey, AEP Ohio repeatedly attempts to redirect the Commission’s attention to the public testimony from the public hearing held on December 4, 2018, as well as comments filed in the Commission’s docket for this proceeding.⁸⁰ AEP Ohio boasts that “56 individuals took the time and effort to travel to the hearing and testify in support of the proposal and not a single witnesses registered oppositions,” and that “well over 5,000 comments in support of the Company’s proposal were filed in the docket as of March 1, 2019,” but “[n]o one filed comments that oppose the proposal.”⁸¹

As a preliminary matter, there is no reason to believe that the individuals who testified at the public hearing did not also submit comments on the docket, and there is no reason to believe that those who submitted comments on the docket did not also respond to the Navigant survey. Regardless, upon closer examination, it becomes clear that by relying on these comments, AEP Ohio is overstating support for its specific proposal. There is no evidence in the record that those customers were in fact AEP Ohio customers. Beyond that, there is no evidence that the customers were in fact supporting AEP Ohio’s specific proposal, including its cost projections and profit for AEP Ohio that would be passed onto customers, and not just showing general support for more renewable energy investment and general societal progress in Ohio, the region, or nation. Additionally, there is no evidence that the customers fully understood the entirety of AEP Ohio’s proposal, including the cost recovery aspect. Finally, there is no evidence in the record that the customers understood that alternatives exist in the market currently that will not increase customers’ distribution bills.

⁸⁰ See AEP’s Post Hearing Brief at 4, 26, 40-45.

⁸¹ *Id.* at 26.

In fact, AEP Ohio highlighted the testimony of individuals who expressed support not for AEP Ohio's investment in renewable resources, but rather for general societal progress.⁸² By AEP Ohio's own admission, several additional witnesses supported the proposals only to the extent it improved "education and workforce development."⁸³ Finally, AEP Ohio highlighted several witnesses who testified their support for AEP Ohio was through the lens of the opioid epidemic, without any discussion of the economics or logistics of AEP Ohio's plan.⁸⁴ Conspicuously absent from all of the testimony of the customers highlighted by AEP Ohio is any discussion of "need" (which is, after all, the focus of this proceeding), let alone any discussion of any specifics surrounding AEP Ohio's proposal.

c. The Commission does not even need to review the customer survey to conclude that AEP Ohio's industrial, commercial, and residential customers resoundingly oppose AEP Ohio's proposal.

As shown above, AEP Ohio's claims that its proposal has received "unanimous support" could not be further from the truth.⁸⁵ For a variety of reasons, the Navigant customer survey is not the best way to gauge what AEP Ohio's customers want – and even that survey reflected significant opposition to AEP Ohio's proposal. Beyond all of the fatal infirmities, however, AEP Ohio is deliberately ignoring the chorus of voices in opposition from its largest industrial, commercial, and residential customers. As the post hearing briefing in this proceeding has confirmed, an overwhelming majority of AEP Ohio's industrial, commercial, and residential customers not only

⁸² *Id.*

⁸³ *Id.* at 44.

⁸⁴ *Id.*

⁸⁵ *See* AEP Ohio's Post Hearing Brief at 26.

reject AEP Ohio's proposal, but are "[taking] the time and effort" to formally oppose the proposal in this proceeding.⁸⁶

The fact is, numerous industrial, commercial, and residential customers of AEP Ohio are represented in this proceeding, and they overwhelmingly oppose AEP Ohio's proposal. Far from the "unanimous" support AEP Ohio would like the Commission to believe its proposal has received, an overwhelming majority of the parties and subject-matter experts have considered AEP Ohio's proposal and has found it to be unlawful. As a result, to the extent the Commission breaks against its precedent to consider customer preferences, it must weigh heavily the opposition from the Opposing Intervenors.

2. AEP Ohio has not shown how its proposal will be economically beneficial.

The second branch of AEP Ohio's argument in favor of "need" is that, even if the renewable energy projects are not technically needed based on resource planning projections, the projects themselves will result in economic benefits to AEP Ohio's customers.⁸⁷ Of course, as the Commission already has recognized, economic benefits play no factor in the R.C. 4928.143(B)(2)(c) determination. That aside, however, the Commission need not be persuaded by AEP Ohio's argument; just as AEP Ohio exaggerated its customers' preferences, AEP Ohio likewise has overinflated the purported economic benefits of its proposal.

To make its case regarding economic benefits, AEP Ohio hired two witnesses, Drs. Buser and LaFayette, who sponsored economic impact analyses which – according to AEP Ohio – prove there is a "need" for the proposed monopoly generation.⁸⁸ Even forgiving the fact that their

⁸⁶ See the Post Hearing Briefs In Opposition.

⁸⁷ See AEP Ohio's Post Hearing Brief at 45-60.

⁸⁸ See Company Ex. 13, LaFayette Direct Testimony in the Tariff Cases; Company Ex. 12, Buser Direct Testimony in the Tariff Cases.

testimony was based on the two specific projects which the Opposing Intervenors' witnesses were not allowed to evaluate, the economic benefits analysis is deeply flawed to the point of being completely unreliable.

Tellingly, AEP Ohio's 15-page summary of the economic benefits of its proposal fails to address the litany of criticism offered by Opposing Intervenors. When the Commission analyzes AEP Ohio's analysis and resulting data of claimed benefits, it is clear AEP Ohio's purported economic benefits are grossly over exaggerated.

Conveniently overlooked in AEP Ohio's Post Hearing Brief, for example, is the fact that Dr. Buser admitted that the benefits he foresees from AEP Ohio's proposed specific projects are completely independent of whether AEP Ohio's proposed projects are completed and whether AEP Ohio itself develops the renewable resources. Such fact destroys any probative value that his conclusions may otherwise have had for AEP Ohio.⁸⁹ As for Dr. LaFayette, AEP Ohio failed to explain how the economic benefits related to the construction of AEP Ohio's projects will exist once the projects are built and in operation, despite Dr. LaFayette's concession that the benefits will "just last as long as the construction project lasts," and the long-term benefits would be "significantly less."^{90 91}

Even beyond the methods for AEP Ohio's statistical analyses, the numbers AEP Ohio produced as the purported economic benefits do not add up, as they are the results of a flawed and/or incomplete analysis. Specifically, AEP Ohio highlights a "Total Customer Benefit" of \$173

⁸⁹ *Id.* at 1087-1088 ("Q: ... you would agree that the economic impact from the projects that get built without AEP would be the same as the projects that you have projected, correct? A: I would probably have to deliberate it a little longer, but my first response would be yes, that sounds reasonable, but I would have to double-check all the inputs.").

⁹⁰ *Id.* at 1147.

⁹¹ *Id.*

millions, combining \$31 million as a result of price suppression in the PJM market with \$88 million from solar resources, with \$54 million from wind resources.⁹² Because these numbers are incomplete, they are unreliable, and AEP Ohio has grossly overstated any purported economic benefits which may come from its projects.

First, for example, the \$31 million “benefit” from the price suppression in the PJM market is incomplete. As thoroughly examined by IGS in its Post Hearing Brief, this figure does not take into consider several key wholesale costs for customers, and it fails to account for the additional transmission construction that may be necessitated by the proposed 900 MWs of generation.⁹³ Compounding its error, AEP Ohio admittedly relied on incorrect modeling assumptions, and “utterly failed to provide testimony to rebut the additional costs that PJM has identified renewables may impose on load serving entities.”⁹⁴

The second figure on which AEP relies for its “Total Customer Benefit” also is flawed. As IGS Witness Leanza explained, the \$88 million forecast is inaccurate for three reasons: (1) AEP’s conclusions are based upon a flawed and overstated projection of natural gas prices; (2) AEP’s forecasts have been incorrect time and again; and (3) AEP and its affiliates clearly have no confidence in their own forecast.”⁹⁵ As Mr. Leanza summarized it: “therefore, the Commission should give it little credibility.”⁹⁶ As IGS explained in its Post Hearing Brief, AEP Ohio’s \$88 million benefit forecast is a flawed product of flawed assumptions which are “completely detached from reality.”⁹⁷

⁹² See AEP Ohio’s Post Hearing Brief at 46; *see also* AEP Ohio Ex. 14 at JFT-1 p. 19.

⁹³ See IGS’ Post Hearing Brief at 24-26.

⁹⁴ *Id.* at 26-32

⁹⁵ See IGS Exhibit 13 at 3.

⁹⁶ *Id.*

⁹⁷ See IGS’ Post Hearing Brief at 26-32.

Finally, as IGS witness Haugen explained, the \$54 million benefit AEP Ohio identified relating to wind resources does not account for the new proposed PJM rule, which “would only allow state subsidized resources to either submit a bid at the Minimum Offer Price Rule or the capacity would fall under the Resource Carve-Out option.”⁹⁸ Under those options, “it is unlikely that Capacity associated with the REPA[s] would have any value in the PJM capacity auction,” and AEP Ohio’s analysis “is therefore fundamentally flawed.”⁹⁹

That said, as Staff summed up so well in its briefing, the Commission does not need to get into the weeds analyzing economic benefits to reach the proper result in this case:

Whether the benefits are large or small, or whether they are incremental or merely represent wealth transfer from one place in Ohio to another, misses the real point. Whatever the benefits are, they are not unique to this proposal. They would exist in just the same way whoever constructed 900 MW of renewable resources. Privately funded construction would do exactly as much or as little as this utility initiative. Therefore these economic effects, regardless of how they are characterized, are not a reason to endorse this proposal.¹⁰⁰

3. AEP Ohio’s argument undercuts itself, as the PJM market structure is working as intended, and renewable energy already is available to those customers who desire it.

Determined to turn this proceeding into a “policy debate,” AEP Ohio attempts to explain away the fact that it cannot demonstrate “need” under R.C. 4928.143(B)(2)(c) by arguing that the PJM market is structured to provide sufficient energy and capacity so this provision could never be invoked.¹⁰¹ Because PJM is adequately supplying capacity and energy, AEP Ohio’s only option

⁹⁸ See IGS Exhibit 10 at 5.

⁹⁹ *Id.*

¹⁰⁰ See Staff’s Post Hearing Brief at 7.

¹⁰¹ See AEP Ohio’s Post Hearing Brief at 14 (“PJM is ‘responsible for ensuring resource adequacy across its footprint, including [AEP Ohio] and all of the State of Ohio.’ Thus, by requiring electric utilities to join RTOs, the General Assembly had already ensured there would be sufficient generation to meet demand.”); *see also* AEP

is to disparage the PJM market in an attempt to convince the Commission to create an exception for AEP Ohio.¹⁰² This is uncomfortable ground for AEP Ohio's battle, however, because the fact is the PJM market is working as it is intended. Even if the Commission turns this proceeding into a "policy debate," as AEP Ohio hopes, the Commission should recognize that Ohio's policy in favor of competition and customer choice are stronger than AEP Ohio's policy of carving out an exception for monopoly generation. Because customers who seek renewable energy currently have an abundance of options, there is no need for AEP Ohio to be granted monopoly generation rights.

As OCC observed in its Post Hearing Brief, "[w]hen Ohio decided to deregulate, Ohio's statutory scheme recognized that PJM would take over determinations of resource adequacy in the region."¹⁰³ This decision to deregulate was designed to increase competition in Ohio, and that is exactly what happened. As OCC witness Sioshansi noted, based on information from AEP Ohio and the Commission's *Apples to Apples* website, the competitive wholesale and retail markets in the PJM multi-state footprint, which includes Ohio, are currently efficiently delivering renewable energy to AEP customers that wish to procure such resources.¹⁰⁴ As IGS noted in its Post Hearing Brief, "distribution customers of AEP Ohio already have several options to procure renewable electricity – to the extent they desire it."¹⁰⁵

Ohio Ex. 2 at 3 ("PJM wholesale markets are adequately supplying capacity and energy to the AEP Ohio load zone.").

¹⁰² *Id.* at 61-70.

¹⁰³ *See* OCC's Post Hearing Brief at 18.

¹⁰⁴ *Id.* at 24, citing OCC Ex. 25 at 6.

¹⁰⁵ *See* IGS' Post Hearing Brief at 47.

Even AEP Ohio's witness Lesser conceded that the PJM market structure has encouraged the development of solar and wind generation.¹⁰⁶ As IGS witness White observed, construction of solar facilities in Ohio has steadily increased since 2009 – as a result, over 605 megawatts of solar have been certified as renewable energy facilities that are deliverable to Ohio.¹⁰⁷ Staff agrees that Ohio customers who desire renewable energy have the option of receiving it, as Staff witness Benedict testified that “[a]s of November 8, 2018, residential customers in the [AEP Ohio] service territory had twenty-nine CRES provider offerings to choose from on the *Apples to Apples* website that were 100% renewable content” and “[s]mall commercial (GS-1) customers had fourteen offers to choose from that were 100% renewable content.”¹⁰⁸ Mr. Benedict added that “Staff also notes that government aggregations are capable of sourcing renewable resources for their participants, such as the one that currently serves Ohio’s third largest city.”¹⁰⁹ Direct Energy also agrees, stating “there can be no dispute that renewable energy is available to retail customers.”¹¹⁰

OCC summarized the state of the market well in its Post Hearing Brief:

Market forces are working effectively to deliver renewable energy from project developers that are willing and able to assume the business and financial risks and rewards associated with the projects. The PUCO should allow the competitive market to continue delivering these low cost generation resources to customers in an unfettered manner, without interference from AEP Ohio. Customers have choices for renewable power and those choices come from the multitude of marketer offers. As Staff Witness Benedict noted, AEP provides “insufficient evidence that customer

¹⁰⁶ OCC Ex. 18 at 38 (“Q: Has there been robust development of in-state solar and wind generation? A: Yes.”).

¹⁰⁷ IGS Ex. 11 at 11 (“[S]olar construction has steadily increased since 2009. *** Moreover, over 605 megawatts of solar have been certified as renewable energy facilities that are deliverable into Ohio.”).

¹⁰⁸ See Staff Ex. 1 at 10.

¹⁰⁹ *Id.*

¹¹⁰ See Direct Energy’s Post Hearing Brief at 8.

preferences are not being adequately met, even as these preferences increase and change over time.”¹¹¹

Thus, AEP Ohio’s own witnesses, and all of the Opposing Intervenors, have observed, the generation needs, including renewable generation desires, of customers are being met through the competitive market, as the General Assembly intended when it deregulated Ohio’s energy markets and established the PJM. The Commission should ignore AEP Ohio’s pleas to fix a system that is not broken. To the extent AEP Ohio’s parent company or unregulated affiliate wants to add itself to the list of options available to those customers who desire renewable energy, they are free to do so with shareholder dollars, but it is unlawful and inappropriate – and against Ohio policy – for the Commission to allow AEP Ohio to do so without first meeting the strict requirements of the law.

C. The Opposing Intervenors Agree That The Phase I Hearing Was An Improper, One-Sided Presentation Of Evidence.

In Kroger’s Post Hearing Brief, Kroger argued that “the record in this case is replete with improper and unduly prejudicial evidentiary rulings that resulted in an unjust and unreasonable one-sided presentation of evidence.”¹¹² Because AEP Ohio unsurprisingly did not comment on the Attorney Examiners’ evidentiary rulings (from which they benefited), there is no argument in AEP Ohio’s Post Hearing Brief to which Kroger can respond. However, it must be noted for the Commission that, in addition to Kroger, many of the other Opposing Intervenors also took note of

¹¹¹ See OCC’s Post Hearing Brief at 27.

¹¹² See Kroger’s Post Hearing Brief at 17-30.

the unfair, prejudicial evidentiary rulings throughout the Phase I hearing.¹¹³ These Opposing Intervenor are correct. Because AEP Ohio has not offered, and cannot offer, any evidence for the Commission to conclude that the evidentiary rulings identified by Kroger were just and reasonable, Kroger renews its request that the Commission find that the Attorney Examiners erred in the rulings identified by Kroger throughout its Post Hearing Brief.¹¹⁴

III. CONCLUSION.

For the foregoing reasons, and those set forth in Kroger's Post Hearing Brief and the other Post Hearing Briefs in Opposition, the Commission should apply the clear and unambiguous statutory language, follow its precedent in *Turning Point*, and find that AEP Ohio failed to make the threshold requisite showing of need based upon resource planning projections as required by R.C. 4928.143(B)(2)(c). Accordingly, the Commission should conclude that the contemplated Phase II of these proceedings is unnecessary, thereby rejecting AEP Ohio's Amended LTFR, as well as the consolidated AEP Ohio's Tariff Cases Application because there can be no cost recovery for specific projects when there has been no demonstration of resource planning need as a matter of law.

¹¹³ See, e.g., OMAEG's Post Hearing Brief at 7-19 ("These decisions and rulings resulted in an imbalanced presentation of evidence at the hearing, whereby AEP Ohio and supporting parties were granted broad discretion to testify and present evidence regarding matters outside the proscribed scope for phase one of this proceeding, while opposing parties were limited in their ability to question witnesses and present evidence rebutting those same issues and positions."); OCC's Post Hearing Brief at 47-57 ("The Attorney Examiners made at least three rulings that should be reversed. First, the Attorney Examiners wrongfully allowed AEP to introduce irrelevant, non-probative evidence regarding the proposed generation plants by denying parties' Motion in *Limine*. Second, the Attorney Examiners erred when they found that AEP had presented sufficient evidence to withstand parties' Motion for a Directed Verdict. Third, the Attorney Examiners erred when they ruled that evidence regarding all of the required elements for a charge under R.C. 4928.143(B)(2)(c) could not be presented at the first phase of this proceeding.") (internal citations omitted); IEU's Post Hearing Brief at 33-37 ("The Commission's decision to admit irrelevant evidence thus was both error and prejudicial. At this point, the Commission can still correct the error by striking the irrelevant testimony and deciding the case on AEP Ohio's admissions that the generic facilities are not needed to meet reliability concerns or to address renewable generation requirements.").

¹¹⁴ See Kroger's Post Hearing Brief at 17-30.

Respectfully submitted,

/s/ Angela Paul Whitfield

Angela Paul Whitfield (0068774)

Stephen E. Dutton (0096064)

Carpenter Lipps & Leland LLP

280 North High Street, Suite 1300

Columbus, Ohio 43215

Telephone: (614) 365-4100

Email: paul@carpenterlipps.com

dutton@carpenterlipps.com

(willing to accept service by email)

Counsel for The Kroger Co.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all parties of record via electronic mail on March 27, 2019.

/s/ Angela Paul Whitfield
Angela Paul Whitfield

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