

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Long-Term Forecast	)	
Report of Ohio Power Company and	)	Case No. 10-501-EL-FOR
Related Matters.	)	

In the Matter of the Long-Term Forecast	)	
Report of Columbus Southern Power	)	Case No. 10-502-EL-FOR
Company and Related Matters.	)	

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**APPLICATION FOR REHEARING AND  
MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO**

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**February 8, 2013**

**ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO**

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**APPLICATION FOR REHEARING OF INDUSTRIAL ENERGY USERS-OHIO**

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Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing of the Opinion and Order ("LTFR Order") issued by the Public Utilities Commission of Ohio ("Commission") on January 9, 2013, which modified and approved the Stipulation and Recommendation ("Stipulation") filed by Ohio Power Company and Columbus Southern Power Company (collectively, "AEP-Ohio") and Commission Staff ("Staff") in AEP-Ohio's long-term forecast report ("LTFR") proceeding. IEU-Ohio commends the Commission for rejecting the portion of the Stipulation requesting that the Commission find that there is a "need" for the Turning Point Solar ("Turning Point") project. The LTFR Order, however, is unlawful and unreasonable in the following respects:

1. The LTFR Order is unlawful and unreasonable because it determined that Section 4928.143(B)(2)(c), Revised Code, does not require a finding of need to be made within an electric security plan ("ESP") proceeding. The Commission lacks jurisdiction to make a finding of need in an LTFR proceeding; the Commission can consider a finding of need under Section 4928.143(B)(2)(b) and (c), Revised Code, only in an ESP proceeding.

2. The LTFR Order is unlawful and unreasonable because it considered whether a renewable energy facility is needed to satisfy renewable energy requirements, and the LTFR Order assumed, for purposes of considering the Stipulation, that the Commission had authority to determine the need for a renewable energy facility. Even in an ESP proceeding, renewable energy facilities are not eligible to be considered for a finding of need; Sections 4928.64(E) and 4928.143(B), Revised Code, prohibit the recovery of the cost of compliance with renewable energy requirements through non-bypassable charges.
3. The LTFR Order is unlawful and unreasonable because it failed to grant the motion to strike the portion of the testimony of William Castle, which improperly relied upon a settlement agreement from another proceeding for the purpose of addressing a contested issue in the LTFR proceeding.

As discussed in additional detail in the Memorandum in Support attached hereto, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing.

Respectfully submitted:

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**MEMORANDUM IN SUPPORT**

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**I. BACKGROUND**

On December 20, 2010, AEP-Ohio filed a supplement to its 2010 LTFR, which requested that the Commission find that there is a “need” for the Turning Point project. On November 21, 2011, AEP-Ohio and Staff entered into a Stipulation and Recommendation requesting that the Commission find that there is a need for the Turning Point project. The Stipulation, in Paragraph 2, stated that AEP-Ohio was seeking a finding of need pursuant to Section 4928.143(B)(2)(c), and the provisions of 4928.64(B)(2), Revised Code.

On March 28, 2012, the Commission held a hearing on the Stipulation. During the hearing, IEU-Ohio moved to strike a portion of the testimony of AEP-Ohio witness Castle, which was based on a stipulation that includes the following language: “Except for purposes of enforcement of the terms of this Stipulation, *this Stipulation*, the information and data contained therein or attached and *any Commission rulings adopting it*, shall not be cited as precedent in any future proceeding for or against any

*Party or the Commission itself.*<sup>1</sup> The Attorney Examiner denied IEU-Ohio's oral motion.<sup>2</sup> On January 9, 2013, the Commission issued an Opinion and Order that, among other things, upheld the Attorney Examiner's ruling, stating, "[a]s AEP-Ohio was not a signatory party to the stipulation in the DP&L Case, the Company is not bound by its terms and, accordingly, we believe the attorney examiner's ruling denying the motion to strike was appropriate under the circumstances."<sup>3</sup> The Commission's determination was unlawful and unreasonable, and, as a practical matter, the Commission's determination will have a chilling effect on the willingness of parties to settle contested legal issues.

The LTFR Order also rejected the portion of the Stipulation which provided that there is a "need" for the Turning Point project.<sup>4</sup> Because AEP-Ohio failed to demonstrate that Turning Point was needed to satisfy its own renewable energy benchmark requirements or the statewide requirements of other utilities and competitive retail electric service ("CRES") providers, the Commission determined that the Stipulation was not in the public interest.<sup>5</sup>

The Commission correctly determined that AEP-Ohio had not demonstrated that the Turning Point project was needed. But the Commission also determined that it had authority to consider in a LTFR proceeding whether a new generating facility is

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<sup>1</sup> *In the Matter of the 2010 Long-Term Forecast Report of Dayton Power and Light Company and Related Matters*, Case No. 10-505-EL-FOR, Stipulation and Recommendation at 2 (Jan. 14, 2011) (hereinafter "*Yankee Solar*") (emphasis added).

<sup>2</sup> Tr. Vol. I at 17.

<sup>3</sup> LTFR Order at 7.

<sup>4</sup> LTFR Order at 26.

<sup>5</sup> *Id.*

needed.<sup>6</sup> The Commission can only exercise the jurisdiction provided by the General Assembly. A settlement cannot provide the Commission with authority to do what the Commission does not otherwise have authority to do or to disrespect procedural or substantive requirements established by the General Assembly or the Commission's rules.<sup>7</sup>

There is no legal basis for the Commission to consider whether a new generating facility is “needed” in a LTFR proceeding. Moreover, even if such a finding were lawful in a LTFR proceeding, renewable energy generating facilities may not be the subject of a need determination because they are not eligible for non-bypassable cost recovery. Therefore, the LTFR Order is unlawful and unreasonable.

## **II. ARGUMENT**

- 1. The LTFR Order is unlawful and unreasonable because it determined that Section 4928.143(B)(2)(c), Revised Code, does not require a finding of need to be made within an ESP proceeding. The Commission lacks jurisdiction to make a finding of need in an LTFR proceeding; the Commission can consider a finding of need under Section 4928.143(B)(2)(b) and (c), Revised Code, only in an ESP proceeding.**

The LTFR Order determined that the Commission may consider whether a new generating facility is needed in a LTFR proceeding, stating:

Additionally, Section 4935.04(E)(2), Revised Code, provides a non-exhaustive list of matters that may be reviewed during a public hearing in a forecasting case, including the projected loads and energy requirements for each year of the period, as well as the estimated installed capacity and supplies to meet the projected load requirements. The provisions of the statute do not limit our review to the sole issue of AEP-Ohio's traditional generation capacity or otherwise preclude our consideration of the alternative energy resource requirements found in Section 4928.64, Revised Code. In fact, the Commission believes that the alternative

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<sup>6</sup> LTFR Order at 22-23.

<sup>7</sup> *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896 at ¶ 26 (2004).

energy resource requirements properly fall within the more general category of “energy requirements” enumerated in Section 4935.04(E)(2)(a), Revised Code. The statute, therefore, provides a basis upon which the Commission may consider the need for the Turning Point project in these proceedings. We note that the Commission's forecasting rules, as set forth in Chapters 4901:5-1 through 4901:5-5, O.A.C, contemplate consideration of the alternative energy resource requirements within the context of a LTFR proceeding.

We disagree that Section 4928.143(B)(2)(c), Revised Code, requires the Commission to first determine, within an ESP proceeding, the need for an electric generating facility before authorizing a nonbypassable surcharge. As the Commission stated in the ESP 2 Case, we do not read the statute to restrict our determination of the need for the electric generating facility to the time at which an ESP is approved, but rather to ensure that the Commission holds a proceeding before it authorizes any allowance under the statute.<sup>8</sup>

The LTFR Order claims that need may be determined in a LTFR proceeding because the hearing may include matters related to projected loads and energy requirements as well as the installed capacity to meet forecasted load requirements. The Commission is incorrect. LTFR proceedings are “limited to issues relating to forecasting”<sup>9</sup> and the Commission’s role is to determine whether the LTFR is accurate, complete, and reasonable.<sup>10</sup> The ultimate purpose of an LTFR is to determine whether the applicant’s forecast of load requirements and resources is accurate and reasonable—it is specifically focused on the reasonableness of forecasting techniques and methodologies.<sup>11</sup> The LTFR statute (Section 4935.04, Revised Code) does not provide the Commission with jurisdiction to consider whether a new generating facility is needed.

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<sup>8</sup> LTFR Order at 22-23.

<sup>9</sup> Section 4935.04(E)(1), Revised Code.

<sup>10</sup> Section 4935.04(F), Revised Code.

<sup>11</sup> *Id.*



Amended Substitute Senate Bill 3 (“SB 3”) and Amended Substitute Senate Bill 221 (“SB 221”) lend further support to the conclusion that the Commission lacks jurisdiction to consider in a LTFR proceeding whether a new generating facility is needed. First, SB 3 declared generation service to be a competitive service, eliminating the Commission’s authority to regulate generation service through traditional cost-based ratemaking. Moreover, SB 3 removed “electric generating facility” from the definition of “major utility facility” in the LTFR statute (Section 4935.04, Revised Code), further limiting the Commission’s authority over generation service in an LTFR proceeding. “Major utility facility” is now defined as a transmission line.<sup>12</sup> As a result of the General Assembly’s actions, an electric distribution utility (“EDU”) submitting a LTFR is no longer required to provide a description of an electric generating plant to be added or taken out of service during the LTFR period. Rather, the EDU must provide “A year-by-year, ten-year forecast of annual energy demand, peak load, reserves, and a general description of the resource planning projections to meet demand.”<sup>13</sup>

If the LTFR projects an imbalance between supply and demand, the LTFR proceeding is not the place to determine whether a particular new generating facility should be built to fill the gap. That is a determination for an ESP proceeding. Section 4928.143(B)(2)(c), Revised Code, specifies when a finding of need must be made—it must be made in an ESP proceeding.<sup>14</sup> Specifically, Section 4928.143(B)(2)(c), Revised Code, states, “no surcharge shall be authorized ***unless the commission first***

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<sup>12</sup> Section 4935.04(A)(1), Revised Code.

<sup>13</sup> Section 4935.04(C)(1), Revised Code.

<sup>14</sup> Section 4928.143(B)(2)(c), Revised Code.

**determines in the [ESP] proceeding that there is need for the facility** based on resource planning projections submitted by the electric distribution utility.”<sup>15</sup> Accordingly, any need determination relevant for purposes of Section 4928.143(B)(2)(c), Revised Code, must be made in an ESP proceeding rather than an LTFR proceeding.

The LTFR Order’s claim that the Commission’s rules support determining whether Turning Point is needed in a LTFR proceeding is also incorrect and unlawful and unreasonable.<sup>16</sup> Regardless of what the Commission’s rules provide, the rules must be interpreted so as to not conflict with Section 4928.143(B)(2)(c), Revised Code.<sup>17</sup> Since that Section provides that a finding of need must be made in an ESP proceeding, any conclusion that Rules 4901:5-5-03 or 4901:1-5-5-06, O.A.C., provide otherwise is unlawful and unreasonable.

- 2. The LTFR Order is unlawful and unreasonable because it considered whether a renewable energy facility is needed to satisfy renewable energy requirements, and the LTFR Order assumed, for purposes of considering the Stipulation, that the Commission had authority to determine the need for a renewable energy facility. Even in an ESP proceeding, renewable energy facilities are not eligible to be considered for a finding of need; Sections 4928.64(E) and 4928.143(B), Revised Code, prohibit the recovery of the cost of compliance with renewable energy requirements through non-bypassable charges.**

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<sup>15</sup> Section 4928.143(B)(2)(c), Revised Code (emphasis added); see Post Hearing Brief of Industrial Energy Users-Ohio at 12 (Apr. 25, 2012).

<sup>16</sup> LTFR Order at 23.

<sup>17</sup> See *Youngstown Sheet & Tube Company v. Lindley*, 38 Ohio St. 3d 232, 234 (1988).

The LTFR Order evaluated whether Staff and AEP-Ohio had demonstrated that Turning Point—a renewable generating facility—was needed under Section 4928.143(B)(2)(c), Revised Code.<sup>18</sup> IEU-Ohio argued that Turning was not eligible for such a consideration; the LTFR Order stated that IEU-Ohio’s argument was not ripe because cost recovery was not at issue in the LTFR proceeding:

FES and IEU-Ohio argue that, pursuant to Section 4928.64(E), Revised Code, the costs associated with an alternative energy resource facility must be bypassable and that that section prevails over Section 4928.143(B)(2)(c), Revised Code, as specified in Section 4928.143(B), Revised Code. FES and IEU-Ohio also raise general concerns regarding the cost of the Turning Point project and the corresponding impact on ratepayers. However, the Commission finds that arguments regarding the cost recovery provisions of Sections 4928.143(B)(2)(c) and 4928.64(E), Revised Code, are premature at this point. Consistent with our recent opinion and order in the ESP 2 Case, we believe that cost recovery is a matter that should be addressed in a separate proceeding. Further, as we have previously stated, the Commission cannot and will not approve any recovery by way of a nonbypassable surcharge unless an applicant meets its burden of satisfying all of the requirements of Section 4928.143(B)(2)(c), Revised Code.<sup>19</sup>

IEU-Ohio’s argument is not premature. Although Section 4928.143(B)(2)(b) and (c), Revised Code, authorizes the Commission to approve a non-bypassable charge for a generating facility if certain requirements are satisfied, the Section specifically prohibits recovery of a non-bypassable charge for a facility designed to recover the cost of compliance with renewable energy requirements. Specifically, Section 4928.143(B),

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<sup>18</sup> For purposes of its analysis, the Commission assumed that it had authority to issue a finding of need for a renewable generating facility, stating, “The Commission emphasizes that we only assume for the purpose of reaching a decision regarding the stipulation, but do not decide, that the determination of need under Section 4928.143(B)(2)(c), Revised Code, may take into account the SER benchmarks found in Section 4928.64(B)(2), Revised Code.” LTFR Order at FN 10.

<sup>19</sup> LTFR Order at 23 (footnotes omitted); see also LTFR Order at FN 10 (“The Commission emphasizes that we only assume for the purpose of reaching a decision regarding the stipulation, but do not decide, that the determination of need under Section 4928.143(B)(2)(c), Revised Code, may take into account the SER benchmarks found in Section 4928.64(B)(2), Revised Code.”)

Revised Code, states “[n]otwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, **division (E) of section 4928.64** . . . . the plan may provide for . . . a nonbypassable surcharge.”<sup>20</sup> Division (E) of Section 4928.64, Revised Code, provides that “[a]ll 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.”<sup>21</sup> Thus, even if this was the proper venue for a need determination (an ESP proceeding), cost recovery for an alternative energy resource—such as Turning Point—is specifically excluded from the scope of the permissive ESP provisions contained in Section 4928.143(B), Revised Code. The Commission’s refusal to address “cost recovery” misses the point; the Commission does not have authority to authorize a non-bypassable charge for a renewable generating facility. As a result, the Commission’s failure to determine that it lacked jurisdiction to determine the need for a renewable energy facility, as urged by IEU-Ohio, was unlawful and unreasonable.

**3. The LTFR Order is unlawful and unreasonable because it failed to grant the motion to strike the portion of the testimony of William Castle, which improperly relied upon a settlement agreement from another proceeding for the purpose of addressing a contested issue in the LTFR proceeding.**

During the hearing, the Attorney Examiner denied IEU-Ohio’s oral motion to strike the portion of the testimony of AEP-Ohio witness Castle, which relied upon the

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<sup>20</sup> Section 4928.143(B), Revised Code (emphasis added).

<sup>21</sup> Section 4928.64(E), Revised Code (emphasis added).

*Yankee Solar* Stipulation.<sup>22</sup> The LTFR Order upheld the Attorney Examiner's ruling denying IEU-Ohio's motion to strike the testimony of AEP-Ohio witness Castle, stating, "As AEP-Ohio was not a signatory party to the stipulation in the DP&L Case, the Company is not bound by its terms and, accordingly, we believe the attorney examiner's ruling denying the motion to strike was appropriate under the circumstances."<sup>23</sup> As discussed further below, the Commission's determination may undermine future settlement negotiations and lead to protracted litigation.

The *Yankee Solar* Stipulation contained the following provision: "Except for purposes of enforcement of the terms of this Stipulation, **this Stipulation**, the information and data contained therein or attached and **any Commission rulings adopting it**, shall not be cited as precedent in any future proceeding for or against any Party or the Commission itself."<sup>24</sup> The Commission orders adopting the Stipulation did not modify this term; thus, the Commission agreed to enforce the prohibition against citation to and reliance upon the Stipulation.<sup>25</sup>

The Commission has an interest in facilitating settlements. The quoted language is designed to facilitate the settlement process and allow parties to support reasonable solutions to contested legal issues. By allowing parties to violate the terms of the *Yankee Solar* Stipulation, the Commission's interest in encouraging settlements in contested cases has been undermined and the failure to enforce the terms of the Stipulation has negatively affected the rights of parties such as IEU-Ohio. As a result,

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<sup>22</sup> Tr. Vol. I at 17.

<sup>23</sup> LTFR Order at 7.

<sup>24</sup> *Yankee Solar*, Stipulation and Recommendation at 2 (Jan. 14, 2011) (emphasis added).

<sup>25</sup> *Yankee Solar*, Opinion and Order (Apr. 19, 2011).

future settlements will be more difficult to achieve. Therefore, the failure to grant IEU-Ohio's motions to strike the portion of testimony that relied upon the *Yankee Solar* Stipulation renders the LTFR Order unlawful and unreasonable and otherwise evades the Commission's obligation to address contested issues on the merits based on the evidence properly admissible and applicable law. Stipulations containing recommendations which are subsequently adopted by the Commission as a packaged resolution of any potentially contested issues are not properly included in testimony and they may not be relied upon by the Commission to address or consider contested issues in this proceeding or any other.

### **III. CONCLUSION**

IEU-Ohio commends the Commission for reaching the correct ultimate result in this proceeding—Turning Point simply is not needed. But that does not change the fact that the Commission should not have considered in a proceeding of this nature whether a generating facility—especially a renewable energy facility—is needed. Unless the Commission grants IEU-Ohio's Application for Rehearing, we are destined to repeat this protracted process in the future.

Finally, Commission proceedings involve diverse parties, with varying legal theories and goals. In the past, these diverse parties have often been able to let go of their legal positions to support reasonable settlement outcomes. It is encouraging that parties can work together to resolve their differences through settlements because the alternative is protracted litigation. The LTFR Order, by determining that settlements may be cited as precedent by non-signatory parties, undermines the settlement process. The Commission has effectively shot a warning to parties that they must look

over their shoulder every time they support a settlement, because it will be used against them by any utility that did not sign the document. That result is unfair and may render future settlements impossible to achieve.

Wherefore, IEU-Ohio requests that the Commission grant the relief requested in this Application for Rehearing and Memorandum in Support.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio* was served upon the following parties of record this 8th day of February 2013, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**2/8/2013 3:59:28 PM**

**in**

**Case No(s). 10-0501-EL-FOR, 10-0502-EL-FOR**

Summary: Application for Rehearing and Memorandum Support electronically filed by Mr. Joseph E. Olikier on behalf of Industrial Energy Users-Ohio