

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	)	
Ohio Power Company for Authority to	)	Case No. 13-2385-EL-SSO
Establish a Standard Service Offer	)	
Pursuant to §4928.143, Ohio Rev. Code,	)	
in the Form of an Electric Security Plan.	)	

In the Matter of the Application of	)	
Ohio Power Company for Approval of	)	Case No. 13-2386-EL-AAM
Certain Accounting Authority.	)	

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**MEMORANDUM OF INDUSTRIAL ENERGY USERS-OHIO IN  
OPPOSITION TO THE APPLICATIONS FOR REHEARING OF THE OHIO  
POWER COMPANY, OHIO MANUFACTURERS' ASSOCIATION  
ENERGY GROUP, AND ENVIRONMENTAL ADVOCATES**

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**April 6, 2015**

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**I. INTRODUCTION**

In the Opinion and Order in these cases ("ESP III Order") issued on February 25, 2015,<sup>1</sup> the Public Utilities Commission of Ohio ("Commission") modified and approved an application for an electric security plan ("ESP") for Ohio Power Company ("AEP-Ohio"). AEP-Ohio filed an application for rehearing of the ESP III Order on March 27, 2015.<sup>2</sup> In its Application for Rehearing,<sup>3</sup> AEP-Ohio requests that the Commission reverse its order denying AEP-Ohio authorization under the Purchase Power

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<sup>1</sup> Opinion and Order (Feb. 25, 2015).

<sup>2</sup> Application for Rehearing of Ohio Power Company (Mar. 27, 2015) ("AEP-Ohio Application for Rehearing").

<sup>3</sup> In one instance, this Memorandum also addresses an issue that is presented by parties other than AEP-Ohio. In their respective applications for rehearing, AEP-Ohio, Ohio Manufacturers' Association Energy Group ("OMAEG"), and the Environmental Advocates also sought an order that collection of costs associated with Schedule IRP-D be changed from the Energy Efficiency and Peak Demand Reduction Rider ("EE/PDR Rider") to the Economic Development Rider ("EDR").

Agreement Rider (“PPA Rider”) to begin collecting above-market generation-related wholesale costs so that AEP-Ohio may insulate itself from the losses it would incur as a result of its decision to retain ownership of an interest in Ohio Valley Electric Corporation (“OVEC”).<sup>4</sup> Second, it seeks to narrow the availability and value to customers of Schedule IRP-D.<sup>5</sup> Third, AEP-Ohio seeks to adjust the balance it may bill and collect under its authorization of the Distribution Investment Rider (“DIR”).<sup>6</sup> Finally, it seeks reversal of the Commission’s refusal to authorize the NERC Compliance and Cybersecurity Rider (“NCCR”).<sup>7</sup>

For the reasons discussed below, the Commission should deny these requests for rehearing by AEP-Ohio.<sup>8</sup>

**II. THE COMMISSION CORRECTLY FOUND THAT AEP-OHIO FAILED TO SUSTAIN ITS BURDEN OF PROOF THAT THE PPA RIDER WOULD PROMOTE STABILITY OR WAS IN THE PUBLIC INTEREST**

In the ESP III Order, the Commission found (1) that AEP-Ohio failed to demonstrate that collection of the above-market generation-related wholesale costs of OVEC under the PPA Rider would have the effect of stabilizing retail electric service and (2) that authorization of collection of those costs was not in the public interest.<sup>9</sup> In AEP-Ohio’s Application for Rehearing, AEP-Ohio argues that the Commission erroneously concluded (1) that AEP-Ohio’s proposed recovery of above-market generation-related wholesale costs of OVEC would be a cost to customers with little, if

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<sup>4</sup> AEP-Ohio Application for Rehearing at 15-25. See IEU-Ohio Ex. 1B at 26.

<sup>5</sup> AEP-Ohio Application for Rehearing at 41-50.

<sup>6</sup> *Id.* at 38-40.

<sup>7</sup> *Id.* at 63-66.

<sup>8</sup> Failure to address any of the issues raised by AEP-Ohio’s Application for Rehearing does not indicate any agreement with AEP-Ohio.

<sup>9</sup> ESP III Order at 23-24.

any, offsetting benefit; (2) that AEP-Ohio had not made a commitment to maintain the rider beyond the term of the ESP; (3) that it was inappropriate to approve wholesale cost recovery when wholesale markets and environmental regulations were undergoing review; and (4) that customers already have a means of fixing their generation-related costs through the current market structure.<sup>10</sup>

As Industrial Energy Users-Ohio (“IEU-Ohio”) demonstrated both in its initial brief<sup>11</sup> and its Application for Rehearing, the PPA Rider cannot be lawfully authorized as a nonbypassable or placeholder rider as a term of an ESP, the rider’s authorization violates several other provisions of the Revised Code, and authorization is preempted by federal law.<sup>12</sup> By correctly finding that Ohio law does not authorize the PPA Rider and that federal law preempts authorization, the Commission need not address the inaccurate factual claims AEP-Ohio presents in its Application for Rehearing a second time.

Further, the Commission should reject AEP-Ohio’s first assignment of error because AEP-Ohio has not raised any new argument that justifies the Commission’s consideration.

**A. The PPA Rider is not a short or long-term benefit for customers**

Initially, AEP-Ohio claims that the Commission incorrectly found that the PPA Rider “does not offer a hedge benefit that offsets the potential short-term costs over the ESP term.”<sup>13</sup> It continues, “The benefit of a hedge is not a guaranteed price reduction

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<sup>10</sup> AEP-Ohio Application for Rehearing at 16-25.

<sup>11</sup> Initial Brief of Industrial Energy Users-Ohio at 3-37 (July 23, 2014).

<sup>12</sup> See, e.g., Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio at 11-52 (Mar. 27, 2015) (“IEU-Ohio Application for Rehearing”).

<sup>13</sup> AEP-Ohio Application for Rehearing at 17.

but stabilization of otherwise volatile prices.”<sup>14</sup> Neither assertion is correct with regard to AEP-Ohio’s effort through the PPA Rider to transfer its business and financial risk associated with OVEC to retail customers.

Contrary to AEP-Ohio’s assertion that the PPA Rider would provide a benefit to customers, AEP-Ohio’s financial projections indicated several different outcomes, ranging from a charge of \$52 million to a credit of \$8 million.<sup>15</sup> Other projections correcting for errors in AEP-Ohio’s estimates of the cost of the PPA Rider limited to only the OVEC above-market generation-related wholesale costs were substantially more expensive for customers.<sup>16</sup> Even if AEP-Ohio were correct that customers may realize an \$8 million benefit, the “benefit” will be 7¢/MWh over the entire term of the proposed ESP.<sup>17</sup> Thus, the Commission correctly found that the PPA Rider provided little or no benefit to customers and was likely a net cost.

AEP-Ohio also failed to demonstrate that customers will realize even the 7¢/MWh benefit. The claim is based on the assumption that the costs of OVEC generation are stable,<sup>18</sup> but OVEC costs can vary significantly from year to year. One recent report indicated that OVEC costs shifted 24% due to a change in output from 2011 to 2012, and output is a function of several factors including weather, general economic conditions, and lower energy prices.<sup>19</sup> AEP-Ohio conceded that it does not

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<sup>14</sup> *Id.*

<sup>15</sup> ESP III Order at 24.

<sup>16</sup> *Id.* at 16.

<sup>17</sup> AEP-Ohio Ex. 8A.

<sup>18</sup> AEP-Ohio Ex. 7 at 8.

<sup>19</sup> IEU-Ohio Ex. 1B at Ex. KMM-3, page 2.

know how weather, economic conditions, or low power prices individually affect OVEC output.<sup>20</sup>

Further, the 7¢ solution on which AEP-Ohio relied is premised on OVEC cost reductions,<sup>21</sup> but those reductions are speculative. OVEC had not committed to those reductions, and AEP-Ohio made no commitment to customers to flow-through the alleged customer benefit if OVEC failed to deliver the cost reductions.<sup>22</sup> Moreover, the cost reductions may have no effect on the costs charged to AEP-Ohio because other unrelated costs may increase.<sup>23</sup>

Additionally, AEP-Ohio itself undermined the credibility of its claims about the benefit of the PPA Rider because it demonstrated little faith in its estimate that the PPA Rider will provide a financial benefit to customers. At least one of the estimates was available to AEP-Ohio when it filed its ESP (the one showing that the PPA Rider would result in a \$52 million cost to customers was prepared in August 2013, several months before AEP-Ohio filed the Application).<sup>24</sup> AEP-Ohio recognized that the cost of the rider would be unique to the ESP in the ESP v. MRO Test,<sup>25</sup> but it did not include a value for the PPA Rider in the ESP side of the test.<sup>26</sup> AEP-Ohio also did not provide a value for the PPA Rider in its bill comparisons.<sup>27</sup> According to Mr. Roush, AEP-Ohio's witness on

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<sup>20</sup> Tr. Vol. II at 544-45.

<sup>21</sup> Tr. Vol. XI at 2603-04.

<sup>22</sup> Tr. Vol. II at 552.

<sup>23</sup> Tr. Vol. III at 749-50.

<sup>24</sup> Tr. Vol. II at 494.

<sup>25</sup> R.C. 4928.143(C)(1) requires the Commission to find that the ESP, including its pricing and all other terms and conditions, is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142.

<sup>26</sup> AEP-Ohio Ex. 7 at 5.

<sup>27</sup> Tr. Vol. III at 930.



the bill comparisons, Mr. Allen indicated that the value of the rider could be positive or negative and directed Mr. Roush to use a value of zero to account for the effects of the PPA Rider in preparing the bill comparisons.<sup>28</sup> Thus, it is apparent that AEP-Ohio was unwilling to stand behind estimates until Mr. Allen decided to recalculate the alleged benefits on the first day of hearing and offer his revision on the second day of hearing.<sup>29</sup>

Because AEP-Ohio was unable to support its claim that customers might see a benefit from the PPA Rider, it also now claims that the financial hedge, regardless of whether the rider is a credit or charge, is the benefit. The PPA Rider, however, would not be a hedge against market volatility, regardless of the cost or benefit conclusions. Market volatility will be what it will be. Customers will pay the “market price” for retail generation supply and whatever volatility occurs will be reflected in their electric bills subject to whatever measures (including substituting natural gas for electricity) they may implement, on their own, to reduce such risk. During the ESP period, the as-proposed PPA Rider will only increase electric bills through another rider that will make the electric bill more volatile and harder to predict. As noted above, the only “hedge” the PPA Rider provides is an assurance that AEP-Ohio would be free of the business and financial risk of its interest in OVEC. Accordingly, the Commission correctly found that AEP-Ohio failed to demonstrate that the collection of above-market generation-related wholesale costs of OVEC will provide rate stability or is in the public interest.<sup>30</sup>

**B. AEP-Ohio has not made a long-term commitment to flow the “benefit” of the PPA Rider to retail customers**

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<sup>28</sup> Tr. Vol. III at 930.

<sup>29</sup> Tr. Vol. II at 484.

<sup>30</sup> ESP III Order at 24.

As grounds for reversing the Commission's finding that AEP-Ohio should not be authorized to collect the above-market generation-related wholesale costs of OVEC, AEP-Ohio also claims that Mr. Vegas made a commitment to continue the PPA Rider beyond the term of the ESP.<sup>31</sup> When presented with the question of whether AEP-Ohio was making a commitment in this ESP to extend the rider beyond the term of the ESP, however, Mr. Vegas stated unequivocally that the rider's term was limited to the term of the ESP.

Q. ... I guess what I'm asking is as proposed in the application, I'm going to get to Mr. Kurtz's hypothetical, but as proposed in the application, it actually—all riders, I believe you said earlier today, all riders terminate at the end of the ESP whether the ESP goes two years or three years, all riders including the PPA terminate. Is that right or are you—

A. I believe that's true.

Q. Okay. I mean, you're not requesting today in your application that the Commission hold one PPA rider outside of the ESP and approve it for a longer term, are you?

A. No, we're not.

Q. And as we discussed earlier, if the PPA—if the ESP, excuse me, terminates at the end of two years, the PPA would terminate at the end of two years; is that right?

A. I believe the answer is still yes, contingent to then—the acceptance of a new ESP by the Commission.<sup>32</sup>

AEP-Ohio's attempt to rewrite the record on the proposed term of the PPA Rider should be rejected.

**C. Pending regulatory reforms of the wholesale capacity and energy markets and environmental rules do not support authorization for AEP-Ohio to bill and collect above-market generation-related wholesale revenue**

AEP-Ohio also contests the Commission's refusal to authorize billing and collection of above-market generation-related wholesale revenue because the current

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<sup>31</sup> AEP-Ohio Application for Rehearing at 18-19.

<sup>32</sup> Tr. Vol. I at 151.

regulatory environment may change. In support of allowing recovery sooner rather than later, AEP-Ohio states that waiting until wholesale market reforms and environmental rules are settled may cause wholesale market prices to increase with the effect that “it would be too late for the PPA Rider to be taken up at that point.”<sup>33</sup> The Commission, however, rejected authorization to collect above-market OVEC-related wholesale costs because it found that AEP-Ohio had failed to demonstrate that authorization would have the effect of stabilizing rates. Regardless of whether the wholesale market is in some sort of regulatory flux, this finding that the PPA Rider did not satisfy a statutory requirement of R.C. 4928.143(B)(2)(d) was fatal to AEP-Ohio’s request.<sup>34</sup>

**D. AEP-Ohio’s claims regarding retail price volatility are flawed**

Finally, AEP-Ohio asserts that the Commission “would be misguided to conclude that an additional tool for rate mitigation should be categorically excluded, especially given the flaws and limitations of the current tools.”<sup>35</sup> AEP-Ohio then rehashes the arguments it presented at hearing to support its claim that the “hedge” resulting from the Standard Service Offer (“SSO”) auction process and customers’ reliance on fixed-price

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<sup>33</sup> AEP-Ohio Application for Rehearing at 19.

<sup>34</sup> Further, AEP-Ohio’s claims about the need for a “hedge” to address weather-related events such as the January 2014 weather events may be largely for local consumption. In contrast to AEP-Ohio’s attempt to justify the PPA Rider as a response to weather-related reliability concerns, a vice president of American Electric Power recently stated that the transmission system “provides a tremendous amount of resiliency whereby customers are no longer exposed to outages associated with the loss of a single transmission line or generating station; rather the grid ensures reliable power even during times when there are maintenance or storm-related outages of major system components.” Testimony of Lisa M. Barton, Executive Vice President, Transmission, American Electric Power, on the State of Technological Innovation Related to the Electric Grid Before the Committee on Energy and Natural Resources, United States Senate at 3 (Mar. 17, 2015).

<sup>35</sup> AEP-Ohio Application for Rehearing at 22. Although AEP-Ohio has overstated the Commission’s decision regarding the PPA Rider by stating that the Commission has “categorically excluded” this so-called rate mitigation tool, denial of the authorization would be the correct outcome in rehearing. As IEU-Ohio demonstrated in its Application for Rehearing, the Commission’s authorization to AEP-Ohio to establish the PPA Rider was neither lawful nor reasonable. IEU-Ohio Application for Rehearing at 11-52.

contracts to fix their generation costs are “short-term” and “limited.”<sup>36</sup> However, AEP-Ohio’s “solution” to market volatility, the PPA Rider, does not deliver any benefit.

As the Commission correctly found, AEP-Ohio failed to demonstrate that the PPA Rider has the effect of stabilizing retail electric service.<sup>37</sup> To the contrary, the record showed that the rider would inject additional volatility into customer bills, and the only party that would benefit from the PPA Rider would be AEP-Ohio, which would no longer be exposed to the business and financial risk of its interest in OVEC.<sup>38</sup>

In support of the claim that shopping customers will benefit from the PPA Rider, AEP-Ohio also argues that customers have limited options to manage retail price volatility.<sup>39</sup> The evidence, however, demonstrated that customers have available fixed price term contracts that reflect a tradeoff of term and price for up to the term of the ESP. Unlike the proposed nonbypassable rider that prevents choice,<sup>40</sup> customers can contract the term and price combinations that best meet their desired outcomes. Additionally, customers can elect other alternatives such as substitution of natural gas to manage the price risk associated with their energy needs. Accordingly, AEP-Ohio’s suggestion that customers lack options to manage their energy needs is nonsense.

**E. Authorization of the PPA Rider is unlawful, unreasonable, and not in the public interest**

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<sup>36</sup> ESP III Order at 24.

<sup>37</sup> *Id.*

<sup>38</sup> IEU-Ohio Ex. 1B at 26.

<sup>39</sup> AEP-Ohio Application for Rehearing at 23.

<sup>40</sup> No customer supported AEP-Ohio’s proposal. Only OEG indicated it supported a PPA Rider, but the rider it proposed was substantially different from that advanced by AEP-Ohio. OEG Ex. 1 *passim*.

AEP-Ohio has not presented any issue that justifies authorization to collect above-market generation-related costs.<sup>41</sup> Moreover, there is no justification for the Commission under Ohio or federal law to authorize a rider that shifts the business and financial risk of a generation owner to retail customers. Retail electric generation has been declared competitive,<sup>42</sup> and the electric distribution utility (“EDU”) “shall be fully on its own in the competitive market.”<sup>43</sup> Thus, the Commission should cut off the debate over the PPA Rider by correctly finding that it cannot lawfully authorize the rider.

**III. THE PROPOSED MODIFICATIONS OF SCHEDULE IRP-D LIMITING THE AVAILABILITY OF THE SCHEDULE AND AMENDING THE CURRENT PORTFOLIO PLAN SOUGHT BY AEP-OHIO ARE UNREASONABLE AND UNLAWFUL**

In its Application for Rehearing, AEP-Ohio requests that the Commission modify the ESP III Order to cap the aggregate load that may be under contract under Schedule IRP-D and reverse a requirement to bid demand resources associated interruptible load into capacity auctions of PJM Interconnection, LLC (“PJM”). Further, AEP-Ohio and others seek to amend AEP-Ohio’s portfolio plan to move collection of the IRP-D credit from the EE/PDR Rider to the EDR.<sup>44</sup> For the reasons discussed below, the Commission should grant AEP-Ohio’s request to remove the requirement to bid the demand resources into the base residual auctions during the term of the ESP and deny the balance of the assignments of error regarding Schedule IRP-D.

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<sup>41</sup> *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Second Entry on Rehearing at 3 (Mar. 27, 2013) (the 2011 ESP case is hereafter referred to as “ESP II Case” or “ESP II Order” as appropriate) (rehearing denied because no new issue presented).

<sup>42</sup> R.C. 4928.03.

<sup>43</sup> R.C. 4928.38.

<sup>44</sup> AEP-Ohio Application for Rehearing at 41-49. OMAEG and the Environmental Advocates also request that the Commission transfer recovery of the IRP-D credit from the EE/PDR Rider to the EDR. OMAEG Application for Rehearing at 13-16; Environmental Advocates Application for Rehearing at 18-19.

**A. The Commission should reject AEP-Ohio's proposed aggregate load cap on interruptible load that may be contracted under Schedule IRP-D**

In its Application for Rehearing, AEP-Ohio seeks authorization to limit the total aggregate load that may contract under Schedule IRP-D to 525 MW.<sup>45</sup> The ESP III Order, however, did not provide for such a limitation, and one should not be ordered. Given the expansion of the customers that may participate to include shopping customers and the recognized value of interruptible service, limiting available load to 525 MW is unreasonable.

**B. The Commission should grant AEP-Ohio's request for rehearing as to bidding demand resources into base residual auctions that coincide for the ESP term, but reject AEP-Ohio's alternative approach which would require customers to bid into future auctions**

In the ESP III Order, the Commission directed AEP-Ohio to bid the additional demand resources associated with Schedule IRP-D into the PJM base residual auctions held during the term of the ESP, with any resulting revenue credited back to customers through the EE/PDR Rider.<sup>46</sup> AEP-Ohio seeks rehearing of this requirement, arguing that it would be impossible for it to bid into PJM's base residual auctions during the term of its ESP because the base residual auctions for delivery periods during the ESP term have already occurred.<sup>47</sup> AEP-Ohio then argues that the Commission could adopt an alternative approach that transfers bidding requirements to individual customers. Under this alternative, AEP-Ohio also proposes that it be authorized to reduce the IRP-D credit available to customers. The Commission should grant rehearing and remove the

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<sup>45</sup> AEP-Ohio Application for Rehearing at 44. In its Application for Rehearing, IEU-Ohio asked that the Commission clarify that there are no caps on the interruptible load that may be contracted under Schedule IRP-D. IEU-Ohio Application for Rehearing at 72.

<sup>46</sup> ESP III Order at 40.

<sup>47</sup> AEP-Ohio Application for Rehearing at 47.

requirement that AEP-Ohio bid into the base residual auctions, but should not approve AEP-Ohio's alternative approach.

AEP-Ohio correctly identifies that PJM has conducted all base residual auctions for delivery years that coincide with the ESP term.<sup>48</sup> Therefore, neither AEP-Ohio nor customers may bid into these auctions any additional capacity that may be interrupted under Schedule IRP-D.

AEP-Ohio, however, does not provide a reasonable alternative proposal. Under AEP-Ohio's alternative proposal, a customer that has entered a contract under Schedule IRP-D would be required to bid into future PJM base residual auctions. Although customers that bid and clear their demand response capabilities into the upcoming PJM base residual auctions will not receive any revenue from PJM until after the ESP term ends because the auctions are three years in advance of the delivery year, they would have the \$8.21/kW-month credit reduced by any revenue the customer may receive when the delivery year begins.<sup>49</sup> As a result, AEP-Ohio's alternative proposal is unworkable since it attempts to match out-of-period revenue to the current period charges. Accordingly, the Commission should reject the proposal.<sup>50</sup>

In sum, neither AEP-Ohio nor customers may bid into PJM base residual auctions for the delivery years associated with the term of the ESP, but AEP-Ohio's "solution" to the problem is unworkable. Therefore, the Commission should grant

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 48.

<sup>50</sup> A separate problem with AEP-Ohio's recommendation is the pending review of the PJM demand response product. As a result of a federal court decision, there is presently uncertainty regarding the role and compensation of demand response resources in future PJM auctions. See *PJM Interconnection, L.L.C.*, Docket No. ER15-852-000, Order Rejecting Tariff Provisions (Mar. 31, 2015). Because the future of demand response resources is uncertain, it would not be reasonable for the Commission to adopt AEP-Ohio's alternative proposal.

rehearing for the sole purpose of reversing its order that requires AEP-Ohio to bid additional capacity resources associated with Schedule IRP-D into base residual auctions during the term of the ESP.

**C. The proposal to recover the costs of the IRP-D credit through the EDR is a proposed amendment of AEP-Ohio's current portfolio plan that is barred by Section 7 of Substitute Senate Bill 310 ("SB 310"); if the Commission authorizes the amendment, it should also state that customers may elect the streamlined opt-out of the benefits and costs of the amended portfolio plan**

In their Applications for Rehearing, AEP-Ohio, OMAEG, and Environmental Advocates request that the Commission amend AEP-Ohio's current portfolio plan to authorize recovery of IRP-D credits from the EDR instead of the EE/PDR Rider. AEP-Ohio argues that the amendment of the portfolio plan would be "equitable" because mercantile customers can avoid the EE/PDR Rider and because a "central purpose of Rider IRP-D [sic] ... is the promotion of economic development."<sup>51</sup> An amendment of the portfolio plan is currently barred by SB 310, but if the Commission grants the request of AEP-Ohio and the other parties, it should also find that the amendment of AEP-Ohio's current portfolio plan triggers the streamlined opt-out option for customers.

AEP-Ohio's current portfolio plan was approved in Case Nos. 11-5568-EL-POR, *et al.*, (hereinafter "*Portfolio Plan Case*") after parties entered into a stipulation and recommendation ("Stipulation").<sup>52</sup> Under the Commission-approved Stipulation, AEP-Ohio may count interruptible load under contract pursuant to Schedule IRP-D toward satisfaction of AEP-Ohio's peak demand reduction portfolio requirement, and the costs

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<sup>51</sup> AEP-Ohio Application for Rehearing at 46.

<sup>52</sup> *Portfolio Plan Case*, Stipulation and Recommendation at 4 (Nov. 29, 2011).



of the IRP-D credit are recovered through the EE/PDR Rider.<sup>53</sup> Although the portfolio plan was scheduled to terminate at the end of 2014, the plan remains in effect until the end of 2016 under Section 6(D) of SB 310.<sup>54</sup> Thus, if the Commission grants the relief AEP-Ohio and the others request, the Commission would authorize an amendment to the current portfolio plan.

Section 7(B) of SB 310, however limits the amendments that the Commission may authorize to those permitted under Section 6(B) of SB 310. Under the terms of those sections, an amendment of the portfolio plan was timely within thirty days after the effective date of the legislation. Since the legislation was effective September 12, 2014, the thirty-day period has expired. Accordingly, the amendment of the portfolio plan sought by the Applications for Rehearing of AEP-Ohio, OMAEG, and the Environmental Advocates is untimely.

If the Commission authorizes an untimely amendment to the portfolio plan by granting the Applications for Rehearing, however, the Commission's entry also should direct that customers may exercise the streamlined opt-out that would have been available under Section 8 of SB 310 as if AEP-Ohio had properly sought an amendment.<sup>55</sup> Under that section, customers may opt out of the opportunity to obtain direct benefits of an electric utility's amended portfolio plan and avoid the costs. The purpose of the early opt-out provision is to accelerate customer relief from the portfolio

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<sup>53</sup> The stipulation provides that under AEP-Ohio's portfolio plan "[c]ontracted interruptible load associated with the Companies' existing tariff programs for interruptible service (IRP-D) will count toward the PDR benchmarks." *Id.*; see also *Portfolio Plan Case*, Opinion and Order at 7 (Mar. 21, 2012). The stipulation further provides that the costs associated with its portfolio plan will be recovered through the EE/PDR Rider. *Portfolio Plan Case*, Stipulation and Recommendation at 9 (Nov. 29, 2011). The Commission approved the stipulation without modification. *Portfolio Plan Case*, Opinion and Order at 17-18 (Mar. 21, 2012).

<sup>54</sup> SB 310, § 6(D), available at: [http://archives.legislature.state.oh.us/bills.cfm?ID=130\\_SB\\_310](http://archives.legislature.state.oh.us/bills.cfm?ID=130_SB_310).

<sup>55</sup> *Id.*, § 8.

costs.<sup>56</sup> If the Commission grants the Applications for Rehearing and permits AEP-Ohio to amend its portfolio plan, therefore, customers should be afforded the right to opt out as provided by SB 310, even though the amendment is untimely.

#### **IV. THE COMMISSION SHOULD REJECT AEP-OHIO'S "CLARIFICATION" OF THE COMMISSION'S FINAL ORDER REGARDING THE DIR IN THE ESP II CASE**

According to AEP-Ohio, the Commission erred when it reduced the amount AEP-Ohio may collect in carrying charges associated with distribution assets by reducing the revenue caps and removing proposed additions of general plant from the calculation of the DIR that AEP-Ohio sought in its Application.<sup>57</sup> As an alternative to increasing the caps, it argues that "[i]t would ... partially offset the adverse effects of drastic annual revenue cap reductions to clarify in this context that the Commission's intention in the ESP II decision ... to adopt an \$86 million annual revenue cap for 2012 without proration, which would produce a significant carryover amount."<sup>58</sup> The Commission should reject AEP-Ohio's request to rewrite the DIR as authorized in the ESP II Order because the "clarification" AEP-Ohio is seeking is unlawful and unreasonable.

The Commission issued the ESP II Order on August 8, 2012. The ESP II Order provided that AEP-Ohio was subject to annual revenue caps of \$86 million in 2012, \$104 million in 2013, \$124 million in 2014, and \$51.7 million for the period of January 1 through May 21, 2015.<sup>59</sup> Further, the order stated that AEP-Ohio was to increase or decrease the annual revenue cap in a subsequent period by the amount it under or

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<sup>56</sup> *Id.*, § 3 (purpose of review to reduce "unrealistic" energy efficiency mandates).

<sup>57</sup> AEP-Ohio Application for Rehearing at 25-38.

<sup>58</sup> *Id.* at 38.

<sup>59</sup> ESP II Order at 42.

over-recovered in the current year.<sup>60</sup> The ESP II Order also required AEP-Ohio to adjust the revenue AEP-Ohio could bill and collect under the DIR to reflect an offset to account for accumulated deferred income taxes (“ADIT”).<sup>61</sup>

AEP-Ohio sought rehearing of the ESP II Order authorizing the DIR,<sup>62</sup> but challenged only the requirement that it adjust the DIR revenue calculation for ADIT.<sup>63</sup> The Commission denied rehearing of AEP-Ohio’s assignment of error in an Entry on Rehearing issued January 30, 2013.<sup>64</sup> The Office of the Ohio Consumers’ Counsel (“OCC”) and IEU-Ohio filed applications for rehearing of the January 30, 2013 Entry on Rehearing on March 1, 2013.<sup>65</sup> The Commission denied these applications for rehearing on March 27, 2013.<sup>66</sup> No party sought rehearing of the March 27, 2013 Entry on Rehearing. The ESP II Order thus became final thirty days later when no party filed another application for rehearing. Having failed to seek rehearing of the Commission’s order concerning the calculation of the annual revenue caps, AEP-Ohio waived review of that provision of the ESP II Order.<sup>67</sup>

The Commission subsequently ordered an audit of the 2012 DIR rate for the collection period of August to December 2012.<sup>68</sup> On June 20, 2013, the auditor filed its

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<sup>60</sup> *Id.* at 42-43.

<sup>61</sup> *Id.* at 47.

<sup>62</sup> *Id.*, Application for Rehearing of Ohio Power Company (Sept. 7, 2012).

<sup>63</sup> *Id.* at 2 (Assignment of Error IV).

<sup>64</sup> *Id.*, Entry on Rehearing at 45-46 (Jan. 30, 2013).

<sup>65</sup> See *id.*, Application for Rehearing of the January 30, 213 Entry on Rehearing and Memorandum in Support (Mar. 1, 2013).

<sup>66</sup> *Id.*, Second Entry on Rehearing (Mar. 27, 2013).

<sup>67</sup> An assignment of error must be made with specificity or is waived. R.C. 4903.10.

<sup>68</sup> *In the Matter of the Review of the Delivery Capital Recovery Rider Contained in the Tariff of Ohio Power Company*, Case No. 13-419-EL-RDR, Entry, (Feb. 20, 2013).

report.<sup>69</sup> As outlined in the 2012 Compliance Report, AEP-Ohio's cap on revenue was stated to be \$86 million for 2012. Based on the rates established through the formula to calculate the rate, AEP-Ohio would have had a revenue under-recovery of \$9.7 million if the rate had been in effect for all of 2012. Under the terms of the ESP II Order, AEP-Ohio carried forward that \$9.7 million as an increase in the 2013 revenue cap.<sup>70</sup> Separately, AEP-Ohio also calculated "underbilled" revenue of \$4.8 million which it described as the difference between the DIR "costs" and the DIR revenue billed for the August 2012 to December 2012 period that led to a revenue shortfall.<sup>71</sup> AEP-Ohio adjusted the subsequent rate for the underbilled amount.<sup>72</sup> Following submission of the 2012 Compliance Report, parties to the case entered into a Stipulation that the Commission approved.<sup>73</sup> The parties agreed to the calculation of the cap and the rate subject to a small adjustment to the rate and an alteration of the treatment of certain equipment.<sup>74</sup> AEP-Ohio did not seek rehearing of the revenue calculations the Commission reviewed in the 2012 Compliance Report.

Although it has never sought rehearing of the terms of the DIR in the ESP II Order except as they relate to the requirement to adjust the revenue collected for ADIT, AEP-Ohio seeks a "clarification" of the ESP II Order so that it may increase the revenue cap for 2015 as part of its Application for Rehearing of the ESP III Case. According to AEP-Ohio, it is unclear "whether the Commission intended to prorate the \$86 million

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<sup>69</sup> *Id.*, Compliance Audit of 2012 Distribution Investment Rider (DIR) of Columbus Southern Power and Ohio Power Company d/b/a AEP-Ohio (June 20, 2013) ("2012 Compliance Report").

<sup>70</sup> *Id.*, 2012 Compliance Report at 45.

<sup>71</sup> *Id.*, 2012 Compliance Report at 45-46.

<sup>72</sup> *Id.*, 2012 Compliance Report at 45.

<sup>73</sup> *Id.*, Opinion and Order (Apr. 23, 2014).

<sup>74</sup> *Id.*, Amended Stipulation and Recommendation (Jan. 17, 2014).

revenue cap for 2012 (based on an effective date of August 2012), so that the actual revenue cap for 2012 could either be \$86 million per the order or \$35.8 million (5/12 of \$86 million).<sup>75</sup>

The Commission's approval of the 2012 Compliance Report, however, demonstrates that there is nothing for the Commission to clarify. As confirmed by the 2012 Compliance Report, the revenue cap of \$86 million for 2012 was used to determine the carryover amount. Because a calculation based on the \$86 million revenue cap has already been performed and AEP-Ohio has secured the opportunity to bill and collect the adjusted revenue cap amount for 2013 and beyond as permitted by the ESP II Order, there is no reasonable basis for the Commission to allow AEP-Ohio to increase its 2015 DIR cap any further.

Moreover, if the Commission allowed AEP-Ohio to reach back to a period prior to the authorization of the DIR to determine the revenue cap, the clarification would result in unlawful retroactive ratemaking. To calculate the revenue cap for 2012, AEP-Ohio is seeking to treat the period for the collection of revenue as twelve months rather than the five months that the DIR was authorized and carry the alleged revenue shortfall forward. Thus, AEP-Ohio's clarification to increase the revenue cap for 2012 and thereafter would have the same financial effect as the order in AEP-Ohio's first ESP case that the Supreme Court found unlawful because it permitted AEP-Ohio to adjust its revenue requirement as if the rates have been in effect for twelve rather than nine months.<sup>76</sup> If the Commission granted the "clarification" AEP seeks of the ESP II Order, the Commission would permit AEP-Ohio to adjust the revenue cap as if the DIR had been in

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<sup>75</sup> AEP-Ohio Application for Rehearing at 39.

<sup>76</sup> *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 514-15 (2011).

effect for the full year instead of the last five months of 2012. Because the clarification would result in unlawful retroactive ratemaking, the Commission should reject it.

Additionally, AEP-Ohio's request to increase the revenue it may recover through the DIR in 2015 is an untimely application for rehearing of the ESP II Order. To be timely, AEP-Ohio was required to seek "clarification" within thirty days after the Commission issued the ESP II Order.<sup>77</sup> This request for "clarification" comes long after the thirty-day period to seek rehearing. Because AEP-Ohio's request for clarification of the ESP II Order is not timely, the Commission must deny it.<sup>78</sup>

Further, AEP-Ohio is barred from raising this issue under the doctrines of *res judicata* and collateral estoppel. The Commission previously determined the amount of over or under-recovery that may be included in the revenue cap in a subsequent period in the ESP II Order and confirmed a methodology for the calculation when it approved the 2012 Compliance Report. AEP-Ohio did not seek rehearing of either decision. "The inevitable conclusion from these facts is that [AEP-Ohio] is barred by the doctrines of *res judicata* and collateral estoppel from attempting to relitigate the issue."<sup>79</sup>

Accordingly, the Commission should deny AEP-Ohio's attempt to increase its compensation through an increase in the amount it can claim to recover under the ESP II Order because the "clarification" is inconsistent with the findings of the ESP II Order and 2012 Compliance Report that the Commission previously approved, would result in unlawful retroactive ratemaking, would result in an untimely rehearing of the ESP II Order, and is barred by the doctrines of *res judicata* and collateral estoppel.

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<sup>77</sup> R.C. 4903.10.

<sup>78</sup> *In the Matter of the Commission-Ordered Investigation of Ameritech Ohio Relative to Its Compliance with Certain Provisions of the Minimum Telephone Service Standards Set Forth in Chapter 4901:1-5, Ohio Administrative Code*, Case No. 99-938-TP-COI, Entry on Rehearing at ¶34 (Sept. 19, 2000).

<sup>79</sup> *Office of Consumers' Counsel v. Pub. Util. Comm'n of Ohio*, 16 Ohio St.3d 9, 10 (1985).

**V. THE COMMISSION SHOULD DENY AEP-OHIO'S REQUEST FOR AUTHORIZATION OF THE NCCR**

Because AEP-Ohio failed to carry its burden of proof, the Commission denied authorization of AEP-Ohio's request for the NCCR.<sup>80</sup> Even though AEP-Ohio failed to demonstrate that it had or would have any NERC compliance or cybersecurity costs, AEP-Ohio seeks rehearing of the Commission's denial of authorization, arguing that the Commission should authorize a placeholder rider as it has done in previous ESP cases and that it is "clear" that AEP-Ohio will incur cybersecurity costs.<sup>81</sup> AEP-Ohio, however, offers no legal basis to reverse the Commission's conclusion that AEP-Ohio failed to carry its burden of proof, and authorization would trigger a violation of the ESP v. MRO Test. Accordingly, the Commission should deny AEP-Ohio's assignment of error.

Initially, AEP-Ohio does not offer any basis for the Commission to reverse its prior determination that AEP-Ohio failed to carry its burden of proof to support the rider. AEP-Ohio points to the Commission's understandable recognition that reliability is important and that AEP-Ohio may incur costs in the future, as if that somehow justifies cost recovery.<sup>82</sup> The burden of proof to demonstrate the lawfulness and reasonableness of cost recovery, however, rests with AEP-Ohio.<sup>83</sup> As the Commission correctly found, AEP-Ohio did not demonstrate that it had any identifiable costs<sup>84</sup> and failed to show how costs would be allocated.<sup>85</sup> Further, the Commission correctly noted

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<sup>80</sup> ESP III Order at 62.

<sup>81</sup> AEP-Ohio Application for Rehearing at 64-65.

<sup>82</sup> *Id.*

<sup>83</sup> R.C. 4928.143(C)(1).

<sup>84</sup> ESP III Order at 62.

<sup>85</sup> *Id.*

that AEP-Ohio could file a distribution case if it wishes to secure cost recovery.<sup>86</sup> Accordingly, AEP-Ohio has not offered a reasoned basis for the Commission to reverse its refusal to authorize the NCCR.

Moreover, authorization of the NCCR as a placeholder rider would trigger a violation of R.C. 4928.143(C)(1). Under that section, the Commission must find that the ESP, “so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code.”<sup>87</sup> Thus, the Commission can approve a rider as a term of the ESP only if it addresses all the expected charges that will be imposed by the ESP, including those deferred for future recovery, and finds that the result is better than the expected results of an MRO. If the Commission authorizes the NCCR with an initial rate of zero, AEP-Ohio will be permitted to pursue authorization to collect costs while evading its burden of proof to demonstrate that the ESP, including those additional costs recovered under the NCCR, passes the ESP v. MRO Test. Accordingly, authorization of the NCCR as a placeholder rider is unlawful.

## **VI. CONCLUSION**

For the reasons discussed above, the Commission should deny AEP-Ohio’s request for authorization to bill and collect above-market generation-related wholesale costs of OVEC. Further, the Commission should not authorize the revisions of Schedule IRP-D requested by AEP-Ohio with one exception related to bidding resources into the PJM base residual auctions during the ESP term. The Commission

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<sup>86</sup> *Id.*

<sup>87</sup> R.C. 4928.143(C)(1).



should also reject AEP-Ohio's untimely attempt to secure clarification of the DIR in the ESP II Order. Finally, the Commission should reject AEP-Ohio's request for authorization of the NCCR.

Respectfully submitted,

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In Accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Memorandum of Industrial Energy Users-Ohio in Opposition to the Applications for Rehearing of the Ohio Power Company, Ohio Manufacturers' Association Energy Group, and Environmental Advocates* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 6th day of April 2015, via electronic transmission.

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**in**

**Case No(s). 13-2385-EL-SSO, 13-2386-EL-AAM**

Summary: Memorandum of Industrial Energy Users-Ohio in Opposition to the Applications for Rehearing of the Ohio Power Company, Ohio Manufacturers' Association Energy Group, and Environmental Advocates electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio