BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan.	)))))	Case No. 13-2385-EL-SSO
In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority.	)))	Case No. 13-2386-EL-AAM

OHIO POWER COMPANY'S MEMORANDUM CONTRA INTERVENOR APPLICATIONS FOR REHEARING

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On behalf of Ohio Power Company

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SUMMARY OF ARGUMENT

In its February 25, 2015 Opinion and Order, the Commission approved with modifications the application of Ohio Power Company ("AEP Ohio" or the "Company") for a standard service offer ("SSO") in the form of an electric security plan ("ESP III"). The Office of the Ohio Consumers' Counsel ("OCC"); Ohio Partners for Affordable Energy and Appalachian Peace and Justice Network ("OPAE/APJN"); Ohio Hospital Association ("OHA"); Industrial Energy Users – Ohio ("IEU"); Interstate Gas Supply, Inc. ("IGS"); Ohio Manufacturers' Association Energy Group ("OMAEG"); Constellation New Energy, Inc. and Exelon Generation, LLC ("CNE/Exelon"); Environmental Law & Policy Center, Ohio Environmental Council, and Environmental Defense Fund ("Environmental Intervenors"); and Retail Energy Supply Association ("RESA") filed applications for rehearing of the Opinion and Order.

The PPA Rider is reasonable and lawful.

In approving the PPA Rider, the Commission properly relied upon the ESP statute, which permits provisions, like the PPA Rider, that relate to bypassability and limitations on customer shopping for electric generation service. *See* R.C. 4928.143(B)(2)(d). Intervenor challenges to the statutory authority for the PPA Rider rehash many arguments that the Commission has already considered and rejected and do not otherwise merit rehearing. The PPA Rider satisfies R.C. 4928.143 and was properly approved in this ESP through record-based findings that support the statutory criteria relied upon in the Opinion and Order.

AEP Ohio filed an application for rehearing regarding the Purchase Power Agreement (PPA) Rider and asked the Commission (among other things) to reconsider its decision to defer whether OVEC costs should be included in the PPA Rider that the Opinion and Order approved. As AEP Ohio's application noted, however, the Commission's Opinion and Order included significant legal and policy support for the establishment of the PPA Rider itself, as well as for

other components of the ESP that the Opinion and Order approved. Intervenors' challenges to the Opinion and Order on rehearing largely repeat arguments that the Commission has already fully considered and rejected and otherwise do not raise a basis for the Commission to modify its decision. As set forth herein, the Commission should deny the intervenor applications for rehearing in their entirety.

And contrary to intervenors' rehearing requests, it was necessary and appropriate for the Commission to approve a zero-dollar placeholder PPA Rider to be filled either on rehearing with AEP Ohio's OVEC proposal (as AEP Ohio's own application for rehearing advocates), or in a future proceeding. It is well-settled that the Commission may approve placeholder riders in an ESP, as the Commission itself recognized in its Opinion and Order. Moreover, it would be a legally flawed approach to deny the Rider now, when the ESP statute supports it, and to subsequently try to adopt it outside of an ESP proceeding. There is no merit to IEU's arguments regarding the PPA Rider's effect on the MRO/ESP test, which seeks to relitigate established methods.

The Commission also acted reasonably in articulating non-binding guidelines regarding the factors it would like to have addressed in any future PPA sought to be included in the PPA Rider. Intervenors' attempts to add to those guidelines in order to make it impossible for any PPA to be included in the Rider should be disregarded. And, most of the guidelines proposed would defeat the very purpose of the PPA and its hedging function by requiring competitive procurement, which would yield market rates. Intervenors' requests to impose cost savings guarantees or to collect the PPA Rider subject to refund are also wholly inappropriate and contrary to the very design and purpose of the rider. Intervenors advance a laundry list of other challenges to the PPA Rider, none of which pass muster.

Contrary to IEU's arguments, the Commission's treatment of the PPA Rider did not violate the rulemaking requirements of R.C. Chapter 119; those requirements are not applicable here because the Commission did not issue any "rule." Nor, as IEU argues, is the Commission's list of nonbinding factors to consider in a future PPA Rider implementation case "void for vagueness." That doctrine does not apply because the Commission did not issue any rule, and even if it did, the Commission's nonbinding factors are not unconstitutionally vague.

The PPA Rider also does not create an anti-competitive subsidy in violation of R.C. 4928.02(H). Despite intervenors' claims, the rider is properly classified as generation-related. The Commission should also disregard intervenor attempts to apply inapposite decisions interpreting SB 3 here.

Intervenors' repeated arguments that the Federal Power Act preempts the PPA Rider are also without merit. The Commission clearly has authority to set the *retail* rates for AEP Ohio's customers, and the PPA Rider falls squarely within that retail ratemaking authority. Moreover, the Commission did not err in declining to take up a preemption analysis, which the Commission had no need to do, and which would be more appropriately resolved by the judiciary.

Next, there is also no merit to RESA's repeated argument that the PPA Rider violates the corporate separation statute. That statute explicitly subordinates its requirements to the ESP statute, under which the PPA Rider was authorized.

Finally, consistent with previous decisions, the Commission should decline again to accept intervenors' misplaced argument that the PPA Rider would permit AEP Ohio to collect untimely transition revenues in violation of R.C. 4928.39. There is no evidence supporting the position that the inclusion of the OVEC units (or any other PPA) in the rider would lead to stranded costs.

The Commission approved a reasonable return on equity that the record evidence supported.

The Commission's determination that a 10.2 percent ROE is appropriate during the term of ESP III was reasonable and well supported by ample record evidence in this case. Contrary to OCC's claim otherwise, it is clear from the Opinion and Order that the Commission set the ROE based upon that evidence, and not based upon the ROE established in AEP Ohio's last distribution rate case. Thus, by merely referencing the distribution rate case settlement, the Commission did not, as OCC and IEU claim, violate that settlement or cite it as precedent for or against any party. The Commission also should disregard OCC's improper request to factor into its ROE determination a number of past issues from other past, unrelated cases. That request improperly seeks a "second bite at the apple" on issues that the Commission previously decided and would circumvent the Commission's statutory significantly excessive earnings test annual review.

Intervenors' requests for rehearing concerning the Distribution Investment Rider and other riders are without merit.

The Commission should disregard OPAE/APJN's unsupported contention that the ESRR AEP Ohio proposed in this case should not have been approved, which OPAE/APJN appear to advance based on the general argument that distribution charges should not be considered outside of base rate cases. As the Commission has repeatedly found, the Commission has the authority – and it is appropriate – to approve distribution –related riders in ESP proceedings.

OPAE/APJN's and OMAEG's criticisms of the approval of AEP Ohio's DIR also do not warrant rehearing. Intervenors simply repeat affordability and policy arguments that they previously made in post-hearing briefs. The Commission has already considered and rejected these arguments in approving the DIR.

The Commission correctly approved the Basic Transmission Cost Recovery Rider.

As a number of intervenors agree, the Commission acted reasonably and appropriately in approving AEP Ohio's request to terminate its existing Transmission Cost Recovery Rider ("TCRR") and replace it with a Basic Transmission Cost Recovery Rider ("BTCR"). IEU raises a number of arguments on rehearing that the Commission has already considered and rejected. Its other positions, regarding customers' participation with respect to double billing and the burden of proof the Commission applied in considering the BTCR's rate design, simply amount to IEU second-guessing a decision with which it does not agree. IEU's novel preemption argument also does not hold water. There is no record on that issue in this case, Ohio law contradicts IEU's position, and IEU is collaterally estopped from advancing it now, after failing to raise it in three other EDUs' cases in which comparable riders were approved. Finally, there is no need to grant rehearing as to RESA's request that the Commission establish a process to ensure that the TCRR and BTCR are properly reconciled because adequate mechanisms already exist to address that concern.

The Commission's IRP-D ruling does not need to be clarified as requested by IEU, but the 525 MW cap should be retained regardless of any clarifications.

There is no need to clarify the IRP-D ruling since emergency interruptions should be handled in the same manner as the rider currently provides and that discretionary interruptions will no longer by required by the rider going forward. AEP Ohio also submits that existing customers currently taking service from Rider IRP-D should be grandfathered to the extent of their current interruptible load served under that schedule and recommends that the appropriate and fair way to allocate remaining load available under the existing 525 MW load limitation continues to be the existing first come, first served method. The Commission should, in any case, deny IEU's request that the Commission eliminate the existing 525 MW load limitation.

As the Company explained in its application for rehearing, the potential burden on remaining firm customers would be excessive and unreasonable if the cap is eliminated.

The Commission properly approved the Purchase of Receivables Program and Bad Debt Rider.

Contrary to OPAE/APJN's claim, the Commission relied upon substantial record evidence that demonstrated that the authorization of a Purchase of Receivables ("POR") program will benefit customers and assist the competitive market's development. OPAE/APJN's argument that creation of the related Bad Debt Rider ("BDR") violates R.C. 4928.02(H)'s prohibition against unlawful subsidies also lacks merit. The Commission has already previously determined that a bad debt rider like the one it approved here is lawful, and that it can be properly approved in an ESP proceeding.

For its part, RESA's position that the Commission should order the Company to file a proxy plan for stakeholder comments ignores the fact that implementation of a POR program that harms the Company is not a requirement. Any stakeholder process should be convened to implement the Company's proposed plan or if the modifications are not fixed then to explore the capability of a program that the Company is willing to implement. On the other issues, RESA's aggressive proposed timeline for Staff to produce a report of supplier consolidated billing and tariff issues in the Market Development Working Group ("MDWG") contradicts RESA's position elsewhere in its application for rehearing that the structure of AEP Ohio's POR must be addressed outside that group because the "MDWG has plenty of issues to discuss and debate already." RESA's contradictory position regarding supplier consolidated billing is unreasonable and should be denied. Finally, RESA's request for access to all distribution company interval meter data is not an appropriate topic for this proceeding.

The Commission's auction decision was reasonable and lawful.

It was reasonable and lawful for the Commission, in its discretion, to order AEP Ohio to conduct two competitive auctions, rather than one, prior to June 2015. CNE/Exelon's concerns that the Company will not be ready for such auctions are incorrect. There will, however, be waste and harm if the Commission changes its decision on this issue on rehearing, because by that point the Company and prospective bidders will have undertaken significant efforts to prepare for an auction that would not take place.

The Commission established the appropriate amount of funding for low income programs.

The Commission should deny OPAE/APJN's request that AEP Ohio double its contribution and provide an additional $1 million annually to fund low-income programs. The ESP that the Commission approved already supports the objectives of R.C. 4928.02(A) and (L). There is simply no basis to double the existing $1 million annual shareholder contribution.

The Commission properly found that ESP III satisfies the MRO/ESP Test.

The Commission correctly found that the ESP it approved for AEP Ohio is more favorable in the aggregate as compared to the expected results that would otherwise occur under a Market Rate Offer ("MRO"). As AEP Ohio explained in its application for rehearing, the Commission's modifications to ESP III actually provide an additional $9 million of quantifiable benefits that should be included in the Commission's calculation. The Commission should disregard OCC's and OMAEG's arguments regarding the ESP's quantitative benefits. Contrary to these intervenors' claims, the Company's voluntary commitment to continue the Residential Distribution Credit ("RDC") through the term of this ESP is a quantifiable benefit of the ESP.

Moreover, the Commission correctly excluded the incremental revenue requirements of distribution riders as quantifiable costs in its MRO/ESP comparison because those revenue requirements could be recovered through the ESP or through a distribution rate case conducted in

conjunction with an MRO. There is no basis for OCC's position that the Commission must ignore the expected results of a distribution base rate case conducted in conjunction with the MRO alternative in administering the statutory test. There is also no basis for OCC's OMAEG's position that the Commission was required to estimate costs for zero-dollar placeholder riders and include those estimates in the MRO/ESP test. The Commission has previously considered and rejected similar arguments because where it is not yet known what the impacts of a rider might be, there is no basis to include it in the statutory test.

OCC's and OMAEG's arguments that the Commission improperly evaluated the qualitative benefits of the ESP are similarly misplaced. It is absolutely incorrect that qualitative benefits should be excluded from the MRO/ESP test, as OCC has argued. The Commission has repeatedly recognized that it must consider the non-quantifiable aspects of an ESP in order to view it in the aggregate. It should continue to do so here. In this regard, the Commission also was correct in recognizing the accelerated transition to fully market-based rates as a benefit of the ESP, in noting as qualitative benefits that the ESP advances many of the important state policy objectives set forth in R.C. 4928.02, and in finding that the ability to hold base distribution rates constant over the ESP term as a result of the continuation of AEP Ohio's distribution-related riders is a qualitative benefit.

ARGUMENT

I. It was reasonable and lawful for the Opinion and Order to adopt the PPA Rider. [CNE/Exelon Props. 1-3; Environmental Intervenors Props. 1-3; IEU Props. 1-12, 18; IGS Props. 1-4; OCC Props. 1-2, 5; OHA AFR §2.; OMAEG Prop. 1; OPAE/APJN Props. 1-5; RESA Props. 1-2][1]

A. The Opinion and Order properly relied upon the ESP statute, R.C. 4928.143, in adopting the PPA Rider. [RESA Prop. 1]

As a threshold matter, RESA argues (at 8-10) that an EDU is not permitted under an ESP to provide generation service to shopping customers. In particular, RESA argues that generation service is competitive and that R.C. 4928.03, 4928.141 and 4928.143 permit an EDU to provide generation service only to "customers who have not selected a competitive retail electric service provider." (RESA AFR at 9.) RESA is incorrect.

The ESP statute, including Division (B)(2)(d), refers to "electric generation service" and "retail electric generation service," but it does not refer to "competitive retail electric service." The statutory term "retail electric service" is a broader term and includes, among other things, generation service. *See* R.C. 4928.01(A)(27).[2] To the extent that R.C. 4928.141 refers to "competitive retail electric service" as including a firm supply of electric generation service, it merely confirms that generation service is part of the standard service offer (SSO). Further, while R.C. 4928.14 requires an EDU to provide service to shopping customers under its SSO when their selected CRES financially defaults, that statute also does not say what RESA asserts (that generation service cannot be provided to shopping customers as part of an ESP).

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[1] AEP Ohio is providing cross references to the intervenor propositions being addressed in each major argument heading [in brackets following the heading]. Some intervenors used different numbering as between their application for rehearing and the memorandum in support. The numbering used in AEP Ohio's cross references correspond to the assignments of error as listed in the intervenors' applications for rehearing (but do not necessarily correspond to numbering in the intervenors' memoranda in support).

[2] Indeed, the Supreme Court of Ohio has held in the context of affirming a generation-related charge as part of an ESP that generation falls within the definition of "retail electric service" for purposes of Division (B)(2)(d) of the ESP statute. *Industrial Energy Users-Ohio v. Pub. Util. Comm.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 32.

Nor do the other general statutes relied upon by RESA conflict with the Opinion and Order's adoption of the PPA Rider under the ESP statute. For example, R.C. 4928.141 makes it clear that an ESP plan is to be formulated and approved "in accordance with section 4928.143." Similarly, the corporate separation statute, R.C. 4928.17, explicitly subordinates its requirements as being applicable "except as otherwise provided in" the ESP statute. In short, there is nothing within R.C. Chapter 4928 that prohibits an EDU from providing generation service to shopping customers as part of an ESP.

The most obvious and fatal flaw in RESA's theory is that it directly conflicts with Divisions (B)(2)(b) and (B)(2)(c) of the ESP statute. Both of those provisions contemplate nonbypassable generation charges for all shopping and non-shopping customers relating to newly-built capacity – by and through an EDU as part of an ESP.[3] Consistent with that obvious example, Division (B)(1) of the ESP statute more generally provides – without regard to a customer's status as shopping or non-shopping – that an ESP "shall include provisions relating to the supply and pricing of electric generation service." The prefatory language in Division (B) of the ESP statute also makes clear that the terms of the ESP statute apply "[n]otwithstanding any other provision of Title XLIX of the Revised Code" except for three specific statutes that have no application here (R.C. 4928.20, R.C. 4928.64 and R.C. 4928.69). In short, the ESP statute itself is what governs this case and the approval of the PPA Rider. The provision at issue here,

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[3] Relying on these same two provisions of the ESP statute, IEU argues (at 14-15) that Division (B)(2)(d) of the ESP statute does not support the PPA Rider because, IEU maintains, only Divisions (B)(2)(b) and (B)(2)(c) authorize the establishment of nonbypassable generation riders under the ESP statute. Of course, the opposite conclusion can be said with equal force: inclusion of the examples in Divisions (B)(2)(b) and (B)(2)(c) shows that nonbypassable generation charges are permitted as part of an ESP. The latter conclusion is particularly cogent given that Division (B)(2)(d) specifically authorizes nonbypassable charges, and the other related statutory provisions confirm the same result, as demonstrated herein.

Division (B)(2)(d), also permits provisions relating to "limitations on customer shopping for electric generation service" as part of an ESP, which is the essence of the PPA Rider.

B. The Opinion and Order correctly concluded that the PPA Rider qualifies under Division (B)(2)(d) of the ESP Statute, R.C. 4928.143. [Environmental Intervenors Props. 1-2; IEU Props. 1-4; IGS Prop. 2; OCC Props. 2, 5; OHA AFR § 2.A.; OMAEG Prop. 1; OPAE/APJN Props. 1-2; RESA Prop. 1]

Consistent with its *ESP II* decision adopting a rate stability charge under Division (B)(2)(d) of the ESP statute, the Commission invoked three applicable statutory criteria in adopting the PPA Rider:

> Specifically, an ESP component approved under R.C. 4928.143(B)(2)(d) must [1] first be a term, condition, or charge; next, [2] relate to one of the enumerated types of terms, conditions, and charges; and, finally, [3] have the effect of stabilizing or providing certainty regarding retail electric service.

Opinion and Order at 20. The Opinion and Order went on to evaluate the PPA Rider proposal in light of the record in this case and properly concluded that all three of the criteria were met. *Id.* at 20-22.

On rehearing, several intervenors predictably second guess the Commission's findings regarding the second and third statutory criteria. In particular, OCC, IEU, OMAEG, and OPAE/APJN all make specific attacks on the Opinion and Order's findings regarding the second and third criteria that are discussed below. Likewise, OHA generally criticizes (at 3-7) the Commission's finding that the PPA Rider satisfies the three components of Division (B)(2)(d) of the ESP statute. None of the intervenors' challenges have merit as the Commission properly invoked R.C. 4928.143(B)(2)(d) and made record-based findings demonstrating that the PPA Rider satisfies the statutory criteria.

1. The PPA Rider is a term, condition, or charge, as the Opinion and Order properly found.

Regarding the first of the three criteria under Division (B)(2)(d) of the ESP statute, the Opinion and Order found as follows:

> [T]he first requirement of R.C. 4928.143(B)(2)(d) is met, as the PPA rider would consist of a charge incurred by customers under the ESP. The PPA rider, as proposed by AEP Ohio, would appear as a charge on customer bills, and there is no dispute among the parties on this point. Although AEP Ohio projects that the PPA rider would provide a net credit over the course of the ESP term, the Company estimates that the rider would result in a net charge to customers in the first year of the ESP (Co. Ex. 8B). Thus, the record indicates that the PPA rider would, at times, consist of a charge to customers.

Opinion and Order at 20. Of course, a credit is simply a negative charge anyway, and credits would qualify as "relating to" the PPA Rider charge calculation, so the times when the PPA Rider is a credit still qualify under this part of the statutory language. None of the intervenors challenge this finding regarding the first statutory criterion on rehearing.[4] Therefore, this aspect of Division (B)(2)(d) is definitively established and cannot be challenged on appeal.

2. The PPA Rider "relates to" bypassability and a limitation on shopping, as the Opinion and Order properly found.

The Opinion and Order accurately recited the second statutory criterion as follows:

> [T]o meet the second requirement of R.C. 4928.143(B)(2)(d), the proposed PPA charge must relate to at least one of the following: limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals.

Opinion and Order at 21. Regarding the applicability of Division (B)(2)(d) to the PPA Rider, the Opinion and Order made this initial finding:

> R.C. 4928.143(B)(2)(d) authorizes electric utilities to include, in an ESP, terms related to "bypassability" of charges to the extent that such charges have the effect of stabilizing or providing certainty regarding retail electric service. * * *

[4] Indeed, some of the PPA challengers explicitly concede this point. OHA AFR at 3; IGS AFR at 10; OCC AFR at 19; and RESA AFR at 9.

> However, we also agree with Staff that, since nearly any charge may be bypassable or non-bypassable, "bypassability" alone is insufficient to fully meet the second criterion of R.C. 4928.143(B)(2)(d).

Opinion and Order at 22. The Opinion and Order went on to address the "limitation on shopping" component of the statute as it applies to the PPA Rider:

> Nonetheless, the Commission agrees with AEP Ohio and OEG that the proposed PPA rider is a financial limitation on customer shopping for retail electric generation service. Although the proposed PPA rider would impose no physical constraints on shopping, the rider does constitute, as OEG witness Taylor explained, a financial limitation on shopping that would help to stabilize rates (Tr. XI at 2539, 2559).

Id. Thus, the Opinion and Order concluded that the "limitation on shopping" component of the statute applies to the PPA Rider in conjunction with the "bypassability" component of the statute. None of the intervenors challenge the conclusion that the "bypassability" component of Division (B)(2)(d) applies to the PPA Rider, but some intervenors advance their opinion that the "limitation on shopping" component should not apply to the PPA Rider.[5]

As an initial matter, OCC, IEU and OPAE/APJN are critical of the fact that AEP Ohio witnesses did not address the legal-statutory basis for the PPA Rider in their testimony or use the same terminology as the statute, and that the Company first addressed the statutory issue with clarity in its legal brief. (OCC AFR at 20-22; IEU AFR at 16-22; OPAE/APJN AFR at 7-12.) But the statutory issue is a legal matter and it would not be appropriate as a focus in expert

[5] Although the Commission concluded that it was unnecessary to reach the Company's additional argument that the PPA Rider can also be considered as relating to "default service" as an alternative to the "limitation on shopping" criterion, *see* Opinion and Order at 22, AEP Ohio submits that it may be wise on rehearing to address this point and further clarify this viable alternative option. In its *ESP II* decision, the Commission found that the Retail Stability Rider fell under the "default service" component of Division (B)(2)(d). (*ESP II*, Entry on Rehearing at 15-16 (Jan. 30, 2013).) The PPA Rider provides a default service for all customers regardless of whether they are shopping for generation service. In light of the intervenors' extensive challenges to the "limitation on shopping" rationale, AEP Ohio suggests that, in order to provide an even stronger "belt and suspenders" approach to defending the second criterion on appeal, the Commission should clarify on rehearing that both statutory alternatives are satisfied by the PPA Rider.

testimony. And, the Company's legal positions are advanced through its counsel, not through expert witnesses, as the Commission clearly recognized in granting the Company's request for oral arguments that allowed the Commission to examine specific legal arguments related to the PPA through questioning of counsel for various parties in the proceeding.

In its post-hearing briefs, the Company made its legal position perfectly clear that the PPA Rider could be considered a limitation on shopping as contemplated by Division (B)(2)(d) of the ESP statute. (*See* AEP Ohio Br. at 28; AEP Ohio Reply Br.at 22.) Further, during the oral argument before the Commission in this case, AEP Ohio's counsel advanced the Company's legal position:

> It's not limiting retail choice, but in the sense that it's being provided to all customers, including shopping customers, it's a service that's being provided to everyone, and that's why we are asking that everyone pay it, and in that sense it is a limitation on shopping under the purpose of this -- under the language of the statute.

Oral Argument Transcript at 18-19 (AEP Ohio counsel, Mr. Nourse). Counsel for OEG, a supporting intervenor, further explained this same concept during the oral argument:

> It's a financial limitation because, in a sense, what will happen under this rider is that consumers will shop for 100 percent of their power. It won't affect anything on the competitive market. They will buy all of their needs from the SSO. All the physical supply will be exactly as it is right now. It's competitively neutral. But you will have this charge on the side, this financial transaction, that will give you a portion of your power bill at cost of service. That's how it's a financial hedge.

Id. at 132 (OEG counsel, Mr. Kurtz). Whether one of the Company's witnesses made the same legal argument in the same fashion as counsel is of no consequence; what matters is that the Commission got it right in the Opinion and Order:

> Under AEP Ohio's PPA rider proposal, shopping customers will still purchase all of their physical generation supply from the market through a CRES provider. Although the proposed PPA rider would have no impact on customers' physical generation supply, the effect of the PPA rider is that the bills of all customers would reflect a price for retail electric generation service that is approximately 5 percent based on the cost of service of the OVEC units and 95 percent based on

> the retail market. Effectively, then, the proposed PPA rider would function as a financial restraint on complete reliance on the retail market for the pricing of retail electric generation service.

Opinion and Order at 22. Notwithstanding such superficial attacks on this finding by intervenors,[6] the Commission should confirm its finding on rehearing that the PPA Rider operates a limitation on shopping for purposes of Division (B)(2)(d) of the ESP statute.

OCC, IEU and OPAE/APJN generally challenge the Opinion and Order's "shopping limitation" finding as being against the manifest weight of the record. (OCC AFR at 20-22; IEU AFR at 16-22; OPAE/APJN AFR at 7-12.) IGS (at 10-11) also summarily challenges the shopping limitation finding. Based on the above-quoted description of the PPA Rider found in the Opinion and Order, however, it is clear that the Commission understands and is convinced that the PPA Rider provides an additional and separate layer of stability and a limitation on shopping for all customers. Intervenors' general claims that that finding is against the manifest weight of the evidence simply register disagreement with the Commission and are transparent attempts to second guess the Commission's judgment and accurate assessment of the PPA proposal. As such, these arguments should be rejected on rehearing.

Intervenors' more specific claims are equally unsupported. For example, IEU (at 18) attempts to portray the PPA Rider's feature of explicitly preserving for all customers the ability

[6] IEU (at 21) also advances a misguided technical/procedural claim that the Commission's reliance on legal arguments and supporting intervenor testimony means the Company technically failed to meet its burden of proof. But there is no burden of proof concerning legal arguments. If there were, however, it is clear from the Opinion and Order that the burden of proof on this issue has been met to the Commission's satisfaction. In a similar vein, OMAEG also advances the technical argument (at 8-9) that the SSO filing requirements were not met regarding any proposed limitation on shopping. AEP Ohio submits that the language used in OAC 4901:1-35-03(C)(9)(c) contemplates physical limitations on shopping and is, therefore, inapplicable. Further, since the Company did not originally present the PPA Rider as a limitation on shopping, the filing requirements do not apply. In any case, the Company's Application and testimony filed with the Application do adequately address the description, estimated impact, justification, etc. that are described in the rule. OMAEG's argument in this regard improperly elevates form over substance and should be rejected as being incorrect and inconsequential.

to freely shop for generation service as undercutting the characterization of the PPA Rider as a limitation on shopping for purposes of Division (B)(2)(d). But as it made explicitly clear in its Opinion and Order (at 22), the Commission understood that the physical supply would come from either the SSO auction or a CRES supplier and that the PPA Rider would provide an additional – but separate – layer of stability through the financial hedge design. In other words, customers can shop for generation and CRES providers can physically supply generation to those customers, while the financial hedge applies to all customers; the physical shopping (retaining retail choice) is separate from the financial hedge (which serves as a limitation on shopping for all customers in order to promote rate stability).

As a related matter, Environmental Intervenors claim (at 6-9) that the PPA Rider will cause customers to pay twice for the same hedging service. This is false for the same reason: any cost for the PPA Rider stability will be separate and apart from any stability purchased from CRES providers; they are two different services that provide additional and separate layers of protection. Accordingly, the Environmental Intervenors' claim is wrong and its reliance (at 8) on the Commission decision in a case involving Duke Energy Ohio (Case No. 03-93-EL-ATA), which involved a situation with two separate customer payments (one to CRES and another to the EDU) for the same thing, is misplaced.

OCC also argues (at 23-27, 67) that the Commission exceeded its statutory authority by effectively adding the word "financial" to Division (B)(2)(d) of the ESP statute. More specifically, OCC argues that the Commission changed the phrase in Division (B)(2)(d) from "limitations on customer shopping" to "financial limitations on customer shopping." In support of this claim, OCC expends considerable effort (at 23-26) to support the notion that "shopping" is equivalent to "switching" and that limits on switching have been lawfully imposed under SB 3

(the predecessor to SB 221 which created the new ESP option).[7] This argument is not only overly-complicated and inaccurate, but it also lacks any cogent or meaningful conclusions.

Under any view of common sense and plain meaning of language, a financial limitation is a type of limitation. Using a general term like "limitation," by necessity, includes subcategories that constitute different type of limitations.[8] And it could not be more evident from the expansive list contained in Division (B)(2)(d) that the General Assembly intended to give the Commission broad latitude in adopting provisions as part of an ESP under this provision. But if that were not enough, the General Assembly also predicated the list with the phrase "relating to" to convey even broader latitude and discretion to the Commission. OCC's lone attempt to impose its narrow and rigid interpretation upon the Commission must be rejected.

Next, OMAEG argues (at 6) that the PPA Rider does not operate as a limitation on shopping because customers can shop freely and the charge or credit associated with the rider "is not a price associated with the provision of retail electric generation service." That argument is simply another way to say that customers are free to acquire generation service from a CRES and AEP Ohio will not be supplying their physical power in connection with the PPA Rider – which is something the Commission understood and considered in adopting the PPA Rider. Nothing in Division (B)(2)(d) requires physical delivery of power in order to qualify as a rate stability rider.

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[7] It is nonsensical for OCC to argue (as it does on page 24-26) that the Commission can impose a hard cap on shopping of 20% so that 80% of customers cannot shop at all, but the Commission cannot adopt a layer of rate stability for all customers in accordance with the ESP statute.

[8] For example, if the General Assembly enacted a statute prohibiting discrimination based on "physical limitations" of any person, it would clearly encompass physical disabilities as well as psychological or mental limitations – because the latter limitations are a subset of physical limitations. If the General Assembly crafted the same hypothetical statute to more broadly prohibit discrimination based on personal "limitations," then the statute would encompass financial limitations or other characteristics in addition to physical limitations. The point is that the use of a broader term in a statute necessarily also includes more narrow or specific items that are subsumed within the broader term. *See* R.C. 1.42 (the rules of grammar and common usage normally govern meaning). Thus, "limitation" in Division (B)(2)(d) of the ESP statute includes financial limitations.

The reality of the PJM grid is that no consumer of electricity (except for perhaps a customer with onsite generation behind the retail meter) actually consumes the electricity purchased from a seller, regardless of whether the sale is a wholesale or retail transaction. Electricity produced in Ohio may be consumed in New Jersey, or vice versa. Even historically in Ohio when AEP Ohio owned generation and supported the SSO with those assets, the power was still liquidated through the PJM markets and the revenue credited against the cost of service for purposes of SSO retail rates. In effect, all power transactions in the PJM control area are financial transactions and this is a common distinction without legal significance here.

In short, the Commission's determination that the PPA Rider operates as a limitation on shopping, for purposes of Division (B)(2)(d), was reasonable and lawful and should not be altered based on intervenors' rehearing arguments.

3. The PPA Rider has the effect of stabilizing retail electric service, as the Opinion and Order properly found.

The Opinion and Order's primary conclusion regarding the rate stability aspect of the PPA Rider is as follows:

> The impact of the PPA rider would be reflected as a charge or credit for a *generation-related hedging service that stabilizes retail electric service, by smoothing out the market based rates* paid by shopping customers to their CRES providers, as well as the market based rates paid by SSO customers, which are determined by a series of auctions that reflect the prevailing wholesale prices for energy and capacity in the PJM markets. Because AEP Ohio has demonstrated that the proposed PPA rider would, in theory, have the effect of stabilizing or providing certainty regarding retail electric service, *the Commission finds that the third criterion of R.C. 4928.143(B)(2)(d) has been met*.

Opinion and Order at 21 (emphasis added). Thus, the Commission confirmed the Company's position that the PPA Rider as structured is a retail rate mechanism that is designed to mitigate the effects of wholesale rate volatility. In the preceding paragraph on page 21, the Commission similarly concluded that "the PPA rider, as a financial hedging mechanism, is proposed to have

the effect of stabilizing or providing certainty regarding retail electric service." The Opinion and Order also observed (at 21) that "[a]t its core, the PPA rider is expected to move in the opposite direction of wholesale market prices, causing a rate stabilization effect." The Commission reinforced its stability conclusion elsewhere as well. *See e.g.*, *id.* at 22 (noting that "both shopping and non-shopping customers may benefit from the PPA rider because it would have a stabilizing effect on the price of retail electric service, irrespective of whether the customer is served by a CRES provider or the SSO").

OPAE/APJN generally challenge (at 12-14) the Commission's record-based findings that the PPA Rider provides additional rate stability, revealing that OPAE/APJN simply disagrees with the Commission's clear findings on rate stability that are supported by the manifest weight of the record. IEU also argues (at 22-26) that the multiple findings in the Opinion and Order that the PPA Rider promotes rate stability are against the manifest weight of the record. IGS also generally disputes the stability finding (at 11-12). All of these arguments amount to an attempt by intervenors to substitute their judgment for that of the Commission and to re-weigh the evidence by making the same points they made on brief. These arguments do not support any change in the Commission's findings on rehearing. As was already addressed by the Company in its own rehearing application (at 15-25) and on brief (AEP Ohio Br. at 57-63), the record manifestly supports the conclusion that the PPA Rider will promote rate stability for shopping and non-shopping customers.

In a similar vein, OCC (at 27-34) questions the rate stabilization impact of the PPA Rider by heavily criticizing the Opinion and Order's singular use of the phrase "in theory" among several related findings that emphasize the clear stabilizing design and effect of the PPA Rider.[9]

[9] In the span of about five pages, OCC uses the phrase "in theory" ten times in disagreeing with the Commission's "rate stability" findings.

(*See also* IEU AFR at 22, 25.) In one sense, the Commission's approval of the empty rider is somewhat theoretical at this point because it presently contains no costs or values. More to the point of the statutory finding, however, the design and structure of the PPA Rider is a financial hedge that will clearly mitigate volatility of market rates and inject stability – but it is not a guaranteed savings over market rates.

The financial hedge aspect of the PPA rider with regard to changes in market prices was demonstrated in Exhibit WAA-R2. The cost/benefit aspect of the OVEC asset is really the point the Commission was expressing doubts about in the Opinion and Order in deciding not to include OVEC for now, without questioning that the inherent structural design and impact of the PPA Rider would promote rate stability. In that light, perhaps the Commission could have more accurately stated that the design and structure of the PPA Rider will have the effect of stabilizing rates, not just "in theory." This distinction could be clarified on rehearing. But the inescapable conclusion from the evidentiary record and the Opinion and Order's findings is that the PPA Rider will operate to stabilize rates – and it is hard to even imagine a scenario where it would not do so. Thus, it remains evident – in light of all the other findings in the Opinion and Order supporting the rate stability effect of the PPA Rider – that the Commission is saying that the rate stability effects of the PPA Rider are more than just a theory at this point.

The overall conclusion reached in the Opinion and Order is clear and is supported by the manifest weight of the evidence. While the ultimate finding is that the Commission is not persuaded to include the OVEC asset at this time, that finding is limited to the current evidentiary record and without prejudice to any future filing. Likewise, the provisional decision not to include OVEC in the PPA Rider for now (a conclusion for which the Company has sought

rehearing) should not be understood as undermining or conflicting with the Opinion and Order's overall findings regarding the design and fundamental structure of the placeholder rider.

For example, the Opinion and Order stated (at 21) that "[a]t its core, the PPA rider is expected to move in the opposite direction of wholesale market prices, causing a rate stabilization effect." And it was the Commission itself that forcefully concluded "there is no question that the PPA rider would produce a credit or charge based on the difference between wholesale market prices and OVEC's costs, offsetting, to some extent, the volatility in the wholesale market." *Id*. Further, the Commission recognized – even though it decided not to initially approve inclusion of the OVEC asset – that a PPA Rider proposal may provide for "a significant financial hedge that truly stabilizes rates, particularly during periods of extreme weather." *Id*. at 25. While this can be further clarified on rehearing (and it would be advisable to do so given that the rehearing order is likely to be challenged before the Supreme Court of Ohio), it is already evident that the Opinion and Order contains two sets of rate stability findings – one about the PPA Rider structure and design and one about the specific forecasted effects of the OVEC proposal – that address two different things and are not in conflict.

Next, OMAEG contests the Commission's finding that the PPA Rider provides rate stability to shopping and non-shopping customers, arguing (at 6-7) that some shopping customers already have fixed rates and that non-shopping customers are served by auctions that reflect laddering and staggering methods for rate mitigation. There was no evidence presented by any party that CRES providers will provide shopping customers with long-term fixed price contracts or that staggering and laddering of SSO auction products can address fundamental market changes over the long term; in fact, the very nature of CRES offerings is that they can change or be eliminated at the whim of the provider regardless of whether customers desire a

specific offering. What customers desire and what market offerings provide, especially with regard to price stability, may not always be aligned. OCC also attempts to undermine the stabilizing value of the PPA Rider by pointing out (at 34) that there are other options for mitigating volatile market rates. Similarly, the Environmental Intervenors contest the Commission's adoption of the PPA Rider as being nonbypassable, claiming (at 6-9) that the PPA Rider is not needed due to existing rate mitigation options.

These arguments rehash points made by these parties in testimony and on brief prior to the decision, claiming that enough rate stability exists already and recommending that no additional rate stability is needed. AEP Ohio submits that such an assertion is without merit and ignores the significant and ongoing volatility of market rates demonstrated in the record. The evidence of record showed that, even with the SSO auction design tools of laddering and staggering, the auction clearing prices still follow market price changes up and down. (*See* AEP Ohio Ex. 33, at 2-3, Ex. WAA-R1.) It would be misguided to conclude that an additional tool for rate mitigation should be categorically excluded, especially given the flaws and limitations of the existing mitigation tools.

Mr. Allen demonstrated in his rebuttal testimony that the laddering/staggering approach only partially mitigates rate volatility and does not mitigate fundamental changes in market rates. (AEP Ohio Ex. 33, at 2-3, Ex. WAA-R1.) Mr. Allen also pointed out another obvious limitation to the auction design solution: it can only help for non-shopping customers and does not mitigate rates for shopping customers or those participating in governmental aggregation programs. (*Id.*)

AEP Ohio witness McDermott rebutted Dr. Choueiki's claim that auction design should be used exclusively to mitigate rate volatility:

> I agree that the SSO auction is an effective method of mitigating price volatility in the shorter term electricity markets and the SSO auction design can benefit

> customers by mitigating those shorter term price fluctuations. *There is, however, no basis to conclude that the SSO auction mitigates longer term market changes. The SSO auctions are not designed to provide price protection from longer-term market trends like the physical hedge found in the PPA.* Moreover, the SSO auctions apply only to non-shopping customers. Even the limited protection from short-term volatility achieved by the auction design is not applicable to shopping customers or those being served by governmental aggregation.

(AEP Ohio Ex. 32, at 11 (emphasis added).) Dr. McDermott reasonably drew the obvious and compelling conclusion that, in light of these limitations of auction design, the Commission "should evaluate the PPA Rider's potential effect on volatility based on its own merits quite apart from the SSO auction design questions." (*Id.*)

Another similarly flawed argument advanced by CRES intervenors is that fixed generation price offers in the market adequately manage rate volatility such that the PPA Rider is simply not needed. For example, CNE/Exelon witness Campbell maintains that there is no need for AEP Ohio to provide a hedge because CRES providers have a number of competitive offerings geared toward customer goals and objectives, including their risk tolerance or desire for a market hedge. (CNE/Exelon Ex. 1, at 15.) He also maintained that CRES providers "can offer a stable, long term, fixed price at a much lower rate that is reflective of market prices." (*Id.* at 16.) As Mr. Campbell himself admitted, however, any CRES offer for a fixed price reflects a risk premium to account for the CRES provider's risk of having to honor the price when market prices are higher than the contract price. (Tr. VII at 1604-06.) Dr. Choueiki also agreed that a CRES fixed price offer reflects a price premium. (Tr. XII at 3017.) By contrast, the PPA Rider involves a straight differential between cost and market without an additional premium.

Factually, Mr. Allen demonstrated that CRES providers are not offering long term stable offers to residential customers using data from the Commission's own Apples-to-Apples website. (AEP Ohio Ex. 33, Ex. WAA-R3.) In reality, the vast majority of offers (72.4%) are for terms of 12 months or less, and there are no offers in the AEP Ohio service territory exceeding 36

months. The short-term nature of these contracts results in customers needing to sign new contracts on a regular basis, which creates volatility for customers as they transition from one contract to another. Based upon a review of CRES offerings of comparable terms, Mr. Allen showed that this transition can result in significant volatility in the form of generation rate changes of at least 9.7% and up to 48.4% over the most recent 12-month period. (*Id.* Ex. WAA-R4.) Mr. Allen also demonstrated that the same phenomenon can occur for customers served by CRES providers through governmental aggregation. As shown in Mr. Allen's Exhibit WAA-R5, customers served under the Upper Arlington governmental aggregation program will see their price increase this year from 5.545 ¢/kWh to 7.84 ¢/kWh, or just over 41%.[10] Finally in this regard, Mr. Allen observed that the risk of shopping customers seeing significant price volatility is exacerbated by the fact that many CRES contracts for residential customers include a rollover provision that automatically enrolls the customer in a new market based variable rate plan or a fixed rate plan unless the customer takes action. In that common scenario, unless the customer takes proactive action, a new and potentially higher rate unilaterally charged by the CRES provider will automatically apply. (*Id.* at 5.)

For these reasons, AEP Ohio submits that the PPA Rider will stabilize rates even for customers that temporarily have a fixed price contract. When considered over anything more than a short-term basis, it is a foregone mathematical conclusion that the PPA Rider will add rate

[10] Subsequent to the hearings in this proceeding the City of Upper Arlington chose to suspend its governmental aggregation program at the end of its current term citing the results of a request for proposal that were not favorable. http://www.uaoh.net/department/division.php?structureid=449

stability for all customers including fixed rate contract customers.[11] As AEP Ohio witness Dr. McDermott succinctly stated:

> [I]f the Commission wishes to provide longer term hedges for all customers it appears that the PPA is the only method currently proposed in AEP Ohio's service territory to do so. Further, as I explain below, some regulators have determined that longer term hedges do serve the public interest and all customers, including those that have chosen to hedge their short-term risk using contracts from competitive suppliers, should benefit, and pay for, those longer term hedges.

(AEP Ohio Ex. 32, at 15.) The PPA Rider has benefits to offer to all customers, including the narrow subset of customers that have short-term fixed rate contracts, and it should not be deferred because there are other limited tools to promote rate stability.

The Opinion and Order (at 25) adopted the empty PPA Rider because it found that a subsequent PPA filing by the Company "has the potential to supplement the benefits derived from the staggering and laddering of the SSO auctions, and to protect customers from price volatility in the wholesale market. It recognized that "there may be value for consumers in a reasonable PPA rider proposal that provides for a significant financial hedge that truly stabilizes rates, particularly during periods of extreme weather." *Id.* The Commission thus determined that it was necessary and appropriate to establish the PPA Rider now and preserve the option to subsequently include PPAs based on future determinations to be made in separate proceedings. Intervenors' attempt to impose their own conclusions about the record and the PPA Rider benefits should be rejected.

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[11] As noted above, even on a short-term basis, the fact is that any CRES offer for a fixed price reflects a risk premium to account for the risk of having to honor the price when market prices are higher. (Tr. VII at 1604-06; Tr. XII at 3017.) Blending in the hedge offered through the PPA Rider, which involves a differential between cost and market without an additional premium, is likely to lower rate volatility for those customers even with short-term fixed rates.

Finally regarding rate stability, OMAEG challenges (at 7) the Commission's finding in light of the potential lag between market price volatility and the PPA Rider reconciliation. The Commission understood this issue and addressed it in the Opinion and Order:

> AEP Ohio acknowledges that, as proposed, the PPA rider would have a reconciliation component to true up actual historical costs and revenues and that the one-year lag associated with the true-up process may mean that the reconciliation component does not always operate in the opposite direction of current market prices. AEP Ohio points out, however, that the regulatory lag inherent in the annual true-up process would not alter the fundamental operation of the PPA rider. At its core, the PPA rider is expected to move in the opposite direction of wholesale market prices, causing a rate stabilization effect.

Opinion and Order at 21. OMAEG's challenge on this point merely reveals that it disagrees with the Commission's conclusion that the PPA Rider "at its core" will move in the opposite direction of market rates, causing a rate stabilization effect – but that is not a proper basis for rehearing.

C. It was permissible and necessary for the Commission to approve the zero-rate placeholder rider to the extent it does not approve the initial OVEC proposal at this time. [CNE/Exelon Prop. 1; IEU Prop. 5; OCC Prop. 2; OPAE/APJN Prop. 5; RESA Prop. 2]

OMAEG contends (at 9-12) that it was inconsistent for the Commission to determine that the Company did not meet its burden regarding the initial OVEC proposal and yet adopt the placeholder PPA Rider for future use during the ESP term. OPAE/APJN also maintains (at 20) that it was unreasonable for the Commission to approve the zero-rate placeholder rider and defer resolution of whether to include OVEC or another PPA within the rider. In addition, RESA argues (at 14-17) that it was unjust and unreasonable for the Commission to approve a placeholder PPA Rider, and CNE/Exelon (same counsel as RESA) makes similar arguments (at 5-7). As noted above, in approving the creation of the PPA Rider at a rate of zero, the Commission has not yet authorized the recovery of any costs in the surcharge. Approval of the PPA Rider as part of the Company's ESP merely establishes the authority for the placeholder mechanism and adopts it as part of the rate plan, subject to further proof before any costs can be

added. But approval of at least the empty rider in the ESP decision – as was done in the Opinion and Order – is important as it needs to be an approved provision of the approved ESP and not adopted outside of the ESP decision.

To be clear, AEP Ohio also objects to the Commission's decision to defer the decision of whether to include OVEC within the PPA Rider. The Company asked the Commission to reconsider including the OVEC asset in the rider at this time (*see* Assignment of Error No. 1 in AEP Ohio's Application for Rehearing). Setting aside the separate decision of whether the Commission will reconsider adding OVEC into the PPA Rider on rehearing, however, it is critical for the Commission to approve at least a placeholder rider as part of its decision to modify and adopt an ESP. The intervenors' focus and true purpose in raising this challenge is to undermine and ultimately eliminate the PPA Rider.

As the Opinion and Order (at 25) points out, the Commission has approved placeholder riders on multiple occasions for other EDUs, as well as for AEP Ohio in the *ESP II* decision (Generation Resources Rider and Pool Termination Rider) and elsewhere within the *ESP III* decision (Demand Response Rider). Indeed, Division (B)(1) of the ESP statute requires that an ESP "shall include provisions relating to the supply and pricing of electric generation service," and Division (B)(2) lists the provisions that may be adopted by the Commission as part of an ESP. The PPA Rider is being adopted under Division (B)(2)(d) and the Commission's authority to adopt such provisions is within the context of an ESP decision. Thus, it would be a legally-flawed approach to deny the rider now and try to subsequently adopt it outside the context of an ESP order. This statutory framework is presumably why the Commission has approved placeholder riders in the past, and it should again do so here. Intervenors also understand that, and their present criticisms are disingenuous – since they would also argue that any subsequent

adoption of the PPA Rider outside the context of an ESP decision would be unlawful as being done outside the scope of the ESP statute.

Intervenors also maintain that the interim decision not to initially include OVEC in the PPA Rider undermines or conflicts with the Opinion and Order's overall findings regarding the design and fundamental structure of the placeholder rider. As discussed above in more detail (*see supra* Section I.B.3), however, the two sets of findings are not in conflict. In approving the placeholder rider with an initial rate of zero, the Commission did what it has done in other ESP orders and elsewhere within the Opinion and Order for other riders. More specifically, the Commission did what it had to do to preserve the ability to subsequently include a PPA in the rider: it adopted a placeholder rider as part of the ESP such that the empty rider can subsequently be activated or otherwise administered, as appropriate, during the ESP term. That aspect of the decision should not be changed on rehearing.

Lastly in this regard, IEU (at 23-24, 27-29) argues that the Commission is not authorized to adopt a placeholder rider and maintains that the MRO Test could be affected if a future PPA is granted for inclusion in the rider. According to IEU-Ohio, no provision of R.C. 4928.143(B) permits the Commission to authorize a placeholder rider. IEU also argues that R.C. 4928.143(C)(1) precludes the Commission from authorizing a placeholder rider because such a rider prevents the Commission from performing the MRO Test that R.C. 4928.143(C)(1) requires. This argument also plows old ground as the Commission's established practice when it adopts a placeholder rider is to only include within the MRO test analysis a known estimate for the potential cost during the ESP term.

There is no requirement in R.C. 4928.143(B) that every provision of an ESP must be established in a form that remains static throughout the course of the ESP. Indeed, there are a

number of riders whose operation and impacts are periodically, if not continuously, reviewed and subject to change over the course of the ESP (*e.g*., the BTCR, ACIR, etc.). In addition, as discussed above, the Commission has previously established placeholder riders at zero cost level subject to future adjustment during the course of the ESP as appropriate.

IEU-Ohio's argument that R.C. 4928.143(C)(1) precludes the Commission from authorizing a placeholder rider because such a rider prevents the Commission from performing the MRO Test that R.C. 4928.143(C)(1) requires also is without basis, In the case of a placeholder rider, such as the PPA Rider, the Commission determines the appropriate level of costs to include in the MRO Test depending on the circumstances. In this case, in light of the decision not to include the impact of any generation resources in the PPA Rider at this point, and in light of the uncertainty regarding what those costs might be in the event that the Commission does include the impact of PPAs in the rider (and the uncertainty regarding whether there would be net costs), it was appropriate to exclude the placeholder PPA Rider from the MRO/ESP analysis and treat it as a zero cost provision. Moreover, if the Commission subsequently adopts a PPA for inclusion in the PPA Rider, it will be based on an expected benefit to customers and there is no reason to think that the MRO Test analysis would be adversely impacted anyway. The Opinion and Order's treatment of the placeholder PPA Rider for purposes of the statutory MRO Test in that fashion was reasonable under the circumstances and did not prevent the Commission from conducting the analysis that R.C. 4928.143(C)(1) requires.

D. The Opinion and Order (at 25) reasonably included guidelines regarding any future proceedings under the approved PPA Rider that are non-binding and represent factors, at a minimum, that will be considered and balanced in that separate proceeding; there is no need to supplement the Commission's guidelines with intervenors' collective wish list of additional factors, especially since those additional factors are designed to undermine and defeat the PPA Rider. [CNE/Exelon Prop. 2; Environmental Intervenors Prop. 3; IEU Props. 11-12, 18; OCC Prop. 2]

1. Because the advisory PPA guidelines were disclosed as topics the Commission itself would like – at a minimum – to have addressed in future PPA proceedings, there is no need to expand the advisory guidelines to accommodate concerns advanced by individual intervenors.

The Opinion and Order (at 25) lists several factors that AEP Ohio will need to address in any future PPA filing – factors that will be considered on balance and without being binding on the Commission. The Commission's PPA guidelines are advisory in nature and are helpful and productive in facilitating additional consideration of PPAs sought to be included in the approved PPA Rider in the future. None of the Commission's existing guidelines fundamentally change the PPA Rider proposal, and the Commission explicitly indicated that the factors should be balanced and that no individual factor is controlling or absolute. Further, the Opinion and Order's PPA guidelines reflect what the Commission itself is interested in hearing more about. By contrast, the purpose and intent of the intervenors' wish list of additional factors is to permanently foreclose the PPA Rider. Moreover, the intervenors will be able to present their cases in opposition to any future PPA filing and will be permitted to advocate in favor of all their proposed restrictions and conditions at that time. Thus, it is both unnecessary and inappropriate for the Commission to incorporate the "poison pill" factors advocated by intervenors.

OCC claims inaccurately (at 42-43) that the advisory guidelines are biased toward approval and recommends (at 43-46) that a long list of OCC's own factors should be added to effectively ensure that they do not support approval. Even though it opposes the advisory

guidelines as being unlawful, IEU also proceeds to propose (at 67-70) their expansion. CNE/Exelon also chimes in (at 7-13) with its own wish list of items that would help defeat the PPA Rider. OMAEG also sets forth (at 12-13) nearly a dozen additional factors that it would like to establish as requirements for any future PPA filing. Finally, the Environmental Intervenors (at 9-18) also urge the Commission to expand the factors for consideration in order to be "just and reasonable."

AEP Ohio opposes the adoption of any and all of the intervenor factors for consideration because they are both inappropriate and unnecessary. Most of the intervenor-suggested guidelines involve competitive procurement for any PPA and focus on cost guarantees/certainty. In addition, OCC makes an unjustified request that the PPA Rider be collected subject to refund. Thus, in order to efficiently respond to the intervenor rehearing requests on this point and present a consolidated response, the Company will focus on discussing its concerns associated with those three common features of intervenor proposals, which would require: (1) competitive procurement as a prerequisite, (2) cost guarantees and certainty, and (3) collecting the PPA Rider subject to refund.

First, any inclusion of competitive procurement as a condition to including a PPA in the rider would serve to effectively undermine the concept and resulting benefits of the PPA Rider. Treating the Ohio legacy plants as just another option for future supply undermines the purpose and effect of the PPA Rider proposal and is inappropriate. There are several major features of the PPA proposal that would largely be emasculated or completely eliminated through the introduction of a competitive procurement requirement.

For example, the PPA Rider proposals involve specific Ohio legacy plants and contractual entitlements. And there are important economic development impacts for Ohio that

are tied to the fate of these plants. These plants were built to serve Ohio and have done so for their entire economic lives. There are also reliability impacts of these plants closing, with price tags associated with grid remediation of the reliability impacts. Competitive procurement would bypass – and thereby fail to intervene or affect the outcome of – these important plant-specific considerations.

Another obvious flaw with a competitive procurement mandate is that it would not involve a cost-based rate component. Not only do OVEC and the other Ohio legacy plants have a long track record established with the Commission of stable costs, the PPA Rider involves a pass through of the costs without markup. There is no price premium for a long-term dedication of the assets. That significant feature would be completely lost with a competitive procurement option. More to the point, the outcome of a competitive procurement would be market rates – which of course would not run counter to market rates like the Company's current PPA proposals would do. This would diminish or eliminate a central purpose and effect of AEP Ohio's PPA proposals: rate stability for retail customers. Even assuming any commercial party would bid on a life-of-unit supply contract that involves uncertainty of cost recovery due to after-the-fact regulatory cost review, the stability value of the hedge would be substantially diminished or eliminated with competitive procurement.

A competitive procurement mandate would also disregard the important differences between the MRO and the ESP options that are permissible under Ohio law.[12] Only under an MRO – and only after a lengthy transition period of 6-10 years – is full competitive procurement

[12] The Environmental Intervenors argue (at 14-18) that competitive procurement is required for legal reasons, in order to ensure the rates are "just and reasonable" and to avoid "revisiting" AEP Ohio's corporate separation plan. But these arguments miss the point that the ESP statute permits the PPA Rider, thus making the rider lawful and reasonable as well as displacing any corporate separation concerns since R.C. 4928.17 subordinates its requirement to anything that is authorized in the ESP statute. *See* R.C. 4928.17(A) ("[e]xcept as otherwise provided in sections 4928.142 or 4928.143 * * *")

required. By contrast, the *raison d'etre* of an ESP is to preserve regulatory flexibility and permit win-win incentive regulation, which requires mutual consent by the Commission and the EDU under the ESP statute. Indeed, the ESP statute explicitly permits prudently-incurred costs associated with "purchased power acquired from an affiliate." R.C. 4928.143(B)(2)(a). It is neither unlawful nor unreasonable for AEP Ohio to present an affiliate PPA as part of an ESP. In reality, the PPA proposals are long-term commitments that can only be presented by EDUs under an ESP, based on the continuing regulatory compact between the utility and its regulator; other external parties simply cannot present such options under Ohio law, even if they wanted to present a comparable offer.

Significantly, competitive procurement would also indirectly undermine one of the Commission's important guidelines for retaining rigorous oversight through audits and cost reviews. That component can only be achieved through a utility offering that is covered by a regulatory compact; such conditional cost recovery would never be accepted by a party bidding for a commercial contract. In short, this unique ESP opportunity would be terminated and precluded if the Commission opens up the PPA Rider to all bidders in the manner of an SSO auction. And such an option would be especially appropriate in connection with the OVEC asset, since it was and remains a legacy generation asset of AEP Ohio that has been recovered for years in SSO rates as a prudent purchased power cost.

Second, the concept of determining the least cost alternative and/or imposing the requirement for cost guarantees could also undermine the PPA Rider, depending on how they were defined and implemented. On the one hand, AEP Ohio has discussed the PPA Rider proposal all along as being an attractive and beneficial option for customers; the Company always presumed the Commission would consider adopting OVEC and/or the affiliate PPA

options based on a determination that it is a prudent option from a long-term customer perspective. And the Opinion and Order seemed to incorporate that perspective when it stated that it would consider "based on the record evidence, whether AEP Ohio's PPA rider proposal is reasonable and whether customers would, in fact, sufficiently benefit from the rider's financial hedging mechanism." Opinion and Order at 23. When deciding that it was not persuaded to include OVEC for now based on the record, the Opinion and Order again (at 25) cited its uncertainty as to whether the proposal "would provide customers with sufficient benefit that is commensurate with the rider's potential cost." But if such a standard means that there must be certainty regarding the costs associated with the remaining life of the unit or a guarantee that the revenues would exceed the costs over the remaining life of the unit, such a standard would defeat the viability of the PPA Rider. It is not a guarantee of savings but a rate stabilizing hedge that is determined to be beneficial based on the best information and projections presently known – just like any other PPA approved for cost recovery in the past and just like any hedge transaction voluntarily entered into by two parties. In any case, as discussed above, the only way to retain a regulatory cost review is to establish a PPA through the utility as part of an ESP.

The third area of major concern is OCC's request (at 41-42) that the advisory guideline regarding "severability" be amended to provide that any non-zero PPA Rider approved by the Commission in a future proceeding be collected subject to refund, even though OCC admits that Ohio law requires that any future reversal of the PPA Rider revenues collected would not result in a refund sought by OCC. This is a transparent attempt by OCC to circumvent Ohio law regarding the effectiveness of Commission orders and the rehearing and appeal process for challenging Commission decisions. Commission orders are effective immediately but subject to rehearing and appeal through the legal process established under Ohio law. R.C. 4903.10,

4903.11, 4903.13, 4903.15. OCC has on many occasions attempted to obtain a stay before the Supreme Court of Ohio without posting a bond, which is the statutory requirement under R.C. 4903.16. It would undermine the Commission's order to adopt a rate as the just and reasonable rate under law – only to render the rate subject to refund. It would be particularly unfair to the Company to impose a refund obligation, because it would be holding up its end of the bargain for any period the rate is in effect and customers would receive the rate stabilizing effect for that same period. Thus, to adopt OCC's recommendation and make the Company refund all of the revenue collected would be prejudicial to the Company and tantamount to a "poison pill" for the proposed transaction.

It is one thing for the Commission to impose the severability requirement to ensure that any legal reversal of the PPA Rider will not cause the balance of the *ESP III* plan to fall apart. The Company understands the severability condition and will address it as part of any PPA filing in the future. But OCC's attempt to bypass the normal process for challenging rate orders and shift additional risk to the Company is unjustified and inappropriate. In any case, there is no need to make a determination on this issue now since the Commission has not approved a rate for inclusion in the rider.

In sum, the Company understands the purpose and intent of the Opinion and Order's PPA guidelines. And it was reasonable for the Commission to issue such advisory guidance in light of its directive that the Company should address the specified items in any future PPA filing. But intervenors' proposed additions and changes to the PPA guidelines are counterproductive and designed to eliminate the PPA Rider option. As such, they should be rejected.

2. The Commission's treatment of the PPA Rider did not create a "rule," and thus the requirements of Revised Code Chapter 119 do not apply. [IEU Prop. 11]

As discussed above, the Opinion and Order approved the PPA Rider as a "zero placeholder rider" and provided that "[a]ll of the implementation details with respect to the placeholder PPA rider will be determined by the Commission in [a] future proceeding." Opinion and Order at 25. The Commission set forth a number of "factors, which the Commission will balance, but not be bound by, in deciding whether to approve the Company's request for cost recovery" in the future implementation case. *Id.*

In its application for rehearing, IEU argues (at 43-44) that by leaving the implementation of the PPA Rider to a future proceeding, and by articulating nonbinding factors for AEP Ohio to address in that proceeding, the Commission somehow "issued a 'rule'" and therefore "violated the rulemaking requirements contained in Chapter 119 of the Revised Code." That argument can be easily dismissed.

The Opinion and Order did *not* issue a "rule" under Chapter 119 of the Revised Code. As the Commission expressly noted, approving a placeholder rider and leaving implementation to another case is a common practice. Opinion and Order at 25 (citing other placeholder riders). This practice does not involving adopting any Commission "rule," nor did it involve amending any of the rules applicable to SSO filings. *See* OAC 4901:1-35-03.

Likewise, the Commission did not issue a "rule" when it listed factors the Commission may consider in a subsequent implementation case. Because the Commission expressly provided that it will "not be bound by" its list of factors, Opinion and Order 25, the Commission's list of factors is not a hard-and-fast "rule" but merely an explanation of the Commission's reasoning and an advisory opinion providing guidance to the parties. IEU's arguments concerning Chapter 119, therefore, are misplaced.

3. The Commission's list of nonbinding factors for the future PPA Rider implementation case is not "void for vagueness." [IEU Prop. 12]

In a related, equally far-fetched argument, IEU claims that the Commission's list of nonbinding factors for the future PPA Rider implementation case is "void for vagueness under the [D]ue [P]rocess [C]lauses of the United States Constitution and the Ohio Constitution." (IEU AFR at 50.) But all of the authority IEU cites in support of this argument addresses either statutes or officially promulgated *rules*. *See id.* Because, as discussed above, the Commission's nonbinding factors do not constitute a rule, the void-for-vagueness doctrine does not apply. In its decisions, the Commission often explains its reasoning by reference to broad factors, and it often offers nonbinding guidance to parties. IEU may challenge the Commission's reasoning and ask that it be clarified, but it may not constitutionalize its challenges merely by invoking the concept of "vagueness."

In any event, under the exceedingly rigorous standards applicable to void-for-vagueness challenges, the Commission's nonbinding factors are not unconstitutionally vague. Courts strike down enactments as unconstitutionally vague "only with great caution and in the clearest of cases." *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St. 3d 122, 2008-Ohio-511, 822 N.E.2d 400, ¶ 41 (cited in IEU AFR at 51). Enactments are entitled to "a strong presumption of constitutionality," and "the party challenging the constitutionality of a law bears the burden of proving that the law is unconstitutional *beyond a reasonable doubt*." *Id.* (emphasis added).

When an enactment is challenged under the void-for-vagueness doctrine, the question is whether it "(1) provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence and (2) is specific enough to prevent official arbitrariness or discrimination in its enforcement." *Id.* ¶ 42. Moreover, where, as here, the enactment is "directed to economic matters," it is "subject to a less strict vagueness test than laws interfering

with the exercise of constitutionally protected rights." *Id.* (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982)).

IEU has failed to engage with any of those standards and has not even come close to demonstrating "beyond a reasonable doubt" that the Commission's nonbinding factors are unconstitutionally vague. *Id.* IEU does not identify which (if any) of the factors cannot be understood by "persons of ordinary intelligence," nor does IEU make any attempt to identify exactly which (if any) of the factors is susceptible to "arbitrariness or discrimination in its enforcement." *Id.* IEU does not explain what additional information it needs to understand the factors, or what ambiguity it would like the Commission to resolve. Neither AEP Ohio (nor, apparently, any other intervenor) has had trouble understanding the nonbinding factors, and even if some of the factors are broad or open to interpretation, that is far from enough to overcome the "strong presumption of constitutionality." *Id.* In sum, even if the Commission's list of nonbinding factors were to constitute a rule (as discussed above, it does not), it would not be unconstitutionally vague.

E. The PPA Rider does not create an anti-competitive subsidy as prohibited by R.C. 4928.02(H). [CNE/Exelon Prop. 3; IEU Props. 6-8; IGS Prop. 3; OCC Prop. 2; OHA AFR §2.B.; OPAE/APJN Prop. 3; RESA Prop. 1]

A number of intervenors argue that the Commission erred in authorizing AEP Ohio to establish the PPA Rider because the rider creates an anti-competitive subsidy in violation of R.C. 4928.02(H). (*See* OCC AFR at 35-39; IEU AFR at 29-33; RESA AFR at 12-13; CNE/Exelon AFR at 14-15; IGS AFR at 12-13; Environmental Intervenors AFR at 2-6; OPAE/APJN AFR at 16.) Each of these arguments, however, is based on the flawed premise that the PPA Rider is a distribution charge simply because it is nonbypassable. As AEP Ohio demonstrated, and as the Commission correctly found, the PPA rider is a generation charge, not a distribution charge. *See, e.g.*, Opinion and Order at 22, 26 ("the PPA rider, whether charge or credit, would be

considered a generation rate"). (*See also* AEP Ohio Reply Br. at 23.) Even CNE/Exelon witness Campbell, who advanced this subsidy argument in his testimony and claimed that the PPA Rider was a "distribution fee" (CNE/Exelon Ex. 1, at 13), agreed on cross examination that the PPA Rider is a generation-related rider that would recover generation-related costs. (Tr. VII at 1623-24.) Moreover, he acknowledged during the same line of questioning that it is permissible under R.C. 4928.02(H) to recover generation costs through a generation charge. (*Id.* at 1622-23.) That is precisely what the Commission authorized here. Because the PPA Rider is a generation rate and not a distribution rate, R.C. 4928.02(H) simply does not apply, and it is not violated.

In support of their position, several intervenors rely upon Ohio Supreme Court jurisprudence issued under SB 3 prior to the enactment of SB 221. (*See* OCC AFR at 38 (citing *Elyria Foundry Co. v. Pub Util. Comm.*, 114 Ohio St. 3d 305, 2007-Ohio-4164, 871 N.E.2d 1176); Environmental Intervenors AFR at 4-5 (citing *Elyria*); IGS AFR at 13 (citing *Industrial Energy Users v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195).) That reliance is misplaced, because the types of charges that could or could not be collected on a nonbypassable basis under SB 3 changed under SB 221. Unlike SB 3, SB 221 authorizes the Commission to establish nonbypassable charges in connection with its approval of an ESP that can include both generation and distribution rate adjustments. *See* R.C. 4928.143 (ESP statute) and 4928.144 (phase-in statute). Thus, the SB 221 amendments to Chapter 4928 <u>did</u> restrict the scope of R.C. 4928.02(H) applied in the cases intervenors cite. (*See* Environmental Intervenors' AFR at 5.) In any case, for purposes of R.C. 4928.02(H), the Court has interpreted the provision to prohibit recovery of competitive generation service revenues through a distribution charge – circumstances that do not apply to the PPA Rider. For these reasons, intervenors' reliance on the

Elyria and *Industrial Energy Users* to support the conclusion that the PPA Rider violates R.C. 4928.02(H) is misplaced.

OCC's and IEU's contention that *In re Ohio Power Company*, Case No. 10-1454-EL-RDR ("*Sporn 5*"), Finding and Order (Jan. 11, 2012), supports their R.C. 4928.02(H) arguments also is misplaced. (OCC AFR at 37-38; IEU AFR at 32.) As the Commission correctly found, that decision, which denied AEP Ohio's request for cost recovery associated with the closure of an uneconomic plant, is not applicable to AEP Ohio's PPA request for up-front approval for cost recovery of an in-the-money OVEC contract. Opinion and Order at 26. Moreover, as the Commission noted, the rider at issue in *Sporn 5* was a distribution rider, not a generation rider like the Commission has approved here. *Id.* Moreover, in stark contrast to the PPA Rider, the Company in the *Sporn 5* case had requested recovery of the net book value of the plant at the end of its economic life and without continued provision of service from the plant.

Regardless, the Company respectfully maintains that the *Sporn 5* decision improperly applied SB 3 concepts to a SB 221 context and included overbroad dicta that should not be applied beyond the unique circumstances of that case. In essence, the decision administratively repealed provisions that were left in the Revised Code by the General Assembly throughout the deregulation and restructuring process of SB 3 and SB 221 (R.C. 4905.20 and 4905.21). Moreover, the deregulation dicta in the *Sporn 5* case cannot be easily reconciled with the Commission's more recent decision in the *ESP II* case, where cost-based generation charges were approved in the context of an ESP. *See ESP II*, Opinion and Order at 49-52 (Aug. 8, 2012). As between the two cases, the Commission's more recent pronouncement should be followed, especially as it involved a similar context to the PPA Rider. Thus, because the *Sporn 5* decision

was issued in a narrow context and was not well-considered precedent, the Commission was correct in distinguishing it and not applying or extending it to cover the present context.

F. The PPA Rider is not preempted by the Federal Power Act. [CNE/Exelon Prop. 3; IGS Prop. 1; IEU Prop. 10; OCC Prop. 1; OPAE/APJN Prop. 4; RESA Prop. 1]

Numerous intervenors again argue that the PPA Rider is preempted by the Federal Power Act ("FPA"). (*See* IEU AFR at 38; OCC AFR at 7; RESA AFR at 13; CNE/Exelon AFR at 16; IGS AFR at 6-7; OPAE/APJN AFR at 19-20.) Intervenors raised the same arguments in their initial briefing, and their arguments are as meritless now as they were before. The FPA expressly preserves the authority of the State of Ohio, though the Commission, to set the *retail* rates paid by AEP Ohio's customers, and the PPA Rider falls squarely within that retail rate-making authority. Intervenors' preemption arguments offer no grounds to reconsider the Commission's approval of the PPA Rider.

The Supremacy Clause of the U.S. Constitution provides that the "Constitution, and the Laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land." U.S. Const. art. VI, cl. 2. Interpreting that provision, the U.S. Supreme Court has articulated two preemption doctrines: "field preemption," under which the party claiming preemption must demonstrate that a state law intrudes in a field occupied by federal law, and "conflict preemption," under which the party claiming preemption must demonstrate that a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See, e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317-18 (1981).[13]

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[13] Another preemption doctrine, "impossibility preemption," is also sometimes invoked as a specific form of conflict preemption. Under that doctrine, the party claiming preemption must demonstrate that it is "impossible" to comply with both state and federal law. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 563 (2009). No party has raised that doctrine here.

Importantly, the U.S. Supreme Court has recognized a presumption *against* preemption, especially where, as here, parties claim that federal law preempts in an area typically reserved to the states. The Court has made clear: "[I]n all pre-emption cases, and particularly in those in which Congress has 'legislated * * * in a field which the States have traditionally occupied,' * * * we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); *see also Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 549 (2009) ("When Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.").

1. Intervenors' field preemption arguments are meritless.

Intervenors' principal argument is one of field preemption – that the PPA Rider is preempted because it acts in the field occupied by the federal government in the FPA. (*See* IEU AFR at 38; OCC AFR at 7; RESA AFR at 13; CNE/Exelon AFR at 16; IGS AFR at 6-7; OPAE/APJN AFR at 19-20.) That argument is meritless. The PPA Rider does not intrude on the federal field; it is based firmly on the State's authority to set retail rates under the FPA.

a. The PPA Rider is a retail rate falling squarely within the State's retail ratemaking authority under the FPA.

In the FPA, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction." *Fed. Power Comm'n v. S. Cal. Edison Co*., 376 U.S. 205, 214 (1964). On one side of that line, Congress gave FERC exclusive jurisdiction over "the sale of electric energy at *wholesale*." *See* 16 U.S.C. § 824(b) (emphasis added). Just as importantly, however, Congress gave the other side of the "bright line" to the States. That is, the Federal Power Act

expressly preserved state authority over "any other sale of electric energy" – meaning, among other things, all *retail* electric sales. *Id.*; *see also, e.g.*, *S. Cal. Edison Co*., 376 U.S. at 214 (in the FPA, Congress preserved "state regulation of a sale at local retail rates to ultimate consumers"). Thus, under the FPA, the State of Ohio – through this Commission – possesses near plenary authority to determine the *retail* rates paid by AEP Ohio customers.

The PPA Rider is not preempted under the doctrine of field preemption because it is a *retail* rate and thus falls squarely on the *retail* side of the FPA's "bright line." Through the PPA Rider, AEP Ohio requested retail rate treatment of wholesale power contracts (PPAs) that AEP Ohio has entered or will enter. The PPAs themselves are wholesale contracts subject to FERC's jurisdiction under the FPA. But the PPA *Rider* is a *retail* rate that establishes the way in which the costs and benefits of those PPAs will be passed on through retail rates to AEP Ohio's customers. If the Commission approves AEP Ohio's request to include PPA costs in the PPA Rider, the PPA Rider will appear on customers' *retail* bills as a *retail* credit or charge. The PPA Rider, therefore, does not implicate FERC's jurisdiction over wholesale sales, because the Rider does not dictate the rates, terms, or conditions of the PPAs themselves; rather, it establishes the way in which AEP Ohio may pass on the costs and benefits of the PPAs through retail rates.[14]

Indeed, the PPA Rider reflects how the division between federal and state jurisdiction has always been drawn for utility wholesale power purchases. A utility's wholesale purchases (such as PPAs) are the purview of FERC, and FERC determines whether the rates, terms, and conditions of the PPAs are just and reasonable. However, the retail rate treatment of those wholesale contracts is the purview of the State, and the State determines whether or to what

[14] IEU argues (at 15-16) that the PPA Rider is unlawful under *Ohio* law because Ohio law does not permit the Commission to set wholesale rates. Although that is an incorrect statement of Ohio law, the issue is irrelevant because, as discussed above, the predicate of IEU's argument is incorrect: The PPA Rider does not involve the Commission setting any wholesale rates.

extent the utility may pass on the costs and benefits of the PPAs to retail customers.[15] *See, e.g.*, *S. Cal. Edison Co.*, 376 U.S. at 214 (states have jurisdiction over "local retail rates"); *see also Pike Co. Light & Power Co. v. Penn. Pub. Serv. Comm'n*, 465 A.2d 735, 737-38 (1983) ("*Pike County*"); *Public Service Co. of New Hampshire v. Patch,* 167 F.3d 29, 35 (1st Cir. 1998); *Central Vermont Public Service Corp*., 84 FERC ¶ 61,194 (1998). The Commission has repeatedly approved utilities' requests to pass on wholesale contract costs to retail customers, including the very OVEC contract now being discussed for the PPA Rider. (The OVEC contract has been recovered in AEP Ohio's retail rates since 2009 based on the *ESP I* decision.) The preemption analysis for the PPA Rider is no different. The PPA Rider merely continues the long precedent under which the State – through this Commission – has authority to establish the *retail* rate treatment of AEP Ohio's wholesale transactions.

Moreover, FERC unquestionably permits bilateral contracts in PJM, yet if intervenors' field preemption theory were correct, it would lead to the absurd result that utilities could rarely, if ever, enter into PPAs. When a utility purchases power in a bilateral contract for the benefit of its customers, the utility expects – and often is entitled to – retail rate recovery related to that wholesale purchase. Yet intervenors' field preemption argument – that retail rate recovery of

[15] The only exception to the State's retail ratemaking authority for wholesale purchases arises in the area of so-called "trapped costs." Under the "trapped costs" doctrine, some cases have held that a State utility commission is *required* allow a utility to pass on the costs of FERC-approved wholesale contracts through retail rates. *See, e.g.*, *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962 (1986) ("interstate power rates filed with FERC or fixed by FERC must be given binding effect by" state utility commissions). But the trapped costs doctrine is not a reason to conclude that the PPA Rider is preempted (nor has any intervenor made such an argument). If anything, the trapped costs doctrine, if applied here, would suggest that the Commission is *required* to approve the PPA Rider and permit AEP Ohio to pass on the costs of any FERC-approved PPAs through retail rates. To be clear, AEP Ohio is not at this time making a trapped costs argument, nor is AEP Ohio in any way claiming that the Commission is required to adopt the PPA Rider or any specific PPA as part of that Rider. Indeed, the trapped costs doctrine typically does not apply where, as here, the utility voluntarily chose to enter the wholesale contract in question. Nonetheless, we raise the trapped costs doctrine here to point out that the *only* precedent recognizing a limit on States' retail ratemaking authority vis a vis wholesale power purchase agreements actually *supports* the PPA Rider.

wholesale purchases (such as the PPA Rider) violates the FPA – would entail that States may *never* provide retail recovery for a utility's wholesale purchases. That is manifestly absurd and contrary to decades of precedent in Ohio and elsewhere. Where, as here with the PPA Rider, a State establishes a retail rate recovery mechanism for costs and benefits related to a wholesale purchase, the State acts well within its retail authority under the FPA.

b. The PPA Rider is starkly different from the state programs at issue in *Solomon* and *Nazarian*, and the field preemption reasoning of those cases does not apply here.

Notwithstanding the fact that the PPA Rider is clearly a *retail* rate, several intervenors claim that the PPA Rider is field preempted under the reasoning of two recent federal court decisions, *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014), and *PPL Energyplus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014). (*See* IEU AFR at 38; RESA AFR at 13; CNE/Exelon AFR at 16; IGS AFR at 6-7.) But those cases are easily distinguishable. In *Solomon* and *Nazarian*, states *forced* their utilities to enter into particular wholesale contracts – i.e., contracts for differences (CfDs) – with state-selected generators. The CfDs required the utilities to make or receive payments that guaranteed that the generators would receive the CfD price, not the PJM market price, for their sales into the PJM market. *Solomon*, 766 F.3d at 249, 252; *Nazarian*, 753 F.3d at 473-474. The courts found that the CfD programs were preempted because, in dictating the price and terms of wholesale sales, the states trespassed into FERC's side of the FPA's "bright line." *Solomon*, 766 F.3d at 255; *Nazarian*, 753 F.3d at 476. In each case, the state program literally set the price and terms of a wholesale contract – the CfDs – and in so doing, expressly established the price that the generators would receive for their wholesale sales in PJM.

The PPA Rider is starkly different. Most importantly, in approving the PPA Rider, the Commission is not *forcing* AEP Ohio to enter any particular wholesale contract. Instead, AEP

Ohio *voluntarily* has entered (or will enter) into the PPAs at issue. Moreover, unlike the programs in *Solomon* and *Nazarian*, the PPA Rider does not involve the Commission dictating the prices or terms of any wholesale contract, nor does the PPA Rider involve the Commission selecting the counterparty of the contract. Instead, AEP Ohio has selected the counterparty and has set the prices and terms of the PPA with that counterparty.

Accordingly, in approving the PPA Rider, the Commission has stayed well on the States' side of the FPA's "bright line." The prices, terms, conditions, and counterparties of the PPAs in question have been (or will be) set pursuant to FERC regulations and without any interference from the Commission. The Commission may determine whether to approve AEP Ohio's requested retail rate treatment, including by conducting a rigorous review of the "prudence" of AEP Ohio's decision to enter into the contracts at issue. *See Pike County*, 465 A.2d at 276, 278; *see also* AEP Reply Br. at 48 (citing numerous other cases). But the PPA Rider and the Commission's prudence review are clearly the province of the State and in no way set or dictate wholesale prices or terms in the manner of the programs in *Solomon* and *Nazarian*.

c. That AEP Ohio will sell the PPA power into the PJM markets does not alter the preemption analysis.

Some intervenors focus on the fact that, as proposed, AEP Ohio will sell the power purchased through the PPA into the PJM market. These intervenors do not argue that the PPA Rider is preempted because it will set the price that the PPA *generator* will receive (as in *Solomon* and *Nazarian*). Instead, they argue that the PPA Rider is preempted because it purportedly establishes the price that *AEP Ohio* will receive for *its* sales of PPA power at PJM. (*See* OCC AFR at 7; IEU AFR at 41; IGS AFR at 7-8.) That argument is meritless and leads to absurd outcomes under which traditional State retail rate jurisdiction would be drastically curtailed.

As discussed above, the PPA Rider establishes the *retail* rate treatment of AEP Ohio's proposed PPA arrangement. Under that arrangement, AEP Ohio will purchase power from the PPA generator and then sell the power at PJM, passing on any balance or deficit to retail ratepayers through the PPA Rider. Insofar as AEP Ohio's balance sheet, under this arrangement, will not rise and fall with the PJM market price, that is only because of the *retail* credit or charge that will result from the PPA Rider.

The retail credits or charges under the PPA Rider are critically different from the payments at issue in *Solomon* and *Nazarian*. The state programs in *Solomon* and *Nazarian* were preempted because the States mandated that *utilities* make wholesale payments to *independent generators* in order to dictate the price the generators would receive for their sales at PJM. That interfered with FERC's authority over wholesale prices because the States reached beyond their traditional retail ratemaking authority to dictate the price that an independent generator would receive for wholesale sales. Here, however, the PPA Rider, like any other retail rate, mandates that *retail ratepayers* make retail payments to *utilities.* As discussed above, States have near plenary authority to determine the revenues that distribution utilities will receive from retail rates. Contrary to intervenors' suggestions, therefore, outside the context of "cost trapping," which is not at issue here, *see supra* footnote 15, there is nothing in the Federal Power Act – or any of the cases interpreting it – that requires a State's retail ratemaking regime to perfectly match the prevailing wholesale prices.

On the contrary, all across PJM, States have established retail rate regimes under which utilities receive retail charges or (or pay retail credits) that supplement the price received for the utilities' wholesale sales. For example, many vertically integrated utilities in PJM sell power at PJM-established market prices but are compensated for their generation separately through retail

rates (usually through a cost-based rate). Indeed, that is precisely how AEP Ohio and other utilities were compensated before corporate separation in Ohio: AEP Ohio would sell power into PJM but be compensated separately for generation through retail rates. Thus, if intervenors' reasoning were correct, it would lead to the absurd conclusion that the retail rate regimes for vertically integrated utilities throughout PJM (and in Ohio before corporate separation) are preempted because the utilities do not receive the PJM price for their wholesale sales. That cannot be the case.

Instead, States have near plenary authority to establish the retail rate treatment of utilities' wholesale sales, irrespective of the price in the wholesale market. That accords with "bright line" division of authority in the FPA, and no case – least of all *Solomon* and *Nazarian* – has held differently. The PPA Rider falls squarely within that State retail ratemaking authority.

2. Intervenors' conflict preemption arguments also fail.

Other intervenors, purportedly relying on *Nazarian*, claim that the PPA Rider is invalid under the doctrine of *conflict* preemption because the Rider may have some effect on wholesale prices in PJM. (*See* OCC AFR at 9 ("[T]he issue is the effect of the retail rate rider programs on the PJM wholesale auction clearing prices for the energy, ancillary services and capacity products."); *see also* OPAE/APJN AFR at 17-18.) But *Nazarian* in no way held that "effects" on wholesale markets are alone sufficient to establish preemption. To the contrary, as *Nazarian* expressly recognized, "not every state regulation that incidentally affects federal markets is preempted." 753 F.3d at 479-80. That is because hundreds of state ratemaking decisions will have an "effect" on wholesale markets, and to hold that all such decisions are preempted by the Federal Power Act "would thoroughly undermine precisely the division of the regulatory field that Congress went to so much trouble to establish * * * , and would render Congress' specific grant of power to the States to regulate production virtually meaningless." *Id.* at 480.

Thus, in contrast to than the paltry "effects" standard on which intervenors attempt to rely, *Nazarian* set an extremely high bar to find that a state program conflicts with federal law. *Nazarian* did not find conflict preemption on the basis of minor or even moderate "effects" on the PJM market. Rather, *Nazarian* found a conflict with federal law only after the plaintiffs had established that the state program would cause a "serious[] distort[ion of] the PJM auction's price signals." *Id.* at 478. Moreover, *Nazarian* only reached its conflict preemption conclusion after a multi-week trial in which the plaintiffs introduced voluminous evidence – including expert testimony – establishing the "serious[] distort[ion]" of the PJM markets. *Id.* Thus, *Nazarian* required an extensive evidentiary record to sustain a conflict preemption claim.

Accordingly, even if *Nazarian*'s conflict preemption standards were applicable here, intervenors have not even begun to meet those high standards. Intervenors' vague allusions to "anti-competitive effects" on the PJM market – and their unsupported claims that the PPA Rider "is not consistent with competition" – clearly do not provide the required evidentiary support. (*See* OCC AFR at 11-12; *see also* OPAE/APJN AFR at 18 (asserting without any record citation that the PPA Rider will "corrupt the operation of the regional wholesale generation market").) The scant record evidence intervenors do cite, moreover, is plainly inadequate. OCC cites its own witness's testimony that the OVEC plant "*may* no longer be economic to operate," (*see* OCC AFR at 11 (emphasis added)), [16] but that speculative assertion does not even begin to show how the PPA Rider would affect PJM market prices. Nor does it in any way support the kind of "serious distortion" needed to show conflict preemption. *Nazarian*, 753 F.3d at 478. Intervenors' conflict preemption arguments fail.

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[16] OCC's attempt to rely on testimony from another utility's ESP proceeding is manifestly improper. (*See* OCC AFR at 12 n.11.) As the Commission knows, that testimony is not part of the record before the Commission in this proceeding.

3. The Commission acted within its discretion in declining to address intervenors' preemption arguments.

Several intervenors argue that the Commission erred by declining to reach intervenors' preemption arguments. (*See* OCC AFR at 3-7; RESA AFR at 13-14; CNE/Exelon AFR at 16.) But the Commission acted well within its discretion in doing so, and intervenors offer no basis for forcing the Commission to reach this thorny constitutional issue.

After concluding that the General Assembly authorized the PPA Rider under R.C. 4928.143(b)(2)(D), the Commission's inquiry into its jurisdiction and authority was complete. There is no reason why the Commission must take up the question of whether, in passing R.C. 4928.143(b)(2)(D) and authorizing the PPA Rider, the General Assembly violated the Supremacy Clause of the U.S. Constitution. As the Commission correctly concluded, the question of whether to strike down a state law (in whole or in part) is a weighty matter best left to the Ohio Supreme Court.

The case law cited by intervenors does not hold otherwise. OCC's main authority, *Coalition for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 442 (6th Cir. 2004) (cited in OCC AFR at 4), is a case addressing the federal Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Whatever standards the APA may mandate for federal agencies, they obviously do not apply to the Commission. OCC's remaining authorities merely address the specificity with which the Commission must explain its rulings. *See, e.g.*, *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312, 513 N.E.2d 337 (1987) (cited in OCC AFR at 5); *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St. 3d 486, 493, 2008-Ohio-990, 885 N.E.2d 195 (cited in OCC AFR at 5). None of those cases hold that it is the Commission's responsibility to decide whether an Ohio statute violates the U.S. Constitution.

IEU's principal authority, moreover, is a case in which the Commission held that its order was *consistent* with the PJM tariff. (*See* IEU AFR at 38 (citing *In re Commission Review of Capacity Charges*, Case No. 10-2929-EL-UNC, Opinion and Order at 2 (July 2, 2012)).) It is obviously a different matter altogether to recognize that a state action is in accord with federal law (which is implicit in nearly all Commission orders) than to take the rare and drastic step of holding that a state action is barred by the Constitution. The Commission has long presumed that statutes are constitutional and, therefore, has often left questions of constitutionality to the courts. *See, e.g.*, *In re Rules Promulgated Under Section 4935.03, Revised Code*, Case No. 86-1140-GE-ORD, Entry ¶ 3 (Feb. 3, 1987) ("[E]nactments of the General Assembly are presumed to be constitutional, and since there has been no Ohio Supreme Court case declaring Section 4935.03, Revised Code, invalid, the Commission must presume that the statute is constitutional. The Commission has no authority to find a statute enacted by the Ohio General Assembly unconstitutional."). The same principles apply here. The Commission was well within its discretion to decline to address intervenors' preemption arguments, and intervenors offer no reason to revisit that decision.

G. The PPA Rider does not violate the corporate separation statute, R.C. 4928.17. [CNE/Exelon Prop. 3; IGS Prop. 4; RESA Prop. 1]

RESA argues (at 10-12) that the PPA Rider violates the corporate separation statute, R.C. 4928.17, and CNE/Exelon (same counsel as RESA) makes similar arguments (at 13-14). IGS also summarily asserts (at 15) that the PPA Rider violates the corporate separation statute because it "could provide AEP Ohio with above-market compensation for unregulated assets" and allow "AEP to exercise market power and to provide an undue preference and competitive advantage to an unregulated business division." In addition to being factually inaccurate, these arguments beg the question whether the PPA Rider is authorized under the ESP statute

(addressed elsewhere in this memorandum) and are otherwise fundamentally misdirected, since the corporate separation statute explicitly subordinates its requirement to anything that is authorized in the ESP statute. *See* R.C. 4928.17(A) ("[e]xcept as otherwise provided in sections 4928.142 or 4928.143 * * *") The Commission's approval of the PPA Rider under the ESP statute trumps any flawed claim that the PPA Rider independently violates the corporate separation statute.

H. The PPA Rider does not involve recovery of stranded generation costs in violation of R.C. 4928.39. [IEU Prop. 9; OCC Props. 2, 5; OHA AFR §2.B.; OPAE/APJN Prop. 3]

The Commission expressly rejected "the assertion that the PPA rider would permit AEP Ohio to collect untimely transition costs in violation of R.C. 4928.38" because "the PPA rider constitutes a rate stability charge related to limitations on customer shopping for retail electric generation service and may, therefore, be authorized pursuant to R.C. 4928.143(B)(2)(d) * * * ." Opinion and Order at 26. Nonetheless, IEU, OCC, OPAE/APJN, and OHA repeat this argument on rehearing. (IEU AFR at 33-37; OCC AFR at 39-41, 67-68; OPAE/APJN AFR at 16-17; OHA AFR at 7.) Intervenors raise nothing on rehearing that the Commission has not already fully considered and rejected in this case. For this reason alone, the Commission should deny the requests for rehearing on this issue.

Denial also is warranted on the merits. Intervenors' position essentially is that when OVEC costs exceed market-based revenue, the difference is costs unrecoverable in a competitive market. This is a misguided view of stranded costs. Under this misguided theory, any period where costs exceed market revenues – be it an hour, a day, a month or a year – would render the asset stranded investment. But stranded generation costs under R.C. 4928.38 were measured through a long-term (life-of-unit) view of costs versus expected revenues. Moreover, the only evidence of record in this case reviewing the long-term costs and benefits of OVEC shows a

long-term benefit. (*See e.g.*, OMAEG Ex. 3 Attachment 2; Tr. XI at 2557, 2604; OMAEG Ex. 3 Attachment 3; Tr. II at 506-507; OEG Ex. 3 at 16 and Ex. AST-2.) Conversely, no intervenor presented any evidence supporting the conclusion that the OVEC units are uneconomic over the remaining life of the plants. Moreover, the Commission's decision here is consistent with and supported by its rejection of a similar "untimely transition revenue" arguments in AEP Ohio's last ESP case. *ESP II*, Opinion and Order at 32 (Aug. 8, 2012). For these reasons, the Commission should disregard intervenors' incorrect assertion that the PPA Rider permits AEP Ohio to recover transition revenue.

II. OCC's and IEU's challenges to the Commission-approved return on equity are without merit and should be denied. [IEU Prop. 17; OCC Prop. 4]

OCC and IEU seek rehearing on the 10.2 percent return on equity (ROE) ordered by the Commission. (OCC AFR at 58-67; IEU AFR at 61-67.) OCC makes its rehearing request on the asserted grounds that it was unreasonable to approve an ROE at the same level that it ordered for AEP Ohio in its last rate case four years ago. (OCC AFR at 58). Specifically, OCC asserts that there are lower risks for the utility now compared to before due to the presence of riders and declining interest rates. (*Id.* at 59.) It also argues that the Commission failed to comply with R.C. 4903.09, which requires that findings be made upon the record. (*Id.* at 61-62.) Both OCC and IEU also seek rehearing based on the argument that approval of the ROE violates the settlement agreement reached in the last distribution rate case. (*Id.* at 62-62; IEU AFR at 61-67.) Finally, OCC recasts its argument attacking the Commission for not adjusting downward the ROE in this case due to issues from past cases concerning the provider of last resort, rate stability, and capacity charges. OCC's and IEU's arguments ignore the Commission's ratemaking discretion and should be denied as meritless.

A. The Commission considered the ROE evidence provided in this record to make its determination.

OCC improperly seeks to attack the findings upon which the Commission relied in ordering a 10.2 percent ROE on the basis that the decision violated R.C. 4903.09. (OCC AFR at 59-62.) OCC's argument that the ROE should be lower is nothing more than a repackaging of the arguments OCC advanced in its post-hearing briefs. The fact that the ROE authorized in this case is the same as that set in the Company's last distribution case does not mean that the Commission violated R.C. 4903.09.

The record in this case provides a range of options and evidence for the Commission to weigh in determining the ROE for purposes of this proceeding. The record contains ROE recommendations by expert witnesses that range from 9 to 11 percent.[17] The Commission considered the evidence the parties presented and determined 10.2 percent to be the proper ROE level. Opinion and Order at 82-84. AEP Ohio discussed this record evidence at length in its initial and reply post-hearing briefs. (*See* AEP Ohio Br. at 108-110; AEP Ohio Reply Br. at 88-97.) AEP Ohio incorporates that thorough discussion of the testimony of Company witness Dr. Avera detailing the extensive analysis provided to determine a ROE for this particular case into this memorandum contra. AEP Ohio's past briefs also discuss the irregularities, short comings and mistakes in the analysis provided by OCC and other intervenors in the record in this case that would justify an ROE even higher than the 10.2 percent approved by the Commission. Wal-Mart witness Chriss also provides evidence that the 10.2 percent ROE is within the range approved by other utility commissions – "The range of reported authorized ROEs for the period [2012-2014] is 8.72 percent to 10.95 percent." (Wal-Mart Ex. 1 at 9 lines 6-7.) However, the

[17] The Company proposed a ROE of 10.65 percent, which was in the range up to 11 percent that Dr. Avera's analysis supported.

Commission exercised its discretion and ordered a 10.2 percent ROE. This number is well within the range of recommendations in the record. OCC's rehearing request should be denied.

B. The Commission's adoption of a 10.2 percent ROE is based on the record and not a past Commission Order adopting a settlement agreement.

The Commission's discussion of the Company's last distribution rate case did not amount to error because the Commission made its decision here based upon the evidence in this case. Nowhere does the Commission say that it is ignoring the record in this case and simply adopting the number previously established in the earlier case for purposes of making its decision in this case. To the contrary the Commission states that it is approving a number based on this record. Specifically the Commission states that, "*[f]ollowing our review of the record in the present ESP proceedings*, we find that it is appropriate to maintain the ROE of 10.20 percent authorized for AEP Ohio in the Distribution Rate Case. Opinion and Order at 84 (emphasis added). Leading up to this finding the Commission discussed the positions and evidence of OCC and Walmart and determined their recommendations were inadequate to address the Company's need to maintain its financial integrity and to allow the Company to attract capital. *Id.* The Commission simply made an observation that this is the same level of ROE approved in the last rate case, not that it is the basis for its finding.

AEP Ohio agrees that the Commission should not issue an Order saying that the parties have waived their right or are estopped from challenging any ROE other than 10.2 percent because they agreed to it in a prior case, but that is not what the Commission did here. The language included in the distribution rate case settlement agreement is tied to the prohibition against citing the terms of the agreement as "precedent" for or against Signatory Parties or the Commission. (IEU AFR at 63.) No party is citing the 10.2 percent ROE from the earlier case as a precedent agreed to by any party or claiming that the Commission must adopt the same ROE

level in this case based on its decision in that earlier case. The Commission's recognition that it is maintaining that number following its "review of the record in the present ESP proceedings" does not violate a term prohibiting citing it as precedent for or against any party or the Commission.[18] The Commission's reference to what it is bound or not bound to do does not impact the finding it made in this case, and IEU's request that the Commission admit some breach and declare some deeper policy statement is unnecessary. (IEU AFR at 66-67.) The Commission found 10.2 percent appropriate, just, reasonable, and supported by the record because it fell within the range of recommendations provided by witnesses for OCC, Walmart, and the Company. OCC's and IEU's rehearing applications concerning the 10.2 percent ROE should be denied.

C. OCC's rehearing request to incorporate issues from past Commission orders into this proceeding is improper and should be denied.

OCC urges the Commission on rehearing to factor into its ROE determination past issues from other cases including issues regarding the provider of last resort, rate stability, and capacity deferral charges. All of these issues were the subjects of past unrelated cases. OCC seeks to use the rehearing process in this case to relitigate its disagreements with how the Commission resolved those issues in the prior proceedings and burden this record before this Commission and potentially on appeal by re-inserting those unrelated issues into this proceeding. The Commission should see this transparent attempt to improperly expand the scope of this proceeding and deny this request for rehearing.

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[18] If IEU and OCC are correct as to the application of the settlement terms from the prior distribution case then the Commission would have to apply the same rationale to the annual $1 million ordered to be provided to the neighbor to neighbor program and remove the modification. Opinion and Order at 65. The Commission ordered the payment of the $1 million annually even though the Commission recognized Company testimony in this case that it was not part of the ESP proposed plan and that it was a stipulation term from another case. *Id.* The inclusion of that amount in this ESP because it was included in a past stipulation would suffer from the same infirmities asserted by IEU and OCC.

OCC also argues that there is precedent supporting a decrease in the ROE for qualitative factors beyond the formulae and that these extra-record issues qualify for such an adjustment. (OCC AFR at 65.) OCC cites to a number of early 1980s base rate cases to support its analysis. The examples OCC provides are not supported by this record. There is no evidence (or allegation) in the record that the Company has failed to implement a demand side management program or that its service reliability is poor. In fact, the Commission pointed out that AEP Ohio is performing at or above its established reliability standards and its expectations are aligned with its customers on service reliability. Opinion and Order at 47. OCC cannot support making adjustments to AEP Ohio's ROE based on the issues involved in the cases it cites. In addition, the fact that it lost arguments in the past that refunds or downward rate adjustments should be made directly to account for other claims certainly does not justify making those refunds or downward rate adjustments indirectly now through reductions to the ROE in this case.

Moreover, this is an ESP proceeding under R.C. 4928 focused on a specific proposed plan. R.C. 4928 has its own mechanism to monitor and potentially adjust the earnings of EDUs in the event they become significantly excessive. Specifically, the Company is subject to the significantly excessive earnings test (SEET) of R.C. 4928.143(F). If past or present decisions result in the Company collecting significantly excessive earnings, then the Commission will have the ability to remedy such overearnings in the manner provided in that statute. OCC seeks to improperly circumvent the R.C. 4928.143(F) earnings review process and apply a version of the R.C. Chapter 4909 process that the Company does not agree would be appropriate even if this were a distribution rate case – which it is not. OCC's attempt to use rehearing in this case to bootstrap its complaints with past Commission orders should be denied and, instead, the

Commission should allow the proper appeals and the SEET test to operate as the General Assembly intended.

III. OPAE/APJN's and OMAEG's rehearing requests concerning the Distribution Investment Rider and other riders are without merit and should be denied. [OMAEG Prop. 3; OPAE/APJN Prop. 7]

A. OPAE/APJN's general rehearing attack on riders should be denied.

OPAE/APJN seeks rehearing on the Commission's approval of riders like the DIR and ESRR and the associated cost allocations. (OPAE/APJN AFR at 24-27.) OPAE/APJN asserts that AEP did not consider the affordability of the DIR and did not demonstrate any quantifiable benefits. (*Id.* at 25.) The only specific support for OPAE/APJN's argument against the ESRR is the conclusory statement that "[t]he expanded ESR should also not have been approved." (*Id.*) OPAE/APJN appears to rely on the general argument that distribution charges should be considered in base rate cases. (*Id.*)

The Commission has the authority and has approved many riders as part of ESP proceedings. AEP Ohio discussed these arguments at length in its post hearing and reply briefs.[19] AEP Ohio pointed out the record evidence that characterized rate cases as "slow turtle dinosaurs" and how the General Assembly recognized the need for a more timely recovery method for certain electric utility expenses, including distribution related costs. For example, R.C. 4928.143(B)(2)(h) permits an ESP to include provisions regarding the electric utility's distribution service, including, without limitation, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking , and provisions regarding distribution infrastructure and modernization incentives for the electric utility. The policy debate

[19] See discussion in AEP Ohio Post Hearing Br. at 73-75 and Reply Br. at 67-68, incorporated as part of this memorandum contra.

on whether riders should be included in an ESP filing or not has passed and OPAE/APJN's rehearing request should be denied.

AEP Ohio also addressed the OPAE/APJN argument that the Company did not consider the affordability of the DIR rider in its previous filings. OPAE/APJN relies on the testimony of OCC witnesses in the abstract to argue against riders, but as the record shows OCC's analysis failed to consider the rates actually produced by this ESP in this case. OCC witness Williams admitted that he was focused solely on OCC's opposition to specific riders and did not consider the overall affordability of the ESP plan as a package for the working poor. (Tr. VI at 1471-1472.) AEP Ohio witness David Roush did consider the impact of the entire ESP proposal on customers in his testimony. He testified that a residential customer using 1,000 kWh of electricity per moth would see an estimated monthly rate decrease of $10.80 for CSP Rate Zone customers and $6.10 for OPCo Rate Zone customers beginning in June 2015. (AEP Ohio Ex. 12 at 6-7.) Mr. Roush's testimony also included exhibits showing the percentage impact for a number of typical usage levels. (*Id.*) The Commission analysis looked at the ESP plan as a whole and determined it is in fact more favorable in the aggregate as compared to the results that would otherwise apply under a market rate option under R.C. 4928.142. Opinion and Order at 91-95.

B. OMAEG's DIR rehearing requests should be denied as meritless.

OMAEG also sought rehearing on Commission findings related to the DIR. (OMAEG AFR at 16-20.) OMAEG sought rehearing based on its argument that the record did not support the level of recovery approved over the ESP and that recovery of such costs is more appropriate in a base distribution case. (*Id.*) AEP Ohio covered the necessity of the DIR levels in its

Application for Rehearing and post hearing briefs.[20] In fact, the Commission can see these exact same arguments addressed in AEP Ohio's Reply Brief at 69-72. In short, OMAEG's arguments, again, are more with the statutory basis of riders and with standards related to the DIR result that are not found in statute. The need for timely recovery of distribution investment can be reviewed above in the discussion of base rate cases as "slow turtle dinosaurs" and the exhaustive discussion in the AEP Ohio briefs.

OMAEG also creates a fictitious requirement that AEP show the benefit of each yearly DIR in this docket. (OMAEG at 18.) That is simply not the standard. The argument that the continuation of the DIR in this case is connected to concerns raised in past cases with the reporting and quantification of reliability is a red herring without merit. Those issues have been dealt with by the Commission from past DIR plans in other cases. OMAEG's arguments on rulings in other Commission DIR specific work plan dockets are improper requests for rehearing from prior Commission decisions. However, this issue was resolved with Staff filing comments on the DIR plan in Case No. 14-255-EL-RDR stating that "[t]he Company did quantify the reliability improvements achieved through implementation of the proactive/reliability programs, thus demonstrating that these programs are achieving their intended purpose of maintaining and improving reliability."

Finally, OMAEG suggests that the Company be required to continue to work with Staff on the development of its DIR work plan each year. (OMAEG AFR at 19-20.) The Commission relieved the Company of the requirement initiated at the start of the DIR to work with Staff and

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[20] See AEP Ohio's Application for Rehearing at 25-40 for a discussion on the importance of the rate caps to AEP Ohio's operations. See AEP Ohio's Post-Hearing Brief at 73-84 and Reply Brief at 68-76 for discussion regarding the justification for the DIR caps and importance toward reliability. Also see the testimony of Company witness Dias (AEP Ohio Ex. 4 at 3-9) and Company witness Moore (AEP Ohio Ex. 13 at 5-7).

develop a DIR work plan because of the recognition of the Company's performance at or above its reliability standards. Opinion and Order at 47. The only directive by the Commission is that the formal requirement and potential corresponding duties previously ordered are no longer necessary. However, it is the expectation of the Company that it will continue to work with the Commission Staff. Staff has been a good partner and the interaction has been valuable in highlighting the challenges of developing a plan that provides the requisite indicators desired by the Commission, while still maintaining the necessary flexibility to manage the distribution system. The Company plans to continue to get Staff's input and understand Staff's expectations when finalizing the DIR plans.

IV. The Commission correctly approved AEP Ohio's Basic Transmission Cost Recovery Rider. [IEU Props. 13-16; RESA Prop. 5]

IEU seeks rehearing of the Commission's Opinion and Order on the basis that the Commission's authorization of AEP Ohio's Basic Transmission Cost Recovery Rider (BTCR) was unreasonable and unlawful. None of IEU's arguments merits rehearing.

IEU argues that the BTCR reduces customer options for transmission services and frustrates price signals provided by PJM's Open Access Transmission Tariff and that Reactive Supply Costs should be assigned to customer classes on a 1 CP basis. (IEU AFR at 56-61.) IEU advanced each of these positions in its post-hearing briefs (*see* IEU Br. at 40-44; IEU Reply Br. at 21-23), and the Commission has already fully considered and rejected them. Opinion and Order at 66-68. Nothing has changed to affect the Commission's rejection of the above arguments. Because it has thoroughly considered and rejected these arguments, the Commission should decline to revisit them on rehearing now.

IEU additionally contends that the Commission's decision approving the BTCR was unreasonable because the Commission did not provide for customers to be included in the

process to ensure that customers do not pay twice for the same transmission-related costs. (IEU AFR at 58-59.) But the Commission's Opinion and Order already addressed this argument too. Specifically, the Commission recognized that, if double billing issues arise, "there are existing means for impacted customers to seek the Commission's assistance, either informally by contacting Staff or through the formal complaint process available under R.C. 4905.26." Opinion and Order at 68. Nothing more is needed on rehearing, particularly where the Commission is "not persuaded" that the BTCR even creates a double billing risk. *Id.*

IEU also erroneously argues that the Commission improperly "presume[d]" that AEP Ohio's proposed rate design for the BTCR was reasonable and shifted the burden of proof to intervenors to demonstrate its unreasonableness in violation of R.C. 4928.143(C)(1), and that AEP Ohio did not provide any evidence that its proposed rate design is reasonable. (IEU AFR at 59-61.) This claim is false. The Company presented ample evidence, both in the form of written and oral testimony, to support its BTCR proposal. As the Commission correctly noted, the Company provided evidence that it specifically designed the BTCR to be consistent with the current treatment of costs under the TCRR approved in *ESP II*, and with other Ohio EDUs' transmission cost recovery riders. *See* Opinion and Order at 67 (citing AEP Ohio Ex. 13 at Ex. AEM-3; Tr. VI at 1518-1529; AEP Ohio Br. at 117-118). Unlike AEP Ohio's well-supported and consistent rate design, however, IEU's proposed rate design was not supported by adequate analysis and "would have an unknown impact on customer bills." *Id.* at 68. Accordingly, the Commission correctly declined to adopt IEU's proposal and deviate from the Company's current transmission cost allocation methodology. *Id.* That the Commission found that AEP Ohio satisfied its burden of proof as to the BTCR but that IEU's proposed rate design modification

lacked support clearly does not violate R.C. 4928.143(C)(1), and it does not provide a basis for rehearing.

The Commission also should disregard IEU's argument that the Commission is preempted from authorizing the BTCR. (IEU AFR at 53-56.) There is no record on this issue, as IEU raised it for the first time on rehearing in this case. Thus, there is no factual basis for IEU's contention that the BTCR "would interfere with the customer's ability to contract directly with PJM" for transmission service. (*See id.* at 55.) On this basis alone, the Commission should deny rehearing on this issue. Additionally, whether or not a customer can contract directly with PJM is irrelevant. If a customer contracts directly through PJM, the Commission would treat the customer the same as a CRES or auction winner, requiring a Declaration of Authority (DOA). Based on the DOA, the basic transmission charges will be billed back to AEP Ohio and allocated and billed through the BTCR as the Commission ordered.

Moreover, collateral estoppel precludes IEU from advancing its preemption argument here. As the Commission has recognized, "collateral estoppel applies to administrative proceedings before the Commission" and "precludes the relitigation in a second action of an issue that has been actually and necessarily determined in a prior action." *In the matter of Duke Energy Ohio, Inc.*, Case Nos. 12-2400-EL-UNC, *et al.*, Opinion and Order at 36 (Feb. 13, 2014). IEU was a party to the proceedings in which the Commission approved transmission riders comparable to the BTCR for DP&L, FirstEnergy, and Duke. *See DP&L ESP*, Case No. 12-426-EL-SSO, Opinion and Order at 36 (Sept. 4, 2013); *FirstEnergy ESP*, 12-1230-EL-SSO, Opinion and Order at 11, 58 (July 18, 2012); *Duke Rider BTR Case,* Case No.11-2641-EL-RDR, Opinion and Order at 7, 17 (May 25, 2011). IEU opposed the approval of DP&L's transmission rider, on many of the same bases it challenges the BTCR here, and the Commission rejected those

arguments. *See DP&L ESP*, Case No. 12-426-EL-SSO, Opinion and Order at 36 (Sept. 4, 2013).[21] The Commission has held, three times, that transmission riders such as the BTCR are lawful and that it has the authority to approve them. It should disregard IEU's attempt to relitigate that issue here.

Although it supports the creation of the BTCR, RESA requests that the Commission "establish a process" to ensure that pre-June 2015 TCRR costs are properly reconciled and collected from SSO customers and that the BTCR includes only the correct costs when the ESP III term begins. (RESA AFR at 21-22.) AEP Ohio appreciates RESA's support for the BTCR and recognizes RESA's concerns; however, the Commission already has adequate safeguards in place to address them. As the Commission's Opinion and Order expressly provides, the TCRR will be reconciled in Case No. 14-104-EL-RDR after it is eliminated effective June 1, 2015. Opinion and Order at 68. With respect to the BTCR, O.A.C. Chapter 4901:1-36 already provides for a reconciliation process, with carrying charges applicable to any over- or under-recovery of costs. *See* O.A.C. 4901:1-36-04(A). There is no need for the Commission to create an additional process on rehearing to further address cost reconciliation that it has already provided for.

V. IEU's requests for clarification of the IRP-D ruling should be denied. [IEU Prop. 19]

IEU requests that the Commission clarify its ruling regarding Rider IRP-D in four ways. First, IEU requests clarification that the Commission's Opinion and Order does not expand the conditions under which AEP Ohio may call for interruption for purposes of an emergency. Second, IEU requests that the Commission clarify that the terms of Rider IRP-D no longer include any provision for discretionary interruptions. Third, IEU asks the Commission to

[21] Tellingly, IEU did not oppose DP&L's or FirstEnergy's transmission riders.

eliminate the existing load limitation on the availability of Schedule IRP-D, which is 75,000 kW (75 MW) in the Columbus Southern Power rate and 450,000 kW (450 MW) in the Ohio Power zone, totaling 525 MW for both zones. Finally, in the event that the Commission does not eliminate the existing load limitation, IEU requests that the Commission establish a process for allocating to customers the available load under Rider IRP-D. (IEU AFR at 70-72.)

With regard to IEU's first and second request for clarification, AEP Ohio does not believe that clarification is necessary. First, emergency interruptions will be handled in the same manner as Rider IRP-D currently provides, and second, discretionary interruptions would no longer be required by Rider IRP-D going forward.

IEU's third recommendation should be rejected for the reasons that AEP Ohio provided in its Application for Rehearing at 44-45. The 525 MW aggregate cap equates to approximately $52.5 million in interruptible credit payments per year. ($8.21 kW-month x 1000 kW/MW x 1 month/30days x 365 days x 525 MW). If that cap is eliminated, the potential burden on the remaining firm customers would become excessive and unreasonable. Accordingly, the aggregate 525 MW limitation (75,000 kW for CSP's load zone and 450,000 kW for OP's load zone) has provided and continues to provide a reasonable cap on the amount that other customers must pay for this program.

With regard to IEU-Ohio's fourth request for clarification, AEP Ohio does not believe that clarification is necessary. The IRP-D tariff language with respect to the caps has been in place for some time. Existing customers will continue to receive service to the extent of the existing interruptible load that they previously committed to the IRP-D program. With regard to additional load that customers might seek to commit to that program in the future, the Company

has always applied the tariff IRP-D caps to new requests for service on a first come, first served basis, and will continue doing so going forward.

VI. OPAE/APJN and RESA's grounds for rehearing on the Purchase of Receivables and Bad Debt Rider issues are without merit and should be denied. [OPAE/APJN Prop. 6; RESA Props. 3-4, 6]

A. OPAE/APJN's requests for rehearing on the Purchase of Receivables Program and associated bad debt rider are without merit.

1. The Commission Order relied upon the record to find that authorizing a POR program provided benefits and increased competition.

The OPAE/APJN arguments attacking the Commission's findings on the POR program are without merit.[22] OPAE/APJN argues that the record does not justify authorization of the program and that the record does not support that a POR program will provide customer benefits or that additional CRES providers will enter the market. (OPAE/APJN AFR at 21.) OPAE/APJN also argues that the approval of the bad debt rider for purposes of collecting bad debt related to CRES provider charges is an unlawful subsidy under R.C. 4928.02(H) and that its approval removes any incentive for CRES providers to manage risk or keep prices affordable. These arguments ignore the substantial weight of the evidence and misapply the relevant law.

The path to consideration of POR programs in electric distribution utility (EDU) territories has developed over the past few years. In its Opinion and Order, at 80, the Commission pointed out that it previously addressed the idea of considering a POR program in AEP Ohio's service territory in the Company's prior ESP and generally in the 12-2050 Market Study docket. As stated, the Commission continues to encourage utility consideration of implementation of a POR program, as it makes sense for the respective utility territories. *Id.* The lessons learned from the stakeholder groups and the implementation in other jurisdictions

[22] See the extensive discussion of the POR program benefits in AEP Ohio's Initial Brief at 118-132 and AEP Ohio's Reply Brief at 101-109, which AEP Ohio incorporates here.

helps educate the Commission on the overall policy issue of the applicability of a POR option for EDUs in Ohio as this is a developing issue.

Regardless of the Commission's larger perspective on POR programs, OPAE/APJN ignores the record evidence relied upon by the Commission to show that authorization of a POR program will provide customer benefits and assist in developing the competitive market. OPAE/APJN asserts the record does not support this conclusion and that there is no customer data or numerical projections supporting the program, that no cost-benefit analysis was done and that there is no support that additional CRES providers will enter into the market. (OPAE/APJN App for Rehearing at 21.)

The Commission found that the POR program will provide significant customer benefits as provided in Company Ex. 11 at 4-6; RESA Ex. 3 at 8. Opinion and Order at 81. The testimony relied upon by the Commission in Company Exhibit 11 is the testimony of AEP Ohio expert Stacey Gabbard. Mr. Gabbard shared that customers would have more choice of CRES providers and products (AEP Ohio Ex. 11, at 4); that shopping customers can take advantage of the Company's Budget or Average Monthly Payment programs (*id.*); that customers will receive the benefit of only dealing with one entity in regard to billing issues for the core commodity charges (*id.* at 5); that customers will receive one bill in the mail and only deal with one company if payment becomes past due (*id.*); and that customers will be free of duplicative credit checks and adverse impacts on credit scores (*id.*). Mr. Gabbard also shared the efficiencies expected for the CRES providers as a potential benefit of a POR program. (*Id.* at 5-6.).

As discussed in Mr. Gabbard's testimony and AEP Ohio's application for rehearing, the only entity the POR program does not benefit would be AEP Ohio. (*Id.* at 6; AEP AFR at 53.) Mr. Gabbard testified to the benefits to the customer and CRES and pointed out the goal is that it

"do no harm" to the EDU implementing the program. (*Id.*) Staff witness Donlon also agreed with this premise that if a company is going to offer a benefit to others at its discretion, it should be held harmless from having to absorb any costs from that offering. (Tr. IX at 2168.)

The record also supports an expected increase in CRES suppliers and offerings as a result of implementing a POR program associated with a bad debt rider. Company witness Gabbard discussed the Abacus Report, the annual baseline assessment of choice in Canada and the U.S. which notes that the states that have purchase of receivable programs surrounding Ohio all have a much higher number of registered suppliers as well as more varied product offerings. (Tr. III at 829.) Mr. Gabbard explained that the report concluded that Ohio ranked lower than most of the other states in product offerings and CRES suppliers in the market, even though Ohio has more customers that have switched. (*Id.*) RESA witness Stephen Bennett, also cited by the Commission, provided testimony on the benefits of increased competition through a POR program. (RESA Ex. 3.) Specifically, Mr. Bennett provides an outline of seven benefits of the POR program including encouraging more CRES providers, lowering the hurdle for market entry, simplifying the process for bills and removing some barriers between CRES providers and EDUs on data sharing.[23] (RESA Ex. 3 at 7.) Staff witness Donlon also discussed the Staff's conclusions in the Market Investigation in docket 12-3151-EL-COI ("Market Investigation"), where Staff stated that a POR program removes a potential barrier and increases the number of active suppliers (Tr. IX at 2163-64), that an increase in shopping options generally corresponds to a decrease in generation prices (*Id.* at 21676-77); and that there is a need for a POR program (*Id.* at 2165.). Mr. Donlon also discussed how the implementation of a POR program with a bad debt rider, as proposed by AEP Ohio, helped grow the competitive environment in the Duke

[23] The Commission Order at page 81 appears to mistakenly cite page 8 of RESA Exhibit 3 rather than the appropriate list on page 7.

Ohio territory. (Tr. IX at 2185; AEP Ohio Br. at 126; AEP Ohio Reply Br. at 103.) In fact, Staff stressed that the impact of the POR program (that had a zero discount rate and bad debt rider at the time) as a factor that could not be minimized as a contributing factor to the increase in providers. (*Id.*)

The record evidence thoroughly supports the Commission's finding that authorizing the Company to offer a POR program provides benefits and increased competition. Arguments on rehearing to the contrary by OPAE/APJN should be rejected.

2. The Commission's approval of a Bad Debt Rider is appropriate and does not need to be authorized in the context of a base rate case.

OPAE/APJN's arguments related to the Bad Debt Rider (BDR) are equally without merit. OPAE/APJN argues that the creation of a BDR to collect CRES receivables is in violation of the statutory prohibition against unlawful subsidies in R.C. 4928.02(H). However, the existence of this same arrangement in the Duke territory shows that there is past precedent for a lawful application of this type of arrangement in Ohio. Likewise, it is not a subsidy when the bad debt rider is set to recover the nonbypassable impact of implementing a regulated program to purchase receivables. The Commission recognized the benefits to customers from initiating such a program as discussed above. There is a relationship between EDUs and CRES providers already. An EDU can bill for a CRES, provide it with customer information, and provide notice to its customers of the presence of the CRES providers offering to provide competitive service. There are already services provided between EDU and CRES providers that do not rise to the level of an unlawful subsidy. Every customer has the opportunity to take advantage of the offering and certain services are related to that universal opportunity.

AEP Ohio agrees that the BDR should not be implemented as modified by the Commission to force AEP Ohio to struggle with a less effective POR and implement discount

rates even though past practice in Ohio shows that a POR with a bad debt rider and zero discount rate is a more effective offering. (Tr. IX at 2185.) But if applied properly, the fact that OPAE/APJN's argument asserts that there are benefits to CRES providers is an admission that the program will incentivize more suppliers to enter the market and make more offerings. These are the exact benefits for customers that the Commission desires and predicted. A POR program is authorized for the benefit of all customers whether they choose a competitive supplier or not and therefore is not an unlawful subsidy.

OPAE/APJN also criticizes the treatment of bad debt outside of a rate case, and that the amount in base rates already is being recovered and should not be disturbed in this proceeding. (OPAE/APJN at 23.) However, there is no prohibition in the ESP statute that prevents the Commission from adopting a BDR in the context of this filing. Besides, it does not appear the Commission wants the Company to file a distribution rate case any time soon. In fact, the Commission indicated that it believed that the items approved in this case should enable the Company to avoid fling a new distribution rate case. Opinion and Order at 95. The establishment of the bad debt rider is within the Commission's authority. As currently modified, AEP Ohio agrees that the Commission could improperly modify the base rate set in the base rate case. With no record basis, the Commission seeks to adjust the amount included in base rates for all Company debt by the amount related to generation commodity levels. Staff witness Donlon disagreed with this approach at hearing. He testified that if the Commission adopted this alternative method of just recovering the bad debt associated with generation receivables that there would no longer be a need to take into account the $12 million bad debt amount included in base rates. (Tr. IX at 2172.) In fact, Mr. Donlon said it [$12 million in base rates] would be irrelevant. (*Id.*) However, the Commission incorporates and encroaches on the $12 million

figure in its modification that Staff agreed should be irrelevant to its alternative BDR based on generation charges. Therefore, the only merit in OPAE/APJN's argument is related to the offsetting of the $12 million of bad debt included in rates from the last. And that is only improper because the offset is comparing apples and oranges as explained in the Company's rehearing application. Otherwise, the OPAE/APJN arguments are without merit and should be denied.

B. RESA's requests for rehearing on the POR are without merit and should be denied.

RESA argues that it is unreasonable to expect the Market Development Working Group (MDWG) to review the AEP Ohio specific POR plan details. (RESA at 17.) RESA argues that the MDWG has a number of stakeholders that have no interest in the AEP Ohio territory and that the MDWG is already busy as a result of the issues involved in the *Market Investigation*. (*Id.* at 18-19.) RESA's suggestion is that the Commission order the Company to file a proxy to implement the authorization outlined in the Commission's Order and allow interested parties the opportunity to intervene and comment. (*Id.* at 20.) RESA then contradicts itself and suggests the need for a more aggressive timeline on supplier consolidated billing and the changes to AEP Ohio tariff sheets even though it recognizes the back log of issues currently before the MDWG. (*Id.* at 22.)

1. RESA's arguments concerning the utilization of the Market Development Working Group miss the necessary focus of any future proceedings to focus on the stakeholders justifying to AEP Ohio what type of POR program it can still offer under the Commission parameters that avoids any harm to the Company.

The timing and treatment of the review of the POR program authorized for implementation is important. AEP Ohio also raised concerns with delegating such responsibilities to the MDWG in its application for rehearing. (*See* AEP Ohio AFR at 50-53.)

The number of issues delegated to the MDWG by the Commission leaves open basic structural issues that already lack agreement by the stakeholders. AEP Ohio is not positive that limiting the discussion to the Company, OCC and then all the CRES providers that are motivated by self-interest to craft the best program will be a feasible approach. The August timeline provided by the Commission may also be an unduly aggressive schedule that would not permit the Company to carefully and constructively review suggestions provided by stakeholders.

The larger issue that is apparently not recognized in the RESA rehearing arguments and its proposal for the Company to produce a proxy plan is the assumption that AEP Ohio would still implement a POR that results in harm to the Company. AEP Ohio already provided the structure of the POR program it determined it would be willing to implement in its particular service territory. The basic structural modifications made by the Commission and the issues left to the MDWG to determine leave the potential that AEP Ohio will not implement the authorized program. This factor changes the focus of the MDWG process. If the Commission sustains its modifications to the POR model offered by the Company, then the working group effort would revolve more around the stakeholders convincing AEP Ohio that it can still implement a POR program that results in no harm to the Company. As stated in the AEP Ohio Application for Rehearing any movement forward would have to start with the premise that implementation of any POR program would only be done with the understanding that AEP Ohio would not be harmed in any way. (*See* AEP Ohio AFR at 52-53.)

The Commission should therefore deny RESA's application for rehearing in this area and grant the AEP Ohio rehearing request to implement the POR program the Company is willing to implement. Otherwise, the only guidance the Commission needs to provide stakeholders is to

focus future discussions upon determining if there is a program that can be created under the parameter that it no cause any harm to AEP Ohio.

2. The RESA recommendation for a timeline for supplier consolidated billing and AEP Ohio tariff issues contradict its other arguments and should be denied.

RESA accepts that the supplier consolidated billing and tariff issues should be deferred to the MDWG for consideration, but complains that there is not a definite expectation or timeframe on action. (RESA AFR at 22.) RESA seeks a requirement that Staff produce a report on the issues by August of 2015 to address RESA's concerns. (*Id.*)

RESA's request for a report to be created by Staff and the MDWG to address its concerns is aggressive and contradicts its argument three pages prior in its pleading that the "MDWG has plenty of issues to discuss and debate already." (*Id.* at 19.) RESA pointed out a list of issues it is hoping the MDWG will discuss as a result of the Market Investigation including: bill format changes, price-to-compare calculation, proper data exchange protocols to improve the ability for CRES providers to offer time differentiated rates, and streamlining competitive processes (as well as the issues developed as a result of this case). (*Id.*) That is an aggressive list of issues already being pursued by RESA. This and other issues being raised by other parties must all fit into the MDWG process. All of these issues need to be put in perspective; as RESA best states in its rehearing application, "[s]ince the members of the MDWG are volunteering their time, and as a practical matter can only address a limited number of issues in a year, the Commission should be judicious in its assignments to the MDWG." (*Id.* at 19.) Yet, RESA contradicts its own position by demanding a Staff Report and the accelerated consideration of its issues to the front of the stack. This position is unreasonable and should be denied.

AEP Ohio also discussed the untimeliness of the supplier consolidated billing debate as raised by Direct Energy in the briefing stage of this case. (AEP Reply Br. at 106-107.) This is

an attempt to jump ahead to address issues not yet proposed by the Company and an effort to misuse the pending ESP as a platform to promote Direct Energy's market preferences. The Commission just finished its market investigation and promoted items like POR as a means to assist competition, and supplier consolidated billing was not an issue at the forefront. POR was a moving topic with developed subcommittee and panel discussions. In fact, there is not even any evidence that such a program can be accomplished at this time in AEP Ohio's territory or elsewhere.

The Commission provided guidance to the MDWG that supplier consolidated billing is another of the potential issues to be discussed, when appropriate, in order to determine the practicality of the effort and likewise the associated cost of such a program. There is nothing in this record to elevate that issue to priority treatment through a quick Staff Report and accelerated process ahead of all the other issues the MDWG is currently discussing. The Commission should deny this request for rehearing.

3. The RESA request to gain access to interval meter data as a result of the Commission's denial of the elimination of AEP Ohio's Time of Use tariffs is not an appropriate rehearing ground and should be denied.

The Commission did not grant AEP Ohio's request to discontinue its Time of Use (TOU) tariffs. In reaction to this modification RESA reaches beyond the issues under review by the Commission and seeks access to all distribution company interval meter data. (RESA at 20.) This general matter is undoubtedly one being considered by the Commission in other areas with larger concerns including general customer privacy and CRES provider rules. It is inappropriate to seek to bootstrap such a requirement in a rehearing application that is statutorily based on questions of unreasonable and unlawful findings and actions by the Commission. RESA admits in its description of the MDWG issues that it is already hoping to discuss proper data exchange protocols to improve the ability for CRES providers to offer time differentiated rates. (*Id.* at 19.)

The opportunistic attempt to directly declare the denial of AEP Ohio's tariff request as an unreasonable Commission action for rehearing solely to gain interval data that it cannot at this point obtain by other means, is improper. While there is a time and a place for this discussion, rehearing in this ESP of the Commission's decision to deny the Company's request to discontinue its Time of Use tariffs is not that time or place.

VII. The Commission modification to require two auctions before June 1, 2015 is not unlawful and unreasonable. [CNE/Exelon Prop. 4]

CNE/Exelon argues that the Commission is unreasonable in ordering the two competitive auctions prior to June of 2015. (CNE/Exelon AFR at 17-18.) CNE/Exelon challenges the Commission's decision saying that such a tight schedule at a time when auction products will be expanding is not just and reasonable. (*Id.*) CNE/Exelon proposes that only one auction should be held and to stagger the rest. (*Id.* at 18.)

CNE/Exelon's argument that AEP Ohio will not be ready for an auction before June and that the Commission is unreasonable in expecting that outcome is without merit and should be denied. AEP will have to conduct at least one auction prior to the start of the new ESP period. The same preparation and understanding that goes into one will be applicable to a second auction. Moreover the Commission order was thirty days before CNE/Exelon raised this issue and the Company is well underway in making preparations for the two auctions to ensure they are successful. Any work done to date and by the time a Commission Entry on Rehearing is released would be wasted – even presuming the rehearing decision is issued prior to the initial auctions.

The preparation for an auction is not an overnight process and we sit here in April at the time of this filing with at least 30 more days before the Commission next has to act on the rehearing applications. AEP Ohio's Auction Manager has already scheduled two auctions, the

Staff and their Consultant have accepted this schedule, and prospective bidders are in the process of preparing applications for the pre-auction qualification process. It would be a significant event for the Commission to modify the auction structure or schedule at this point. It is unrealistic to expect this requirement to be changed at this stage. Likewise, the Commission stated that its concern was with higher prices and price volatility at later dates. (Opinion and Order at 31.) The proposal by CNE/Exelon does nothing to address how its proposal to delay addresses that Commission concern. The Commission should deny the rehearing request by CNE/Exelon and allow the process already in motion to move forward to produce an early auction.

VIII. OPAE/APJN's rehearing argument seeking greater funding for low income programs is without merit and should be denied. [OPAE/APJN Prop. 8]

OPAE/APJN seeks rehearing to secure another million dollars annually above the $1 million annual contribution the Commission already provided with its modification to the AEP Ohio proposed ESP. (OPAE/APJN AFR at 27-28.) To justify this rehearing request, OPAE/APJN argues that doubling the Commission's addition to the plan would support R.C. 4928.02(A) (to ensure availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service) and 4928.02(L) (protect at-risk populations). (*Id.*)

AEP Ohio discussed in its post hearing reply brief the benefits that the AEP proposed plan provided at-risk customers and ensuring adequate, reliable, and safe electric service.[24] First and foremost, the policy goals provided in 4928.02 are state goals that must be balanced and are not independent requirements for every ESP decision. Regardless, the outcome of this ESP as

[24] (*See* AEP Ohio Reply Br. at 103-104.) Also see the discussion throughout the record on the benefits of all the rider programs and changes offered to support customer reliability, price stability and safety all incorporated into this memorandum.

better than a market rate offer satisfies both the provisions enumerated by OPAE. Company witness Gabbard also testified to the advantages of the Company proposal that does provide security for competitive suppliers to pursue at-risk populations and avoid any socioeconomic discrimination in the CRES marketing. (Tr. III at 799.) But the POR was just one minor element supporting at-risk populations. The other distribution riders include: increased reliability through greater investment in utility infrastructure to prevent outages, the assurance that trees will be cleared from circuits to prevent outages and the voluntary extension of the residential credit and the auctions to provide customers SSO pricing based on competitive bids. These among other provisions of the proposed ESP (and the addition of the $1million annual shareholder contribution) protect the at-risk populations and ensure adequate, reliable, and safe electric service. The overly-ambitious request to double down on the generous addition already provided by the Commission on rehearing should be rejected.

IX. The Commission properly found that the proposed ESP, as modified, is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4905.142. [OCC Props. 3, 5; OMAEG Prop. 4]

In its Opinion and Order, at 91-95, the Commission found that AEP Ohio's ESP , including its pricing and all other terms and conditions, as modified by its Opinion and Order, is more favorable in the aggregate as compared to the expected results that would otherwise apply under a Market Rate Offer (MRO) authorized by R.C. 4928.142. From a pricing standpoint, the Commission noted that SSO generation rates to be charged to customers will be established through a fully auction-based process and, therefore, will be equivalent to the results that would be obtained from an MRO under R.C. 4928.142. However, the Commission also observed that, as part of its proposed ESP, AEP Ohio has committed to continue, throughout the ESP term, the Residential Distribution Credit Rider which would otherwise expire as of May 31, 2015, and which would *not* be available under an MRO. The Commission found that this feature of the

ESP alone will provide a quantifiable benefit of $44,064,000 over the three-year term of the Company's proposed ESP. But, in addition, as the Company explained in its Application for Rehearing, at 66-67, the Commission made two modifications to the proposed ESP, requiring the Company to include $1 million per year of funding for the Neighbor-to-Neighbor program and $2 million per year of funding for the Ohio Growth Fund, that provide $9 million of additional quantifiable benefits over the three-year term of the ESP. Accordingly, the quantifiable benefits of the proposed ESP, as modified by the Opinion and Order, total $53,064,000 over the ESP's term.

Consequently, when evaluated on the basis of pricing and quantitative benefits alone, the modified ESP is substantially more favorable, in the aggregate, than the results that would occur in an MRO. However, the Commission also found that the proposed ESP, as modified, provided additional, significant, non-quantifiable benefits that further increases its advantages over the MRO alternative. For example, the Commission noted that many provisions of the modified ESP advance the state policy enumerated in R.C. 4928.02. The Commission found that the modified ESP also enables AEP Ohio to move more quickly to market rate pricing than would be expected under an MRO. The Commission also found that, while AEP Ohio has not committed to refrain from filing a distribution rate case during the ESP period, the approval of the DIR, ESSR, and other distribution-related riders should enable the Company to hold base distribution rates constant over the ESP period, while making significant investments in distribution infrastructure and improving service reliability. Opinion and Order, at 95.

Nevertheless, OCC and OMAEG contend on rehearing that the Commission's findings that that the proposed ESP, as modified by the Opinion and Order, provides both quantitative and

qualitative benefits as compared to what would result from an MRO are in error. These contentions are meritless.

A. Arguments that the proposed ESP does not provide significant quantitative benefits are meritless.

1. The continuation during *ESP III* of the Residential Rate Credit provides a substantial quantitative benefit.

OCC contends that continuation of the Residential Distribution Credit (RDC) at $14,064,000 per year should not be considered a benefit of the ESP. OCC theorizes on rehearing, as it did in its post-hearing initial brief, that residential customers would be entitled to continue to receive the credit in order to mitigate alleged possible future over-earnings through base distribution rates and the DIR. (OCC AFR at 50; OCC Br. at 8-10.) The fact of the matter is that there is no such entitlement to the credit after May 31, 2015. Absent the Company's voluntary commitment to continue the credit, residential rates would increase on June 1, 2015, by the amount of the credit. Moreover, there is no basis for OCC's speculation that any over-earnings through distribution rates will occur during the post-May 31, 2015 period. Nor is there any basis for OCC's contention that the credit "is merely a mechanism to mitigate the excess revenue collection under the DIR." (OCC AFR at 50.) Any earnings that result from the DIR during *ESP III* are for incremental capital expenditures made during that period and, as such, are extremely unlikely to support excessive earnings.

The Commission correctly found that the Company's voluntary commitment to continue the residential rate credit is a certain and quantifiable benefit of the proposed ESP that is worth in excess of $44 million dollars over the term of a three-year ESP III. When the additional $9 million of Neighbor-to-Neighbor program and Ohio Growth Fund benefits are considered, the ESP, as modified, it is clear that it provides over $53 million of quantifiable benefits over e its three-year term.

Nevertheless, OMAEG complains that the RDC only benefits residential customers and, thus, the $44.064,000 value of that credit over the term of the ESP is "somewhat misleading" and "illusory" to other customer classes. (OMAEG AFR at 21.) OMAEG made this argument in its post-hearing brief also. (OMAEG Br. at 22.) The cost of the RDC is certainly not illusory. Nor is it misleading to consider it to be a significant and quantifiable benefit of the ESP. There is no requirement that quantifiable benefits of an ESP must apply to all customer classes in order to be counted for purposes of the MRO Test. In any event, the Commission's Opinion and Order modified the ESP to include $2 million per year, or a total of $6 million, of funding for the Ohio Growth Fund, "which creates private sector economic development resources to support and work in conjunction with other resources to attract new investment and improve job growth in Ohio." Opinion and Order at 69. Thus, the funding for the Ohio Growth Fund provides quantifiable benefits for all customers, including non-residential customers.

2. The incremental costs of the DIR and other distribution riders are properly excluded from the MRO/ESP Test.

OCC criticizes the Commission, on rehearing, for not including the incremental revenue requirements of the DIR, ESRR, and other distribution riders as quantifiable costs in the MRO/ESP comparison. (OCC AFR at 50-53.) The Commission properly declined to include such costs as part of that comparison because "the revenue requirements associated with the recovery of incremental distribution investments should be considered to be the same whether recovered through the ESP or through a distribution rate case conducted in conjunction with an MRO." Opinion and Order at 94.[25]

[25] The Commission's Opinion and Order in this proceeding addressed and resolved this issue in precisely the same manner as it has done in other recent cases. *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and the Toledo Edison Co.*, Case No. 12-1230-EL-SSO, Opinion and Order, at 56 (July 18, 2012) (*FirstEnergy ESP III*) ("these costs should be considered substantially equal and removed from the ESP v. MRO analysis").

On rehearing OCC raises the additional argument that the Commission is statutorily precluded from recognizing that the costs of the DIR, ESRR, and other distribution riders would also be recovered through distribution rate cases in the MRO context because R.C. 4928.143(C)(1), the provision that requires the MRO/ESP Test, does not specifically authorize the Commission to do so. (OCC AFR at 51-53.) OCC contends that the Commission exceeded its statutory authority under R.C. 4928.143(C)(1) by considering the results of distribution base rate cases that would be expected to occur in the MRO alternative. (*Id.* at 68-69.) There is no rule of statutory construction that requires the Commission to wear blinders while conducting the MRO/ESP Test.

The language of R.C. 4928.143(C)(1) does not require, as OCC's argument presumes, that the Commission must assume that no distribution rate case would be conducted during the period of the alternative MRO proceeding. Rather, the statute requires, when conducting the comparison, that the Commission evaluate the expected results that would apply if, instead of pursuing an ESP, the electric distribution utility (EDU) pursued the MRO alternative. The results that the Commission would expect to occur in the event an EDU pursued the MRO alternative logically and inevitably would include the distribution base rate cases that the EDU would be compelled to undertake and complete in order to maintain and improve the quality and reliability of its distribution services in a manner comparable to what it would have achieved under the foregone ESP approach. There is nothing in the MRO/ESP Test's statutory language that requires the Commission to blind itself to the results of the inevitable distribution base rate cases that the EDU would have to undertake in conjunction with the MRO alternative, in order to accurately compare the expected results of that alternative with the ESP.

R.C. 4928.143(C)(1) requires that the Commission apply it in a rational and reasonable manner, which the Commission did. The Commission properly rejected OCC's position that it should apply the statute in an irrational and inaccurate manner.

3. Zero cost placeholder riders are also properly excluded from the MRO/ESP analysis.

The Commission found that "in light of * * * the fact that the PPA rider and BDR have been set at zero, it is not necessary to attempt to quantify the impact of any of these riders in the MRO/ESP analysis." Opinion and Order, at 94. Nevertheless, both OCC and OMAEG contend on rehearing that, even though these riders have been approved as placeholders at a zero cost level, the Commission is required to estimate costs for them and include those estimates in the MRO/ESP analysis. (OCC AFR at 53-54; OMAEG AFR at 22-23.)

The Commission correctly determined not to include an estimate of costs for these placeholder riders in the MRO/ESP analysis. Where the future costs of placeholder riders are unknown or speculative, the Commission has properly declined to include any estimates of such riders' costs in the MRO/ESP analysis. *See*, *e.g.*, *In re AEP Ohio*, Case Nos. 11-346-EL-SSO and 11-348-EL-SSO, Entry on Rehearing, at 8-9 (Jan. 30, 2013) (rejecting argument that estimates of future costs associated with a zero-cost placeholder Pool Termination Rider should have been included in the MRO/ESP test). The reason for declining to include estimates of costs for either the PPA Rider or the BDR is clear: Currently, there is no better estimate of the projected cost impact of both riders than zero. In addition, it is not yet known whether the impact of either rider might change to be a net cost or credit during the term of ESP III, let alone what levels of costs (or credits) either rider will experience in the event of a change.

B. Arguments that the proposed ESP does not provide significant non-quantifiable benefits are meritless.

As noted above, when evaluated solely on the basis of pricing and quantitative benefits, the proposed ESP, as modified by the Opinion and Order, is more favorable by more than $53 million than the results that would occur under an MRO alternative. Accordingly, at this point in the Commission's MRO/ESP analysis, the modified ESP had passed the test that R.C. 4928.143(C)(1) requires. However, the Commission found that the modified ESP also provided, in addition to its clear and substantial quantitative advantages, other significant qualitative benefits that would not be available in the MRO context. OCC and OMAEG argue that the Commission improperly evaluated the qualitative benefits of the modified ESP. OCC even argues that the Commission may not consider qualitative benefits of an ESP when conducting the MRO/ESP analysis that R.C. 4928.143(C)(1) requires. These arguments are meritless.

1. It is both necessary and appropriate to take into consideration non-quantifiable, qualitative, benefits as part of the MRO/ESP Analysis.

OCC argues on rehearing, as it did in its post-hearing briefs, that the MRO/ESP Test is limited to consideration of quantitative benefits, and that qualitative benefits may not be incorporated into the test. OCC's objection to considering the qualitative benefits of an ESP is that, because only provisions that are expressly listed in R.C. 4928.143(B) can be included in an ESP, and because qualitative benefits of an ESP are not specifically listed in that section as provisions that may be included in an ESP, the qualitative benefits that the ESP offers may not be considered in the MRO/ESP analysis. (OCC AFR at 54-55; OCC Br. at 11 n.33.) OCC's argument misapplies the statutory test of R.C. 4928.143(C)(1). That test evaluates the benefits, quantitative and qualitative, that the ESP's provisions provide in its effort to determine whether the ESP is more favorable in the aggregate compared to the expected results of an MRO. OCC mistakenly conflates the provisions of the ESP with the benefits that those provisions provide.

The Commission correctly declined to accept OCC's argument in its Opinion and Order, and it should reject it again on rehearing. The MRO/ESP Test of R.C. 4928.143(C)(1) does not require the Commission to ignore the non-quantifiable provisions of an ESP that provide significant benefits when determining whether the ESP is more favorable in the aggregate compared to the expected results that an MRO would provide. Indeed, the Commission has correctly concluded that it is required to consider non-quantifiable benefits in making the comparison that the statutory test requires: "By statute, our analysis does not end [with a consideration of quantifiable impacts], however, as we must consider the non-quantifiable aspects of the modified ESP, in order to view the proposed plan in the aggregate."[26]

2. The proposed ESP facilitates a faster transition to competition than would be possible through an MRO, which is a substantial benefit.

The Commission also confirmed that the more rapid implementation of market based rates made possible by ESP III is a qualitative benefit of this ESP that is consistent with state policy set forth in R.C. 4928.02. Opinion and Order at 95. The Commission properly recognized the role that the proposed ESP III plays, and the significant non-quantifiable benefit it provides, by enabling the accelerated transition to competition to occur by June 1, 2015.

OCC continues to contend on rehearing, as it did in it post hearing brief, that the accelerated transition to fully market-based rates is not a benefit of ESP III, because it was considered to be a benefit of the prior ESP II. (OCC AFR at 55-56; OCC Br. at 12-13.) The Commission correctly rejected this argument are also meritless. If AEP Ohio had switched SSO tracks and substituted an MRO for the proposed ESP III, one sure result would have been that progress towards completion of the transition to competition would have become much more

[26] *ESP II*, Opinion and Order at 75; *see also*, *e.g.*, *FirstEnergy ESP III*, at 56; *The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, Opinion and Order, at 50-52 (Sept. 4, 2013) (*DP&L ESP*).

uncertain, with adverse repercussions for all stakeholders. Clearly, the proposed ESP III, which will provide certainty regarding that transition, provides a valuable benefit.[27]

3. The Commission correctly noted that many of the provisions of the modified ESP advance Ohio energy policy in R.C. 4928.02.

The Commission found in its Opinion and Order, at 95, that among the qualitative benefits of the modified ESP is that many of its provisions advance the state policy enumerated in R.C. 4928.02. OCC contends that the achievement of policy objectives articulated by R.C. 4928.02 may not be considered as an ESP benefit. OCC argues that, because only provisions of an ESP may be considered as benefits in the MRO/ESP analysis and the state policies enumerated in R.C. 4928.02 are not provisions of and ESP, the Commission's treatment of the extent to which the ESP advances state policy as a benefit of the modified ESP was unlawful. Second, OCC also questions whether the Commission's Opinion and Order properly identifies which state policies are supported by which specific ESP provisions. (OCC AFR at 55, 69.)

With regard to the first criticism, it is appropriate to take into account, when evaluating whether and to what extent an ESP is more favorable than an MRO alternative, instances when provisions of the ESP provide benefits by promoting state policies enumerated in R.C. 4928.02 in ways that perhaps an MRO alternative would not be able to do. OCC's criticism that the Commission does not have the statutory authority to consider whether an ESP provides benefits by advancing state policy confuses, once again, the provisions that may be included in an ESP to those listed in R.C. 4928.143(B) with the need to evaluate the benefits, quantitative and

[27] OMAEG argues on rehearing that establishing a PPA Rider works in the opposite direction of the transition to fully market based prices by June 1, 2015, and detracts from the qualitative benefit that the Commission found the ESP provides by enabling that transition. (OMAEG AFR at 22.) If OMAEG's criticism is that the PPA Rider somehow impedes the transition to fully market based prices and, thus, dilutes the benefit that ESP III provides in that regard, that criticism is misplaced. The PPA Rider has no impact on either the rapidity of the transition to market prices by June 1, 2015, or the market prices that are or will be available to AEP Ohio's customers. *See* Opinion and Order at 22.

qualitative, that those provisions provide in order perform the MRO/ESP Test that R.C. 4928.143(C)(1) requires. The benefits that the ESP provisions provide, which are consequences of those provisions, and which must be considered in the MRO/ESP Test, are not the same as the provisions themselves

With respect to the second issue, the Commission's Opinion and Order in several instances specifically identified how particular ESP provisions promoted specific aspects of state policy. For example, at page 26 of its order the Commission found that the adoption of the placeholder PPA Rider is consistent with R.C. 4928.02, and particularly division (A) (Ensure the availability of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service). As another example, at page 26 the Commission specifically found that the Neighbor-to-Neighbor furthers the state policy set forth in R.C. 4928.02(L) (Protect at-risk populations). And, at page 95, the Commission found that the more rapid implementation of market based rates possible under an ESP is a qualitative benefit that is consistent with the policies of R.C. 4928.02.

OCC's criticisms of the Commission's findings that provisions of the modified ESP provide benefits by advancing state policy enumerated under R.C. 4928.02 are unfounded.

4. The Commission properly found that the Distribution Investment Rider, Enhanced Service Reliability Rider and other distribution-related riders will provide significant qualitative benefits.

The Commission found, as another qualitative benefit, that the Commission's approval of the continuation of the DIR, ESSR, and other distribution-related riders should enable the Company to hold base distribution rates constant over the ESP period, while making significant investments in distribution infrastructure and improving service reliability. OCC and OMAEG question the value of this benefit on rehearing on the basis that it does not reflect an absolute commitment by AEP Ohio to refrain from filing a distribution rate case application during the

ESP III period. (OCC AFR at 56-58; OMAEG AFR at 21.) These criticisms are without merit. The value of the DIR, ESSR, and other distribution-related riders is that they enable distribution investments and expenditures to be made without the need for a distribution rate case. Consequently, they avoid the necessity of filing a distribution rate case to recover the costs of those investments and expenditures. Avoiding the costs of processing such a case is a substantial benefit because the time, expense and burden of doing so are significant. The Commission correctly found, as a result, that the DIR, ESSR, and other distribution-related riders provide a substantial qualitative benefit. The fact that there is not an absolute commitment not to file a distribution rate case during the ESP term does not diminish the conclusion that those distribution-related riders will mitigate the potential need for such a rate case.

CONCLUSION

For the foregoing reasons, the Commission should deny the intervenor applications for rehearing and/or clarify its February 25, 2015 Opinion and Order as set forth above.

Respectfully submitted,

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On behalf of Ohio Power Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of *Ohio Power Company's Memorandum Contra Intervenor Applications for Rehearing* was served upon counsel for all other parties of record in this case, on this 6th day of April, 2015.

/s/ Steven T. Nourse
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