BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider.	**)))))**	**Case No. 14-1693-EL-RDR**
In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority.	**)))**	**Case No. 14-1694-EL-AAM**

REPLY BRIEF IN SUPPORT OF THE JOINT STIPULATION AND RECOMMENDATION ON BEHALF OF OHIO POWER COMPANY

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I. EXECUTIVE SUMMARY

Despite Opposing Intervenors' attempts to modify it, the three-part test for evaluating contested settlements is the appropriate standard of review for this case – as supplemented by the *ESP III* decision factors/requirements and an updated verification under the statutory MRO test. As demonstrated herein, the Stipulation passes the three-part test because it: (1) reflects serious bargaining among knowledgeable, capable parties, (2) as a package benefits ratepayers and the public interest, and (3) does not violate any important regulatory principles. Prong two of the test includes the factors and consideration and requirements adopted by the Commission in the *ESP III* decision, as well as an updated MRO test analysis. Adopting the beneficial provisions of the Stipulation (including the PPA Proposal) is a unique and impactful regulatory opportunity for the Commission to simultaneously promote rate stability, help preserve generation resource diversity, protect Ohio's economy and facilitate competition.

<u>SERIOUS BARGAINING AMONG KNOWLEDGEABLE, CAPABLE PARTIES</u>

As described in AEP Ohio's Initial Brief (at 29-32), the Stipulation satisfies the first prong of the three-part test because it is "a product of serious bargaining among capable, knowledgeable parties." In their initial briefs, the Opposing Intervenors make a number of accusations and assertions related to what the Stipulation means and how the Commission should view stipulations in general. The arguments are offered in an attempt to convince the Commission that there was not serious bargaining leading to the Stipulation before the Commission for consideration. However, the Opposing Intervenors' arguments are without merit and fail to properly apply the law, Commission practice, and the plain words of the Stipulation. The record supports the serious bargaining that occurred in this proceeding.

Some Opposing Intervenors argue there was not serious bargaining in this case due to the disclosure of a settlement with IEU that reached well beyond the issues involved in the present case, but included a provision that IEU would not oppose this Stipulation. The fact is that there was no requirement to disclose the IEU Global Settlement, but AEP Ohio did disclose the document in discovery on the same day that IEU referenced the document in its letter expressing its non-opposition to the Stipulation. There could not have been any impact of the IEU Global Settlement, which memorializes a settlement of several regulatory and litigation matters well beyond the non-opposition section related to this proceeding, on the Signatory Parties of the Stipulation – and no evidence was presented to support any such claim. As indicated in the IEU Global Agreement and the letter filed by IEU on December 22, 2015, IEU is merely not opposing the Stipulation and it is not a Signatory Party. This is an important distinction because it undermines the specious arguments they assert to claim that the IEU Global Settlement impacts the seriousness of the bargaining.

The other argument offered as an attempt to undermine a finding that serious bargaining occurred in the proceeding is the argument that the Stipulation's terms are confusing and thus no party could participate in serious bargaining in the absence of understanding the terms. The Opposing Intervenors offer two areas of argumentation to support their point. First, they argue that the uncertain commitments in the Stipulation make it impossible to seriously negotiate. Second, they argue that there are vague footnotes and terms in the Stipulation that undermine the bargaining or remove the diversity of Signatory Parties. Third, they argue that the meanings of the terms are unclear to them as Opposing Intervenors and, therefore, the Commission should deny the Stipulation. All of these arguments are without merit and in no manner negate the serious bargaining that occurred to reach the Stipulation in this proceeding.

Footnotes and other language clarifying parties' settlement positions are commonplace in stipulations approved by the Commission. If anything, the presence of footnotes or any other clarifying disclaimer language in the final Stipulation actually shows that the parties took the language seriously in the bargaining that occurred in developing the final Stipulation. Thus, the Commission should not be distracted by OCC's and OMAEG's frolic into the granular meaning of footnotes in a signed Stipulation.

<u>STIPULATION PACKAGE BENEFITS RATEPAYERS AND THE PUBLIC INTEREST</u>

<u>The four *ESP III* factors support adoption of AEP Ohio's PPA Proposal.</u>

The Company's Initial Brief (at 32-58) demonstrated in detail how the Stipulation's PPA Proposal fulfills the four factors set forth in the *ESP III* decision. Opposing Intervenors' counterarguments are without merit.

First, the financial challenge, and resulting need, that the PPA units face is due to depressed wholesale market pricing in the near-term coupled with both short and long-term pricing volatility. The PPA Rider is designed to address both factors, allowing the continued capital investment necessary to the long-term operation of the PPA units, and enabling the intrinsic long-term value of those units to continue to be realized for the benefit of customers.

Second, AEP understands that grid reliability is the primary responsibility of PJM, but as Robert Bradish, Vice President – Grid Development for AEPSC, testified, transmission owners are also part of ensuring reliability in the PJM footprint. Further, AEP Ohio has established that there is a substantial reliability price-tag associated with the retirement of these PPA units – $1.6 billion. Modeling has determined that this is the amount AEP would need to spend to effectuate necessary transmission grid upgrades to cover these unit closings. Lastly in this regard, certain Opposing Intervenors claim that continuation of these PPA units will chill innovation and investment in new generation facilities. Construction and operation of new generation facilities is an incredibly speculative process. As AEP Ohio witness Wittine testified, projects in the queue are years away from being placed in-service, and based upon PJM's own historical data, many of them may never reach that point.

Third, the Opposing Intervenors raise a number of issues related to AEP Ohio's showing to satisfy this guideline related to the plant compliance with pertinent environmental regulations and pending regulations. OCC proposes an impossible standard rendering the Commission factor unattainable and therefore meaningless. OCC asserts that when it comes to environmental regulations and compliance costs that uncertainty is the only certainty. But the two witnesses for AEP Ohio have over 50 years of experience in the industry. Unlike OCC's analysis based on worst case scenarios, AEP Ohio witnesses McManus and Thomas provided the Commission with realistic budget and plan information based on expected operations for each of the existing and contemplated environmental regulations – this information was reflected in the Company's PPA cost projections. The evidence shows that the units are compliant with current environmental regulations and on track to stay compliant with the pertinent pending regulations.

Fourth, AEP Ohio detailed the record support for substantial economic benefits of the proposal and the presence of the units in the Ohio towns they are located. Mr. Vegas also testified to the economic benefit of the PPA Proposal on economic development based on the stable price structure and continued operation of the units to keep thousands of Ohioans employed. Mr. Allen also provided testimony and supporting studies valuing the ongoing value of the PPA Units' operation at $650 million. Some argue that the positive economic impact of any new plants should prevail. But even if there were some level of significant new construction, there is no guarantee it would be in Ohio in the areas that would be impacted by the closure of existing facilities. Dynegy holds itself out as a new large investor in Ohio and an expert on how markets should work. But Dynegy witness Ellis admitted that nearly all of its senior executives are based in Houston, Texas, a state without any Dynegy generation assets. More importantly, Dynegy does not believe that location of the generation assets within any particular state is an important issue; it is focused on the overall market footprint. Ohio deserves better.

The PPA Proposal also satisfies the four additional requirements from the *ESP III* decision.

First, as discussed in AEP Ohio's Initial Brief (at 61-68), the PPA Proposal as modified by the Stipulation provides numerous opportunities for the Commission to conduct a rigorous review of PPA Rider costs and revenues. Multiple Opposing Intervenors claim that the annual financial and managerial audits proposed by AEP Ohio are inadequate because Opposing Intervenors will allegedly be barred from participating in those audit proceedings, and they will involve no hearing. If the Commission believes that a hearing is necessary in order to ensure a "rigorous" review of the PPA Rider in any particular year, it will simply order that a hearing take place. Wal-Mart alleges that the proposed Commission review process for the PPA Rider is faulty because it will be limited to "after-the-fact compliance review." This ignores AEP Ohio's stated intentions of seeking prudence "pre-approval" from the Commission for any significant investment decisions or other major PPA Unit decisions. If AEP Ohio declines to seek prudence preapproval for a particular PPA Unit cost, then AEP Ohio runs the risk of the Commission finding AEP Ohio's actions imprudent and disallowing cost recovery.

Second, AEP Ohio committed to provide AEPGR fleet information on any cost component pursuant to a reasonable Staff request (as determined by the Commission). Thus, the Affiliate PPA – combined with AEP Ohio's commitments in its PPA Proposal as modified by the Stipulation – gives the Commission substantial visibility into PPA Rider costs. Yet OCC criticizes this proposal on the ground that such summaries and details 'may or may not' include the actual books themselves. This argument epitomizes the flimsiness of Opposing Intervenors' critiques. The Affiliate PPA provides AEP Ohio a right to inspect AEPGR's records, and AEP Ohio has committed to providing Staff and the Commission any information necessary to evaluate any PPA Rider cost component, so long as the request is reasonable. If Staff makes a reasonable request for information, AEP Ohio will provide it, and AEP Ohio witness Allen made clear that the Commission is the ultimate arbiter of whether a Staff request is "reasonable."

Third, regarding allocation of risk under the PPA Proposal, OCC wrongly relies, in part, on Staff's objections to the Amended Application – even though Staff has signed the Stipulation in support of the modified PPA Proposal and stated on brief that its concerns have been resolved. Any reliance on the criticisms levied against the Amended Application ignores, among other things, changes made in Stipulation such as the $100 million customer credit commitment and the $86 million savings associated with the reduced ROE. P3/EPSA sets forth a list of potential retail costs and refers to them as additional risks placed on customers. This list is proves nothing, since all of those things were incorporated into the quantitative benefit projections performed by AEP Ohio. Opposing Intervenor criticisms are result-oriented arguments designed to undermine the PPA Rider, even though the Stipulation injected significant additional risk for AEP Ohio and struck a reasonable balance.

Finally regarding allocation of risk, PJM's recommendations regarding capacity performance charges are disconnected from both the requirements of the Capacity Performance regime and the realities of retail ratemaking. PJM attempts to bootstrap wholesale market rules into retail policy and improperly seeks to enlist the Commission to extend PJM's authority in ways that go beyond the PJM market rules. Also disturbing is that PJM's recommendations effectively manufacture a special rule for the PPA Proposal that does not apply to other similarly-situated market participants. It is unclear why PJM seeks such an unfair approach, but this is not the forum for extending or modifying PJM market rules.

Fourth, AEP Ohio established in its Initial Brief how the PPA Proposal satisfies the fourth requirement for severability. (AEP Ohio Br. at 72.) The only substantive criticism on this point came from OCC, who complained that AEP Ohio should provide for a retroactive customer refund if the PPA Rider is reversed or vacated on appeal. But the lack of this feature is a matter of following established Ohio law and cannot be reasonably considered a shortcoming of the Stipulation or the PPA Rider.

<u>The evidence shows that customers are expected to sufficiently benefit from the PPA Proposal and the other terms of the Stipulation</u>

AEP Ohio showed that there is a reasonable expectation of a long-term financial benefit to customers from the proposed PPA Rider. In that regard, AEP Ohio explained the manner in which AEP Ohio witness Pearce developed forecasts of revenues and costs under the version of the PPA Rider proposed in the Amended Application. AEP Ohio explained that, in order to prepare those forecasts, Dr. Pearce relied upon various data, including the supporting information provided by AEP Ohio witnesses Bletzacker (a long-term forecast of PJM wholesale power prices) and Hawkins (the appropriate capital structure and return on equity for use in the Affiliate PPA, initially set at 11.24%).

Some Opposing Intervenors have argued that AEP Ohio should not have relied upon its 2013 Fundamentals Forecast. As Mr. Bletzacker testified, the 2015 Fundamentals Forecast was not finalized, released, and available for use at that time. Second, to the extent that the Opposing Intervenor criticisms are that AEP Ohio should have delayed filing its Amended Application and supporting testimony until it could incorporate the 2015 Fundamentals Forecast into its filing, Mr. Bletzacker and Mr. Allen explained that such an approach would be counterproductive and a recipe for never-ending delay. Mr. Bletzacker explained that the process of preparing Fundamentals Forecasts is essentially a continuous and iterative one.

Opposing Intervenors also argue that, even though the PPA Rider may be projected to convey a net benefit to customers, the other provisions of the Stipulation are projected to impose a net cost – thereby concluding that the package of provisions in the Stipulation renders customers "worse off" than they would be if only the PPA Rider were adopted by itself. Other Opposing Intervenors' own subjective views as an outsider of the Stipulation by nitpicking a series of provisions in the Stipulation by subjectively appraising them as having minimal or no value. This, too, is a misplaced argument since the Signatory Parties attributed value to the provisions and included them for that reason. The important thing is that the Commission will independently assess the benefits of the Stipulation package, including the PPA Proposal, based on the record and in considering Ohio law and energy policies. So, it should not really matter whether any particular outside party favors or opposes the PPA Proposal.

The arguments presented claiming that no volatility exists in the retail and wholesale market are anchored in denial. Despite the record evidence provided by the Company and the admission of Dynegy's corporate position based on high volatile prices, Opposing Intervenors continue to question the value of the hedge provided by the PPA mechanism. The arguments range from a desire to stay with the laddering and staggering approach of the SSO auctions to criticisms about the number of forecast scenarios provided by the Company. Opposing Intervenors also fail to recognize the agreement by Staff to the PPA concept of the addition to the traditional tools that smooth out the short term market rates. The Company provides a further explanation of the evidence not considered in the opposing briefs and stresses the opportunity for customers.

In terms of general benefits beyond the PPA Proposal, the Stipulation also provides "transformative" additional benefits that go well beyond AEP Ohio's initial proposal to support retail rate stability and economic development for Ohio and to benefit customers and the public interest. Those benefits are described in great detail within AEP Ohio's Initial Brief (at 99-130). Those commitments made by AEP Ohio within the Stipulation clearly advance the public interest, convey significant benefits to customers and materially advance Ohio's energy policies. Finally regarding the public interest, the MRO test remains affirmative

<u>NO IMPORTANT REGULATORY PRINCIPLES OR PRACTICES ARE VIOLATED</u>

<u>The PPA Proposal is fully consistent with existing wholesale market structures, accords with FERC's affiliate restrictions, and is not preempted by the Federal Power Act</u>

Opposing Intervenors make a number of arguments that the PPA Proposal is either inconsistent with existing wholesale market structures or preempted by federal law. But these arguments are meritless. As AEP Ohio described in its initial brief, the Commission's responsibility is to focus on the likely effects of the PPA Proposal on *retail* rates – in particular, the PPA Proposal's likely stabilizing effect on retail rates. Even if there were effects of the PPA Proposal on the wholesale markets, they are not relevant in this proceeding as they are not within the scope of the Commission's regulatory authority. In any event, Opposing Intervenors' concerns have no merit. The feature of the PPA Proposal that Opposing Intervenors believe is inconsistent with wholesale markets – the Affiliate PPA's cost-based compensation model – is in fact commonplace in PJM, and has been for some time. The PPA Proposal cannot be "inconsistent" with – or otherwise undermine – existing wholesale market structures if tens of thousands of megawatts of generation have, for years, both participated in the PJM markets and received cost-based compensation analogous to the PPA Proposal. That fact was implicitly acknowledged by the PJM Independent Market Monitor when he confirmed that every PJM capacity auction has reflected "competitive outcomes" notwithstanding the proliferation of cost-based compensation for generation in PJM.

Moreover, the Commission should reject PJM's request that this Commission essentially impose an additional "PJM tariff requirement" on the manner in which AEP Ohio bids the PPA Units' capacity in the PJM capacity auctions. AEP Ohio intends to fully comply with all PJM tariff requirements – and any other applicable rules – in bidding the PPA Units' capacity. The Commission may review the prudence of AEP Ohio's bidding activity *within PJM rules*, but asking the Commission to effectively impose an additional PJM bidding rule on AEP Ohio is improper because it falls well outside the Commission's jurisdiction. In any event, PJM's proposal is profoundly unfair, since PJM is asking this Commission to impose an additional bidding rule on the PPA Units that PJM has never sought for similar existing generators in PJM that receive cost-based compensation. The PPA Units should be subject to the same bidding rules that apply to other generators in PJM that receive cost-based compensation – not subject to the additional bidding rules that PJM is asking the Commission to formulate and apply.

Other Opposing Intervenors invoke FERC's affiliate restrictions as grounds to reject the PPA Proposal, but these parties fail to acknowledge that FERC has granted AEP Ohio a waiver of those affiliate restrictions (including the requirement to apply the *Edgar* standard, which Opposing Intervenors rely on heavily). Moreover, although it is not this Commission's job to apply FERC's affiliate restrictions, there are two findings that the Commission can – and should – make in this proceeding that FERC will likely defer to: First, the Commission should reiterate its long-held opinion that there is retail competition in Ohio, and that AEP Ohio's customers are not "captive" just because non-bypassable charges (like the PPA Rider) exist to stabilize retail rates and promote competition for all customers. Second, the Commission should make clear that, in approving the Stipulation, the Commission is affirmatively finding that the PPA Proposal accords with all Ohio corporate separation laws and regulations and that the evidence in the record of this proceeding contradicts the affiliate abuse and subsidy allegations raised by various Opposing Intervenors. FERC has traditionally deferred to similar findings by this Commission in evaluating affiliate transactions, and it will likely defer to such findings again insofar as it evaluates the Affiliate PPA.

Finally, a few Opposing Intervenors once again attempt to argue that the PPA Proposal is preempted by the Federal Power Act. But the Commission dismissed the very same arguments in the *ESP III* proceeding, finding that the PPA Rider was lawful and that any questions of preemption "are best reserved for judicial interpretation." There is no reason for the Commission to revisit that determination. In any event, the PPA Proposal is not preempted. This Commission has near plenary authority to determine the *retail* rates that customers pay AEP Ohio for retail service, and that includes well-established authority to address the retail rate treatment of the costs incurred under AEP Ohio's wholesale purchases. That is all that is at issue here. The Commission is not *forcing* AEP Ohio to enter into any particular wholesale contract (as in the recent cases in New Jersey and Maryland) or otherwise regulating the Affiliate PPA *itself*. Rather, the Commission is simply establishing the *retail rate treatment* of the Affiliate PPA and OVEC entitlement, both of which are *voluntary* wholesale transactions. That falls squarely within the Commission's well-established authority over retail rates. To hold otherwise would lead to absurd outcomes under which traditional State retail rate jurisdiction would be drastically curtailed.

<u>The PPA Proposal is permitted under Ohio law and the cost-based compensation model represents sound regulatory policy</u>

Various parties continue to portray the PPA Proposal as being contrary to Ohio law and policy and counter to the competitive environment of SB 3 and SB 221. But these arguments directly contradict the *ESP III* decision's determinations that the PPA Rider is authorized under the ESP statute and that the PPA Rider is consistent with Ohio energy policy under R.C. 4928.02. Implementing the PPA Rider is not a "step backward" regarding competitive issues but merely builds on the same tradition and regulatory history of protecting rate stability while advancing competition – it is actually Opposing Intervenors' position that would be a "step backward" from that well-established regulatory context and long history of rate impact sensitivity and real-world pragmatism by the Commission. The PPA Proposal is a creative and practical solution to the real-world rate volatility problem facing customers, grounded in the same principles of promoting both rate stability and competition. It is a valid and helpful solution within the current statutory paradigm to mitigate over-reliance on short-term market prices. In considering adoption of the Stipulation, the Commission should continue its trajectory of moving toward competition while being mindful of – and addressing – customer rate impacts and market price volatility through population of the PPA Rider with the Affiliated PPA and OVEC contractual entitlement.

Additional Opposing Intervenor challenges under R.C. 4928 are also without merit. There is no anticompetitive cross-subsidy and the PPA Rider does not amount to untimely stranded costs. Contrary to Opposing Intervenors' claims to the contrary, the Stipulation does not seek to amend the ESP in this proceeding and properly divides the requested relief between this case and the upcoming ESP extension filing. Further, the renewable development commitment does not violate R.C. 4928.143(B)(2)(c). As detailed below, the PPA Rider does not violate R.C. 4928.17 or AEP Ohio's approved corporate separation plan.

Miscellaneous Opposing Intervenor challenges are without merit

Opposing Intervenors' remaining substantive arguments against the Stipulation are also meritless. The Commission has an adequate evidentiary basis upon which to evaluate the prudence of the affiliate PPA. Section III.C.11 of the Stipulation does not contravene R.C. 4928.6613. Approval of transition provisions in the event of the Termination and Transition of an ESP under R.C. 4928.143(E) is appropriate and lawful. OMAEG's criticisms that certain Stipulation provisions amount to inappropriate and disfavored "direct payments" are mistaken. OMAEG's claims that the Stipulation denies customers protections and undermines certainty in Commission orders are also baseless. The Stipulation's proposed allocation of EE/PDR, IRP, and PPA Rider credits and costs does not violate any regulatory principle or practice.

OCC's challenges to evidentiary rulings are untimely and misguided. All parties were afforded due process in this case.

No additional clarification of Stipulation is needed

Finally, OEG's recommended clarifications are without merit and the Stipulation is already clear in its reflection of the Signatory Parties' agreement. OEG's proposed findings are cumulative to what is already presented, but could be helpful if done correctly.

II. STANDARD OF REVIEW

In its opening brief, AEP Ohio explained why the three-part test for evaluating contested settlements is the appropriate standard of review for this case – as supplemented by the *ESP III* decision factors/requirements and an updated verification under the statutory MRO test. (AEP Ohio Br. at 25-29.) As predicted, Opposing Intervenors argued on brief that the three-part test should be modified in ways that are designed to undermine the Commission's approval of the

Stipulation. The Commission should retain and apply the three-part test without modification, for the reasons explained below and in AEP Ohio's opening brief.

The position of the Ohio Consumers' Counsel ("OCC")[1] is that the Commission should modify the three-part test and be more "wary" of a settlement reached with a utility in an ESP case and second-guess whether signatory parties "truly view" the settlement to be in their best interests – based on an assumption that certain parties supposedly have inferior bargaining power. (OCC Br. at 13-16.) Of course, this case is not an ESP proceeding and whatever additional scrutiny that applies there (if any) does not apply here. Further, OCC's reliance on personal opinions of former Commissioners – in cases where those Commissioners dissented from the majority opinion – simply has no relevance here. (OCC Br. at 14-15.) Moreover, since the time of that opinion in a decision involving the same utility, the Commission has more directly rejected OCC's position and again retained the three-part test as written. *In re Application of Ohio Edison Co.*, Case No. 12-1230-EL-SSO, Opinion and Order at 27 (July 18, 2012) (the Commission refused to modify the three-part test and in rejecting OCC's similar argument found that it "expects that parties to a stipulation will bargain in support of their own interests in deciding whether the support that stipulation"). Thus, the Commission has continued to employ the three-part test without modification to evaluate contested settlements in cases generally and in ESP cases specifically. Regardless, OCC advocates that "[t]he ultimate question to be answered is whether, in light of the record, AEP Ohio's proposals are reasonable, comply with Ohio law, and are in the public interest." (OCC Br. at 15.) Setting aside that the Stipulation proposals are not just those of AEP Ohio, the reality is that this OCC-modified test is easily met in this case, as is shown in the briefs supporting the Stipulation.

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[1] A joint brief was filed by OCC and the Appalachian Peace and Justice Network. For convenience, this Brief will refer to both parties collectively as "OCC" and their brief as "OCC Br."

In a separate but related discussion, OCC claims that the Stipulation should not be considered as a package because "there is no nexus to the various terms" to the PPA Proposal. (OCC Br. at 55.) This argument regarding the second prong of the test (which OCC refers to as the third prong) is circular. That component of the test necessarily examines the sum of the parts, or the whole package, to determine whether customers benefit and the public interest is advanced. More to the point, OCC's argument turns the second prong of the test on its head. A package of settlement terms necessarily involves various "gives and takes" on issues important to the parties and it is the examination of the total package that is envisioned in the second prong of the test; incorporating a line-item veto for settlement provisions that are not directly raised in the original proceeding, as OCC suggests, would break the package apart and become a self-defeating exercise. OCC's inappropriate approach would straightjacket parties and discourage settlement – something the Commission has thankfully avoided in the past.

In a similar result-oriented and transparent effort to undermine the Stipulation, the PJM Power Providers Group and the Electric Power Supply Association ("P3/EPSA") advocate use of a new *six-part test*; actually, since one component incorporates the three-part test, the P3/EPSA test is more accurately described as an *eight-part test*. (P3/EPSA Br. at 27-35.) On the one hand, P3/EPSA's approach incorporates some general constraints that are not objectionable. For example, components 1 (burden of proof), 3 (*ESP III* factors/requirements), 4 (MRO test), 5 (three-part test), and 6 (decision is confined to the record) generally incorporate factors that are not objectionable. Indeed, AEP Ohio included the three-part test, the *ESP III* factors/requirements, and the statutory MRO test in its description of the applicable standard of review for the Stipulation. On the other hand, general procedural constraints like the burden of proof and making decisions based on the record are not unique components to be considered in adopting contested settlements; and listing the three-part test as one component of a larger test also makes little sense. Those points aside, AEP Ohio has two more substantive objections to P3/EPSA's recommended eight-part standard of review.

First, while the general requirement of P3/EPSA's components 1 and 4 are not objectionable, the triggering premise that the Stipulation seeks to modify the ESP is incorrect. The only components of the Stipulation that involve amendment of the ESP are addressed in Section III.C of the Stipulation (Jt. Ex. 1 at 10-13) and will involve a separate proceeding that is conducted under R.C. 4928.143. Since the Commission adopted the PPA Rider as part of the *ESP III* decision, however, populating the rider in this case is properly considered a rider case, does not constitute an ESP amendment and does not trigger any of the procedural requirements associated with an ESP amendment.

Second, AEP Ohio objects to component 2 of the P3/EPSA test, which argues that AEP Ohio needs to "prove anew" the applicability of Section (B)(2)(d) of the ESP statute because the Commission rejected the prior OVEC-only PPA Proposal. (P3/EPSA Br. at 27-28.) As a related point in Section IV.A of their brief (at 30-31), P3/EPSA argue that AEP Ohio presents nothing different relating to OVEC to support the new PPA Proposal (which includes the same OVEC component). This argument misapprehends the *ESP III* decision and is simply incorrect. As much as P3/EPSA would like to deny it, the *ESP III* decision clearly found that the PPA Rider satisfies the three aspects of Subsection (B)(2)(d) of the ESP statute. *See ESP III*, Opinion and Order at 20-23 (making affirmative findings under each of the three statutory aspects and concluding in summation that "R.C. 4928.143(B)(2)(d) provides the requisite authority" to adopt the PPA Rider).

What P3/EPSA cite as a negative statutory conclusion on the third aspect of Subsection (B)(2)(d) regarding rate stability (quoted as the third bullet on page 31 of its brief and attributed in footnote 102 to page 24 of the *ESP III* Opinion and Order) is actually part of the Commission's finding that declined to adopt the OVEC-only proposal without prejudice based on the record in that prior proceeding. That negative finding was clearly not under the statute but was a factual finding based on the record in that proceeding unique to the OVEC-only proposal. The Commission went on in the following paragraph immediately following the finding quoted by P3/EPSA (top of page 25) to signal its openness to AEP Ohio's ongoing development of a new PPA Proposal. In particular, the Commission emphasized that a "properly conceived" PPA Proposal has "the potential to supplement the benefits derived from the staggering and laddering of the SSO auctions" and 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." *ESP III*, Opinion and Order at 25. The OVEC-only proposal was approximately 5 percent of the Company's connected load (Opinion and Order at 22) while the updated PPA Proposal represents approximately 30 percent (AEP Ohio Ex. 2 at 17); that major change transforms the proposal into a "significant financial hedge that truly stabilizes rates" as envisioned by the *ESP III* decision. Moreover, a separate docket (the case at bar) had, by that time, been opened and the Commission went on to give its explicit guidance on the factors and requirements that the new PPA Proposal would need to satisfy. Indeed, the *ESP III* decision explicitly held (at 26) that its ruling "does not preclude the Company from seeking recovery of its OVEC costs in a future filing." In sum, the Commission unequivocally left the door wide open and P3/EPSA's attempt to portray the decision as closing the door to a modified proposal that includes OVEC is misguided.

Consequently, the various attempts described above by OCC, P3/EPSA, and Dynegy to modify the well-established and trustworthy three-part test should be rejected.

III. THE STIPULATION IS THE PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES

As described in AEP Ohio's Initial Brief (at 29-32), the Stipulation satisfies the first prong of the three-part test because it is "a product of serious bargaining among capable, knowledgeable parties." The arguments offered by Opposing Intervenors revolve around issues dealing with the finalized Stipulation versus the level of bargaining that led to the Stipulation. The parties also challenge level of negotiations in light of the existence of a global agreement involving a non-opposing party.

A. The Stipulation's inclusion of Signatory Parties in specific Stipulation terms does not negate serious bargaining that occurred in this proceeding.

Opposing Intervenors seek to challenge the seriousness of bargaining by attacking any Signatory Party that is included by name in any provision in the Stipulation. Essentially, Opposing Intervenors argue that a Stipulation, and by implication the bargaining that leads to it, should be limited to a finite number of issues or areas eligible for settlement. The irony of this position is obvious. If AEP Ohio had started the negotiations in this case by asserting that only one issue could be discussed, then Opposing Intervenors would be asserting a lack of serious bargaining because they were unable to raise all their issues. The very nature of negotiations is reaching a deal acceptable to all willing parties. Opposing Intervenors provide no case law or precedent that limits the topics of negotiation, and their arguments should be denied. On the contrary, the second prong of the three-part test governing this proceeding explicitly contemplates a *package* of terms and conditions in a Stipulation.

The Opposing Intervenors argue that the terms that were included in the Stipulation related to a particular party are inappropriate as a specific deal or handout. (Dynegy Br. at 21-

22; OCC Br. at 62-63.) The Ohio Manufacturers' Association Energy Group ("OMAEG") asserts that the Signatories are an *ad hoc* group that represent only themselves. (OMAEG Br. at 21.) OCC argues that the earmarked provisions related to some Signatory Parties made the Stipulation fatally flawed, referring to the items as cash equivalents previously forewarned by the Commission. (OCC Br. at 59-60.) It is true that parties in a negotiation typically focus on the interest group they represent. The Commission requires parties to state their interest when seeking intervention in cases. It is appropriate to bargain in a settlement negotiation based on the interests of the entity a party represents. In fact, the Commission previously stated that it expects that parties to a stipulation will bargain in support of their own interests in deciding whether to support a stipulation.[2] The Commission declined to conclude that enumerated benefits in a Stipulation are the sole motivation of any party in supporting a Stipulation, without any evidentiary support, when considering this issue in the *2012 FE ESP Order*. In the current case pending before the Commission, Retail Energy Supply Association ("RESA")[3] witness Bennett admitted that he has no evidence that any single provision of the Stipulation is the sole motivation of any party to support the Stipulation. (Tr. Vol. XXII at 5567-70.) In fact, no party has presented such evidence, and the argument that there is a lack of serious bargaining based upon such an accusation should be denied.

As discussed above, AEP Ohio disputes that the settlement terms constitute payments to Signatory Parties to sign the Stipulation. Mr. Allen testified to the rate stabilizing effect of many

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[2] *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, 12-1230-EL-SSO, July 18, 2012 Opinion and Order at 27 ("*2012 FE ESP Order*").

[3] A joint brief was filed by RESA, Constellation NewEnergy, Inc., and Exelon Generation Company LLC. For convenience, this Brief will refer to those three entities collectively as "RESA" and their joint brief as "RESA Br."

of the provisions of the Stipulation, as discussed on brief. (*See* AEP Ohio Br. at 124-125.) The benefits of the total Stipulation terms were comprehensively described in greater detail throughout Part VI of the Company's Initial Brief. (*Id*. at 32-133).

B. The existence of the IEU Global Settlement does not negate the serious bargaining that occurred in this proceeding.

A number of parties argue there was not serious bargaining in this case due to the disclosure of a settlement with IEU that reached well beyond the issues involved in the present case, but included a provision that IEU would not oppose this Stipulation. (Dynegy Br. at 22-24; OCC Br. at 64-65; OMAEG Br. at 21; P3/EPSA Br. at 67-69; RESA Br. at 50-51.) The arguments seeking to tie the IEU Global Settlement (P3/EPSA Ex. 11) to a finding that there was a lack of serious bargaining neglect to apply the facts of the agreement and the state of the law. IEU is not a Signatory Party and the agreement covered a number of cases. Despite the lack of a requirement to do so, AEP disclosed the agreement to parties in discovery and raised no objection when the IEU Global Settlement was entered into the record.

The record shows that the IEU Global Settlement between AEP Ohio and IEU did nothing to negate the serious bargaining leading to the Stipulation under Commission review. Opposing Intervenors seek to define the document as a secretive side deal that eliminated IEU's opposition to the PPA Proposal in exchange for an $8 million payment. (Dynegy Br. at 23; P3/EPSA at 68.) A review of the actual document provides a more accurate picture of the scope of the agreement. The document memorializes a settlement of several regulatory and litigation matters well beyond the non-opposition section related to this proceeding. (P3/EPSA Ex. 11 at 1.) The first prong of the agreement calls for IEU to (1) file a dismissal of four Supreme Court of Ohio appeals, (2) move to withdraw its intervention in five PUCO proceedings, and (3) limit its participation to an agreed upon set of issues in another PUCO proceeding. (*Id.* ¶ 1.) The paragraph dealing with the payment raised by the Opposing Intervenors clearly states that "[t]he Parties agree that this payment relates primarily to the cases addressed in Paragraph 1 above" (*Id.* ¶ 6.) Paragraph 1 did not relate to the present proceeding. The IEU Global Agreement did include a provision that results in IEU not opposing the Stipulation currently under review by the Commission. (*Id.* ¶ 3.) The IEU Global Settlement required IEU to file a letter in the docket indicating its position and that the two parties reached a global settlement on several issues. (*Id.*; OMAEG Ex. 27.)

As indicated in the IEU Global Agreement and the letter filed by IEU on December 22, 2015, IEU is not a Signatory Party to the Stipulation. IEU is merely not opposing the Stipulation. This is an important distinction because the cases cited by the Opposing Intervenors deal with side agreements between "signatory parties." (Dynegy Br. at 23-24; OMAEG Br. at 22; P3/EPSA Br. at 68; RESA Br. at 50.) These cases do not apply to the IEU Global Settlement because the settlement does not include a commitment of a Signatory Party to support the Stipulation.

As evidenced by the terms of the IEU Global Settlement, IEU and AEP Ohio were deliberately transparent about the IEU Global Settlement from the start. The agreement affirmatively provided that it would advise the parties of the agreement in the letter IEU was set to file in the docket. AEP Ohio provided a copy of the IEU Global Settlement in discovery, on the same day the IEU letter was filed in the docket, even though it was under no obligation. (Tr. XXI at 5462-63.) AEP Ohio and IEU Ohio were both completely transparent about the agreement and there is no basis to conclude that any Opposing Intervenor relied upon IEU's non-opposition or otherwise was prejudiced by the IEU Global Settlement.

Dynegy argues that the fact that IEU did not sign the Stipulation is irrelevant. (Dynegy Br. at 24.) Dynegy presumes too much in its argument as it seeks to undermine the important fact that IEU is not a Signatory Party to the Stipulation. Dynegy asserts that the fact that IEU is not a Signatory Party is irrelevant because IEU once opposed the PPA Proposal and that must mean that AEP Ohio purchased IEU's support. Dynegy's brief improperly attempts to attribute its own rationale, without any record support, to the reason why IEU is not opposing the Stipulation. Dynegy fails to recognize that many parties, including the Commission Staff, changed their view after the conclusion of the first phase of the hearing. Surely Dynegy would not make a similar statement about the Commission Staff. Some parties decided to become Signatory Parties to the Stipulation, some decided to oppose the Stipulation and IEU decided to be a non-opposing party. The Company also changed its position by agreeing to compromise on a long list of issues reflected in the Stipulation. It is inappropriate for Dynegy to assert any other position for IEU other than the position provided by IEU in the global agreement disclosed to all parties.

P3/EPSA cites the Commission expressing a grave concern about exclusionary settlement talks as a warning against the actions taken in this case. (P3/EPSA Br. at 68.) However, the facts surrounding the Commission's concern on excluding parties discussed in the case relied upon by P3/EPSA are very specific. The Commission discussed this exclusion of parties in association with this concept of access for all parties to the draft stipulation in its consideration of the *2012 FE ESP Order*. The Commission found (at 27) that there was no evidence in the record that an entire customer class was excluded from the settlement negotiations, which was the factual predicate of Time Warner. *Constellation New Energy, Inc. v. Pub. Util. Comm.*, 104 Ohio St. 3d 530, 2004-Ohio-6767, 820 N.E. 2d 885, at 8-9. As discussed in AEP Ohio's Initial

Brief, there were numerous meetings among the parties and even OCC witness Haugh admitted that numerous drafts were circulated, including a redline version provided by OCC. (AEP Ohio Br. at 30 (citing Tr. XXII at 5423).)

The fact that IEU and AEP Ohio entered into a global settlement resolving a number of cases had nothing to do with the option of any party to sign or not sign the Stipulation under review. The development of the IEU Global Settlement Agreement had no relevance to another party seeking to decide if it was going to sign or not sign the Stipulation. The terms and conditions of the Signatory Parties that govern the Stipulation are enumerated in the Stipulation filed and there are no other terms relating to the Signatory Parties.[4] The IEU Global Agreement has no impact on the terms of the Stipulation nor do the terms impact another party's ability to negotiate or determine if the terms in the Stipulation were the full set of terms for the party to agree or disagree. The IEU Global Agreement does nothing to change the terms of the Stipulation that each party had a right to negotiate and sign. The Opposing Intervenors chose not to join and no party presented any evidence suggesting they relied to their detriment on IEU's (non) position in making their own decision. The argument asserting the IEU Global Settlement Agreement violated the first prong of the test is without merit.

C. The meaning of the terms in the Stipulation is clear and Opposing Intervenors' claimed confusion with the terms does not negate serious bargaining that occurred in this proceeding.

Opposing Intervenors argue that the Stipulation terms are confusing and thus no party could participate in serious bargaining. The Opposing Intervenors offer three areas of argumentation to support this point. First, they argue that the uncertain commitments in the

[4] The enforcement contract entered into between Sierra Club and AEPGR to establish contractual privity (OMAEG Ex. 26.) was explicitly referenced in the Stipulation (Jt. Ex. 1 at 25), and provided to the parties in discovery.

Stipulation make it impossible to seriously negotiate. (OCC Br. at 32-36; OMAEG Br. at 22.) Second, they argue that the presence of footnotes defining the participation of some parties undermine the bargaining or remove the diversity of Signatory Parties. (ELPC/OEC[5] Br. at 13; OCC Br. at 37-41, 61, 65; OMAEG Br. at 22.) Third, they argue that the meaning of the terms is unclear to them as Opposing Intervenors and therefore the Commission should deny the Stipulation. All of these arguments are without merit and in no manner negate the serious bargaining that occurred to reach the Stipulation in this proceeding.

1. The Opposing Intervenors incorrectly argue that uncertainty related to commitments in the Stipulation undermines the serious bargaining that led to the Stipulation.

OMAEG and OCC assert that there was not enough information to seriously negotiate a Stipulation. OMAEG argues that the Stipulation provisions lack information on costs estimates (co-firing, retiring, refueling), the level of the Competition Investment Rider, carbon emission reduction levels and unknowns related to the renewable commitments. (OMAEG Br. at 22.) OCC takes a stranger tactic. OCC lists thirty six bullets over four pages of the brief asserting that each provides an element of unknowns proving that serious bargaining could not be met. (OCC Br. at 32-36.) Each bullet corresponds to a discovery response with further explanation of how or when more details will be available. Each of these areas could have also been explored at hearing with Company witness Allen.

A closer look at OCC's bullets of uncertainty list highlights a common theme that undermines OCC's credibility. OCC is essentially arguing that because there are commitments in the Stipulation to make later filings that will require Commission review and rulings in the

[5] A brief was filed jointly by the Environmental Law & Policy Center, the Environmental Defense Fund, and the Ohio Environmental Council, with the latter two organizations represented by a single counsel. For convenience, this Brief will refer to these parties collectively as "ELPC/OEC" and the joint brief as "ELPC/OEC Br."

future that parties are paralyzed now and therefore unable to seriously negotiate the terms reflected in the Stipulation. OCC's arguments focus on items like not having the cost impact of a future Commission decision. Another example is the argument that AEP Ohio does not have the full scope of the elements that will be in future plans to reduce carbon emissions or how it will meet its commitment to reach a certain level of energy efficiency and therefore the parties are unable to seriously bargain. OCC's approach to negotiating is perverse and limits its ability to ever agree on anything. As shown by the existence of the Stipulation, the Signatory Parties were able to negotiate and discuss future commitments and resolve major disagreements. The fact that AEP Ohio is committing to how it will file future cases and the content of what those cases will entail are real and substantive issues that parties bargained for and included in the Stipulation. In reality, OCC's approach is just another transparent attempt to undermine, second-guess and criticize the Stipulation that it opposes.

OCC also seeks to use the testimony of its witness Dormady to support this argument that uncertainty in the outcome of the terms equates to failure of the first prong of the three-part test. (OCC Br. at 53-54.) OCC's use of Mr. Dormady to judge compliance with the test is inappropriate. Mr. Dormady admitted that he was not testifying as a regulatory expert. (Tr. XXII at 5617.) That fact is obvious when he testifies he does not know the components of the three-part test adopted by the Commission; has no background or history on the test; and is unsure whether the "diversity of interests" language he includes in his recitation of the prong, is part of the test. (Tr. XXII at 5626, 5632.) Given his appalling lack of knowledge and experience, the Commission cannot rely on any testimony provided by Mr. Dormady but especially any testimony on a regulatory compliance issue like satisfaction of the Commission's three-part test.

2. The presence of footnotes and clarifying language that Opposing Intervenors claim not to understand in the executed Stipulation does not undermine the serious bargaining to reach the Stipulation.

Opposing Intervenors take issue with footnotes in the Stipulation. The Opposing Intervenors argue that the presence of footnotes undermines the understanding of the Stipulation and removes the necessary diversity of parties that they have added to the three-part test. (ELPC/OEC Br. at 13; OCC Br. at 37-41, 61, 65; OMAEG Br. at 22.) These Opposing Intervenors ignore the purpose of this prong of the three-part test focuses on the opportunity for parties to be involved in the discussions, not a critical or self-destructive review of the document once it is finalized among Signatory Parties. The Opposing Intervenors' emphasize on the result of the negotiations, including footnotes, but fail to link their presence in the final document to any matter that prevented them or any other party from seriously bargaining in the negotiation phase before the Stipulation was final.

ELPC/OEC asks the Commission to continue consideration of the opposing testimony previously sponsored by Signatory Parties that was not withdrawn. (ELPC/OEC Br. at 12-13.) The Commission is aware that it is common for settling parties to leave their prior testimony in the record after signing a settlement. The purpose is not to continue the attack on an applicant's case, but instead to show the reasonableness of the Stipulation in light of the original position. This allows the Commission to use the record to weigh the reasonableness of the stipulation based on all the positions in the record. If all testimony was withdrawn whenever a settlement was reached, the Commission would be at risk of preparing an order based on an incomplete record without context. By definition, the testimony concerning the original proposal does not go to the merits of the modified proposal reflected in the Stipulation and should not be used to evaluate the merits of the Stipulation.

The arguments that the footnotes in the Stipulation can be used to show a lack of serious bargaining are without merit. (OCC Br. at 37-41; OMAEG Br. at 22-23.) OCC argues that the existence of footnotes, which it defines as parties opting out of the agreement, diminishes the significance of the Signatory Parties signatures. It is unclear how the presence of these footnotes impacts in any way the seriousness of the bargaining that occurred before execution of the Stipulation and therefore how this applies to the first prong of the three-part test.

The words in the Stipulation speak for themselves and are clear. OCC's and OMAEG's attempts to bring nefarious meaning or assert a complete lack of understanding how it could apply to the Stipulation are meaningless. For example, OCC argues (at 37-39) that the footnotes stating that certain parties agree not to oppose this provision means that the Stipulation is not really as advertised. The footnote mentioned can only be read to mean that those parties will not oppose that provision. OCC's feigned confusion does nothing to impact the bargaining that took place prior to execution. Mr. Allen provided some context for some other footnotes. He testified based on his regulatory expertise and as a participant in settlements in multiple jurisdictions, that certain footnotes that indicate that parties are not obligated to support the Stipulation typically meant that a party does not have a duty to expend funds to defend the Stipulation or stay involved in the case any further. (Tr. XIX at 4687-89.) OCC's attempt to go footnote by footnote and assert a lack of serious negotiation is unconvincing and another result-oriented exercise to deliberately undermine the Stipulation.

The Signatory Parties negotiated footnotes as part of their serious negotiation and ultimately signed the agreement. OCC and OMAEG never presented evidence that it expressed a concern and was denied the opportunity to ask about any potential settlement terms during negotiations. The other parties to the Stipulation viewed those footnotes and also signed the

Stipulation, making them all Signatory Party footnotes. The Stipulation, including the footnotes, is therefore the package for review. Mr. Allen provided testimony and appeared to defend that package.[6]

The final argument raised by OCC[7] deals with the argument that the language and standards used in the Stipulation are vague and therefore cause the Stipulation to fail the first prong of the three-part test focused on seriousness of bargaining. (OCC Br. at 41-53.) For example, OCC takes issue with the phrase "efficiently, cost-effectively, and with maximum market profitability." (*Id.*) OCC also claims to be confused by terms like "not unreasonable' and "in good faith." (*Id.* at 42.) Just like the argument on the footnotes, OCC's argument attacking these other terms within the Stipulation have no impact on the determination of serious bargaining. Witness Allen was available for cross-examination if OCC had specific questions on any terms in the final agreement.

In sum, the Commission faced a challenge to the serious bargaining finding in the *2012 FE ESP Order*. In that opinion the Commission recognized that to promote confidentiality in settlement it has available to it a very limited record with respect to the settlement process in any given proceeding. *2012 FE ESP Order* at 26-27. The Commission found that serious bargaining existed when each party to the case was given an opportunity to review and comment upon the draft stipulation before it was filed. To satisfy that standard in this case, the Commission need to look no further than the testimony of OCC witness Haugh. He testified to the numerous meetings and drafts of settlement terms discussed amongst the parties including redlines by

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[6] OCC's use of the statements of Sierra Club counsel as evidence for the Commission's review is also inappropriate. (OCC Br. at 40-41.) Arguments made by counsel in response to motions made by parties are not record evidence available for OCC to create new arguments.

[7] OCC also raised its lack of diversity argument (OCC Br. at 40-41, 60) that is addressed in the Company's Initial Brief (at 26, 31.)

OCC. (AEP Ohio Br. at 30 (citing Tr. XXII at 5423).) This fact alone shows notice, participation and inclusiveness of all the parties. The Commission has this testimony along with the other supporting testimony dealing with the nature of the negotiations and participation. In short, the Commission should focus the first prong of the three-part test on the bargaining and find that the record supports satisfaction of this prong of the test.

IV. THE STIPULATION, AS A PACKAGE, BENEFITS RATEPAYERS AND THE PUBLIC INTEREST

As described in AEP Ohio's Initial Brief, the Stipulation satisfies the second prong of the three-part test because "settlement, as a package, benefit[s] ratepayers and the public interest." (AEP Ohio Br. at 32-133.) Opposing Intervenors' arguments to the contrary are meritless.

A. The four *ESP III* factors support AEP Ohio's PPA Proposal.

As an initial matter, the Stipulation fully satisfies all of the factors established in the *ESP III* decision. (*See* AEP Ohio Br. at 32-72.)

1. *Factor One*: Financial need of the generating plant.

Opposing Intervenors make a number of arguments that the PPA units do not have a financial need. None of these arguments has merit. For example, OCC observes that the total assets of American Electric Power Co., Inc., the parent of AEP Ohio and AEPGR, have increased from 2014 to 2015. (OCC Br. at 71.) From that, OCC apparently infers that the PPA units must not have a financial need. Any such inference has no basis. The financial need of the PPA units, and the financial challenges that they face as a result of the current market construct and circumstances, have absolutely no connection with the fluctuation in AEP's total assets.

OCC and P3/EPSA note that the PPA units have been profitable in the past and have the potential to produce profits in the future. They conclude that this means that those units do not have a financial need going forward. (OCC Br. at 74-75; P3/EPSA Br. at 37, 48.) This argument misses the point of AEP Ohio's Amended Application. The financial challenge, and resulting need, that the PPA units face is due to depressed wholesale market pricing in the western part of PJM (including Ohio) coupled with both short and long-term pricing volatility. The PPA Rider is designed to address both factors, allowing the continued capital investment necessary to the long-term operation of the PPA units, and enabling the intrinsic long-term value of those units to continue to be realized for the benefit of customers.

Similarly, Opposing Intervenors contend that AEP's statements in presentations to investors that AEPGR's generation fleet "is well-positioned from a cost and operational perspective to participate in the competitive market" are inconsistent with claims that the PPA units have a financial need for the revenue stability that the PPA Rider will provide. (RESA Br. at 39-40, (OCC Ex. 6 at 28; OCC Ex. 7 at 28; OMAEG Br. at 26-27; OCC Br. at 71-72; and P3/EPSA Br. at 37.) There is no inconsistency. The statements are that the units are competitive "from a cost and operational standpoint." The financial challenge that these units face is not the result of any inefficiency or shortcoming in how the units are being operated or how their costs are being managed. Rather, the challenge, and thus the financial need, results from the revenue side of the equation. Low near-term market prices and both short and long-term market price volatility create the need for the revenue stability that the PPA Rider would provide that will, in turn, allow for continued capital investment in the units and their long-term viability.

RESA and P3/EPSA contend that, because all AEPGR capacity was offered into the most recent PJM capacity auctions, the PPA units are committed to operate for several more years and, thus, do not have a financial need. (RESA Br. at 40-41; P3/EPSA Br. at 36.) Offering the PPA units into the PJM capacity auction, however, does not mean that AEPGR has committed to continue to operate the units for any length of time. The fact that a decision to sell or retire the

PPA units has not yet been made does not indicate that they are not currently facing financial pressures. The financial need of the units is what may lead to one or the other of those results shortly in the absence of the PPA Rider. Moreover, the reduced PPA Rider term still extends well beyond the period covered by the existing BRA capacity auctions.

Opposing Intervenors also argue that the fact that there are no current plans to close the AEPGR units means that they are not on the "economic bubble" or in financial need of the more stable and predictable long-term revenue support that the PPA would provide. (RESA Br. at 40; P3/EPSA Br. at 36.) As explained above, the fact that a closure decision has not already been made does not mean that either closure or sale will be avoided going forward if the PPA Rider is not implemented and the financial need of the units for more stable and predictable revenues cannot be met. Further, as has been discussed extensively in the record, a denial of the PPA Proposal would leave AEP with the option to sell the PPA Units which would, in turn, create a buyer that could either close or curtail the plants.

Certain Opposing Intervenors claim that increases in capacity prices from recent PJM Capacity Performance auctions undercut AEP Ohio's claims of financial need for the PPA units. (OMAEG Br. at 27-28; ELPC Br. at 46-48.) AEP Ohio witness Pearce explained that, while the revenue "uplift" obtained from the recent Capacity Performance auctions mitigates some of financial uncertainty that the PPA units face, and while the benefits of such capacity price increases ultimately will flow through the PPA Rider to benefit customers, it is not sufficient to address the financial need of the PPA units on even a short-term basis, let alone for the long term. (AEP Ohio Ex. 2 at 5, tbl. 1; *id.* at 30-31; Tr. II at 597.) AEP Ohio witness Vegas also testified that PJM's Capacity Performance product is not sufficient to address the financial uncertainty that the PPA units face. (AEP Ohio Ex. 1 at 18-19.) In any event, whatever incremental financial support that the recent Capacity Performance auctions provide, it is only for a short-term period, through May of 2019. AEPGR is willing to give up the financial up-side of the Capacity Performance product in exchange for longer-term, stable revenue, and the PPA Proposal provides that longer-term certainty.

OMAEG asserts that because AEP does not control jointly-owned units, PPA support will have little impact on whether those plants continue in operation. (OMAEG Br. at 28.) While AEPGR may only have a partial ownership share in certain of the generating units that does not mean it does not have influence over the decision making process related to investment in those units. In fact, as AEP Ohio witness Thomas explained, there are “engineering and operating committee meetings that we have between the joint owners” that discuss and make decisions regarding investments in these units. (Tr. IV at 1223.)

RESA and P3 argue that AEP Ohio did not provide unit-specific information concerning financial need, and that it provided no information regarding the OVEC units’ financial need. (RESA Br. at 39; P3/EPSA Br. at 32, 35-37.) AEP Ohio provided testimony and information supporting the financial need of the PPA units as a package. (AEP Ohio Ex. 1 at 16-19; AEP Ohio Ex. 3 at 31 & tbl. 1; AEP Ohio Ex. 9 at 14-15.) That testimony and information supports AEP Ohio’s position that the PPA units in the aggregate and, thus, individually need the financial support that the PPA Rider will provide.

Wal-Mart and OCC contend that, if AEP Ohio does enter into a PPA with AEPGR, a return on equity (ROE) of 10.38%, which is the ROE that the Stipulation provides to be used in the computation of the PPA units’ cost of capital for the Affiliate PPA is too high. Wal-Mart recommends that any ROE should be in a range of 9.69% to 9.99% (Wal-Mart Br. at 10-14), and OCC believes that it should be no higher than AEPGR’s average cost of debt (OCC Br. at 116-

121.) AEP Ohio's Initial Brief (at 36-38), thoroughly addressed these contentions and demonstrates that an ROE of 10.38% is very reasonable to use for a PPA with a generation-only IPP.

2. *Factor Two*: Necessity of the generating facilities in light of future reliability concerns, including supply diversity.

Several Opposing Intervenors challenge AEP Ohio's position that the PPA units are necessary to support grid reliability and stability. (OCC Br. at 121-123; PJM Br. at 9-12; OMAEG Br. at 29-33.) AEP understands that grid reliability is the primary responsibility of PJM, but as Robert Bradish, Vice President – Grid Development for AEPSC, testified, transmission owners are also part of ensuring reliability in the PJM footprint. (Tr. VI at 1618.) Further, AEP Ohio has established that there is a substantial reliability price-tag associated with the retirement of these PPA units – $1.6 billion. Modeling has determined that this is the amount AEP would need to spend to effectuate necessary transmission grid upgrades to cover these unit closings.

In response, certain Opposing Intervenors have made unsupported and misguided arguments challenging AEP witness Bradish's testimony regarding his transmission grid upgrade cost estimate. (OCC Br. at 79-80; P3/EPSA Br. at 21-23; RESA Br. at 41-42; ELPC/OEC Br. at 48-50.) The primary criticism of his testimony is that he failed to separate out specific necessary upgrade costs associated with only the subject PPA units from scheduled retirements projected under the Clean Power Plan (CPP). (*Id.*) The Opposing Intervenors' arguments in this regard are short-sighted and wholly unfounded. When questioned on this issue during cross-examination, AEP Ohio witness Bradish testified:

> Q: Okay. But you haven't analyzed what portion of retirement - - of transmission upgrades would be needed if just the 111(d) [CPP] units retired as opposed to the PPA units?

> A: No. You wouldn't do that analysis. And the issue you have there is the two events are happening at the same time and the two events will impact each other, so you have to model those together to get the combined impact. It's a compounding effect. So no, we want to get the right impact of retiring the PPA units.

(Tr. VI at 1554-1555.)

As AEP Ohio witness Bradish explained during his cross-examination, repeatedly and at great length, you cannot look at these events in separate silos. AEP Ohio's models were based upon the world we are projected to be operating in if both the PPA units are retired and the CPP closings are realized. For example, the Conesville PPA units are also part of the Clean Power Plan projected retirements, evidencing the interconnected nature that must be addressed. AEP Witness Bradish's transmission upgrade cost estimate did not include costs associated with generation unit retirements, and associated upgrade costs, by other companies. (AEP Ohio Ex. 7 at 9.) Overlapping outages affecting multiple companies will also present a challenge, as neighboring utilities often must upgrade their respective systems during similar timeframes. Scheduling outages of existing facilities are required to allow for safe transmission upgrade construction. Extended duration outages would be required to complete transmission upgrades. Keeping the subject PPA units in service alleviates the need for these immediate and expensive upgrades and modifications.

Certain Opposing Intervenors also attack AEP Ohio's commitment to fuel diversification and the benefits that result therefrom. OCC claims that AEP Ohio has failed to show that these PPA units contribute to fuel supply diversity. (OCC Br. at 124.) Referencing Market Monitor Bowring, P3/EPSA argues that AEP Ohio failed to show that supply diversity supports reliability. (P3/EPSA Br. at 38, 49.) These arguments are without merit. Coal is, and should remain, a critical component of fuel diversification efforts.

While Dr. Bowring attempted to minimize the importance of fuel source diversity, he did ultimately admit that he "ha[s] not evaluated whether the relationship between coal deliverability and gas deliverability matters." (Tr. XII at 3093.) Dr. Bowring ultimately agreed that fuel diversity is a factor that the Commission should consider in this proceeding. (Bowring, Tr. XII at 3074). The Commission itself has gone on record as supporting and advocating for greater fuel source diversity. Specifically, on May 15, 2014, the Commission filed comments with FERC concerning that year's technical conference on winter operations, which stated, in part:

> In addition, with upcoming requirements that will take effect next spring, fuel diversity is of great importance to the Ohio Commission and should remain the top operative for FERC as it considers the events from this past winter [Polar Vortex].
>
> ***
>
> Based on performance during winter events, no one fuel resource can sufficiently meet demand on its own during extreme weather events."

Comments Submitted on Behalf of the Public Utilities Commission of Ohio to the Federal Energy Regulatory Commission, Docket No. AD14-8-000, May 15, 2014, at 2, 7.

Over-reliance on one source of fuel, such as natural gas, as opposed to a diversified fuel source portfolio presents risks that can, and should, be avoided. As AEP Witness Bradish testified, the coal-fired PPA units store a substantial amount of fuel on-site, as opposed to natural gas. (AEP Ex. 7 at 3.) On-site storage assists in maintaining reliability during adverse weather conditions. *Id.* One needs only to look back to the Polar Vortex of January 2014 and the similar frigid temperatures of early 2015 to understand the very real threat of extreme adverse weather conditions.

AEP witness Steve Fetter, former Chairman of the Michigan Public Service Commission, testified that it is far better to have a portfolio of different supply choices, using various types of fuels, spanning from long-term in-ground cost-based generation commitments to market-based alternatives. (AEP Ex. 3 at 6-7.) The vast majority of new construction is for gas-fired generation – five of the six dispatchable generation plants in various stages of construction are gas-fired. (AEP Ohio Ex. 11 at 8-12.) The rationale for greater fuel diversity is quite simple and straightforward. Any fuel source supply can experience temporary or prolonged system constraints. Keeping these PPA units, which will be coal-fired for the immediate future, gives Ohio a flexible generation portfolio.

Lastly, certain Opposing Intervenors claim that continuation of these PPA units will chill innovation and investment in new generation facilities. (Advanced Br. at 3-6; RESA Br. at 23-24.) These arguments are wholly disconnected from AEP's request of the Commission to keep the PPA units in operation. Construction and operation of new generation facilities is an incredibly speculative process.

For all of these reasons, AEP has clearly demonstrated the continued need for operation of these PPA units.

3. ***Factor Three*: Description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations.**

The Opposing Intervenors raise a number of issues related to AEP Ohio's showing to satisfy Factor three of the Commission's guidelines, related to plant compliance with pertinent environmental regulations and pending regulations. The Opposing Intervenors challenge AEP Ohio's ability to gather enough years of data, adequately respond to regulations and the expertise of AEP Ohio's planning. Most of the arguments raised are already addressed in AEP Ohio's Initial Brief at 43-53.

OCC proposes an impossible standard rendering the Commission factor unattainable and therefore meaningless. OCC asserts that when it comes to environmental regulations and compliance costs that uncertainty is the only certainty. (OCC Br. at 81.) Under OCC's framework there is no chance for anyone to satisfy the standard. OCC's standard cannot be used in this case. However, despite the change in environmental regulations and the "worst case scenario" approach taken by OCC witness Jackson (Tr. XIV at 3559), AEP Ohio can and has presented an appropriate reflection of the generating units' compliance with pertinent regulations and through its experts displayed an understanding of pending regulations to the extent they can be accounted for at this time. (*See* AEP Ohio Br. at 43-44.) AEP Ohio has never asserted that the costs will remain constant over time. Mr. McManus testified that a number of things can change the costs (Tr. IV at 993-94), but that does not change the work done by AEP Ohio and the ability to rely on its experts. As discussed in AEP Ohio's Initial Brief, the two AEP Ohio witnesses testifying for AEP Ohio have over 50 years of experience in the industry. It is their expertise that is needed to anticipate change and to be prepared to address it effectively when it happens, expertise which is not possessed by OCC witness Jackson.

A major concern after reviewing the OCC analysis is that it presents its arguments largely as if the Stipulation under review in this proceeding did not exist. One of the most telling areas is the argument on the costs related to environmental compliance over the life of the units. (OCC Br. at 83, 125, 129-30.) OCC criticizes AEP Ohio for not providing data on compliance past 2024. (*Id.* at 83, 129-30.) This argument is misplaced because the Stipulation changed the term of the PPA Proposal to run through 2024. OCC also makes reference to the fact that the PPA Rider could be renewed. If AEP Ohio seeks to extend the use of these units in the PPA Rider it will need Commission approval and the Commission will determine the process for that at that time. Compliance beyond the duration of the term of the pending proposal is not a matter for consideration under this factor.

OCC continues to rely on the elements of Ms. Jackson's testimony that is based on a concern of what is unknown in the later years of the life of the units, past 2024. OCC even recognizes this in their brief, stating: that Ms. Jackson "emphasized that although most of the PPA Units are currently fairly well-controlled from a criteria air pollutant standpoint, the PPA Units will be impacted by increasingly stringent environmental controls over the life of the Affiliate PPA and PPA Rider. (*Id.* at 125 (citing OCC Ex. 13 at 8).) OCC's expert agrees with AEP Ohio experts, that the units are well controlled. The post 2024 timeframe that gets into the "life of the unit" concerns of OCC witness Jackson is no longer an issue of concern in this Commission review.

OMAEG argues that the Commission lacks authority to even have the standard, because the Commission is not in a position to judge environmental compliance. (OMAEG Br. at 34.) This is just further proof of OMAEG's disagreement with the Commission on the basis of the PPA Rider and failure to apply the past decisions of the Commission under the standards established by the Commission. Rather than discuss the environmental compliance of the units, OMAEG discusses environmental regulations and the compliance assumed by AEP Ohio and how that will position Ohio in the global economy under the general R.C. 4928.02 policy provision. Essentially, OMAEG asserts that the Clean Power Plan will significantly raise compliance costs, making coal facilities less profitable, and resulting in a PPA Rider that is a charge and not a credit and that will redistribute economic activity away from Ohio, harming its economic future. (OMAEG Br. at 35-36.) OMAEG's argument has nothing to do with this factor focused on the environmental compliance and should not be considered under this section.

P3/EPSA raises a concern that the Commission is without information related to the OVEC plants and future compliance. However, Company witness McManus testified to his interaction with the environmental staff for the OVEC facilities and his involvement in their compliance process. He testified that he spoke with OVEC environmental management specifically about additional controls for CSAPR compliance and that they are well-positioned for compliance. (Tr. IV at 1029, 1034.) Mr. McManus discussed his understanding of how the expected costs for OVEC were included in the budgets sponsored by Company witness Pearce. (Tr. IV at 1033-35.) These budgets provide the expected compliance costs for the timeframe sponsored by Dr. Pearce through 2024. The OVEC costs for compliance through 2024 are included in the budget provided.

OCC and ELPC/OEC offer arguments related to operations, specific regulatory requirements and pending rules. Again AEP Ohio addressed many of these arguments in its initial filing in this case (see AEP Ohio Br. at 43-53), but will discuss the matters raised by the Opposing Intervenors on a limited basis here.

OCC and the ELPC/OEC raise a concern with AEP Ohio's preparation for the National Ambient Air Quality Standards (NAAQS). (OCC Br. at 127-128; ELPC/OEC Br. at 28.) ELPC/OEC claims that AEP Ohio failed to review the available data on counties that could be considered nonattainment areas under the rule set for release during the hearing. (ELPC/OEC Br. at 28.) Likewise, OCC cites the testimony of OCC witness Jackson that several of the counties in Ohio and Indiana around the PPA units are not meeting the standard and that more will be designated as non-attainment when the new standard is finalized. (OCC Br. at 127.) As discussed in the AEP Ohio initial brief (at 51), the OCC and ELPC/OEC concern ignores the record evidence. When faced with this argument on cross-examination, Company witness McManus testified that any review of air quality must be based on current data to recognize that there has been a reduction in emissions that contribute to ozone, and that air quality is expected to continue to improve. (Tr. IV at 1055, 1111.) This prediction was legitimized by documents from the EPA discussed later in the hearing with OCC witness Jackson. The EPA released a memorandum (AEP Ohio Ex. 40) indicating that the data relied upon by OCC witness Jackson, and the data used by Sierra Club (Sierra Club Ex. 13) for cross examination is not the data that will be used by the EPA in determining nonattainment. The EPA intends to use ozone data from 2014 to 2016, and the current air quality data may not be reliable. (Tr. XIV at 3580-3582.) The conclusions reached by OCC witness Jackson (and argument offered by ELPC/OEC) were based on data that she and the EPA admit may not be reliable. (Tr. XIV at 3581-82.) That is a fact on which Mr. McManus had already testified based on his own expertise, without the benefit of even seeing the EPA's memorandum on implementation because it was published after he testified.

OCC and ELPC/OEC also raise concerns with 316(b), Effluent Limitation Guidelines ("ELG"), and Coal Combustion Residual Rule ("CCR") compliance. (OCC at 126-127; ELPC/OEC at 27-28.) OCC reiterates Ms. Jackson's extreme position to assume the addition of cooling towers would be necessary on the 15 units in the application that are not already equipped with cooling towers, at a calculated cost of $900 million. (OCC Br. at 126.) This argument by OCC ignores the record evidence and fails to provide the Commission with a reasonable estimate of expected costs. Ms. Jackson herself agreed that she did not believe the units would require new cooling towers, but that she included them in her estimate because there was a risk. (Tr. XIV at 3561.) Mr. McManus and Thomas attempted to provide the Commission with a realistic budget and plan based on their specific knowledge of these generating units and expected operations, not a worst case scenario of every regulation at every plant as OCC witness Jackson provides. ELPC/OEC also argues that AEP is not accounting for remediation of groundwater pollutants if detected under the CCR rule. (ELPC/OEC Br. at 27.) Mr. McManus explained at hearing that there is not a reason to include costs associated with remediation because AEP Ohio is only in the early stages of monitoring and there is no evidence that there will be any costs. (Confidential Tr. IV at 1139.)

ELPC/OEC also raised concerns that there will be costs to convert to dry ash disposal systems. (OCC Br. at 126; ELPC/OEC Br. at 28.) AEP Ohio directly addressed this issue in its Initial Brief (at 45-46). In sum, Mr. McManus and Thomas testified that units are either in compliance with the rule or have a plan to comply and that any additions are included in budgets. (*Id.*) The evidence of record also shows the plan to address this issue. Sierra Club Confidential Exhibit 7 contains line items for dry bottom ash handling for Conesville, Cardinal and dry ash conversion and fly and bottom ash closure for Stuart. This is another area where OCC argues that AEP Ohio only considered ten years of costs but that there could be more costs in later years. (OCC Br. at 126.) Again the term of the Stipulation under review is through 2024, not the "life of the units" assumed by Ms. Jackson in her testimony and apparently still relied upon by OCC.[8]

ELPC/OEC also raises concern with more stringent standards and potential liabilities at the plants and required permits. (ELPC/OEC Br. at 29.) AEP Ohio addresses compliance with CSAPR in its Initial Brief (at 45). All of the units, other than one unit at Clifty Creek Unit 6 and Conesville Units 5 and 6, are already equipped with SCR technology. (AEP Ohio Ex. 4 at 7.) These units have a plan for compliance involving emission allowances. (*Id*.; AEP Ohio Ex. 5 at 8.) ELPC/OEC's concerns on a lack of disclosure with potential liabilities and water permitting

[8] OCC's reliance on Ms. Jackson fails to account for the discussion in AEP Ohio's Initial Brief (at 49-53) that discusses her unfamiliarity with the units and addresses her overstatement of issues similar to the Clifty Creek compliance addressed in the initial brief.

requirements are without merit. As discussed in AEP Ohio's Initial Brief (at 52), AEP Ohio's presentation in this case involved the major capital investments for the units. The budgets included in the filing are based on a collaborative process at AEP. (Tr. IV at 966, 1171-72, 1192-93.) The data reviewed in hearing on Sierra Club Confidential Exhibit 7 was based on a more detailed collection of costs provided in discovery. The budget includes plant buckets for other projects that could come up any year. (Tr. IV at 1191.) Permitting efforts and liabilities associated with assertions made from operating a major utility facility are commonplace and did not rise to the level of a major capital project. That does not equate to AEP Ohio not being transparent; these facts show that the plant operators know how to run a plant and understand what constitutes a normal level of ongoing expenses versus large and distinct projects. Mr. Thomas testified that the numbers used in the budget represent a reasonable forecast based on how they run their whole business. (Tr. IV at 1193.)

OCC also raises issues with environmental compliance related to the developing Clean Power Plan. Curiously, OCC argues that there is an issue because AEP Ohio does not know the price to comply with the CPP and what will be required. (OCC Br. at 82.) AEP Ohio discussed the Clean Power Plan in depth in the testimony of John McManus and in the Initial Brief (at 47-49.) AEP Ohio understands that the details on the plan are subject to a number of factors that could significantly delay implementation including the individual state's role in developing a plan. Thus, AEP Ohio provided a $15 per metric tonne of carbon dioxide (CO_2) emission cost in its budget to account for this compliance. (AEP Ohio Ex. 4 at 20; AEP Ohio Br. at 48.) OCC witness Jackson and IGS witness Haugen both agreed that the $15/tonne CO_2 emission cost is a reasonable assumption for use by AEP Ohio. (OCC Ex. 13. at 33; Tr. X at 2519.)

AEP Ohio has addressed all of the arguments raised by Opposing Intervenors in testimony or the post hearing briefs. The evidence shows that the units are compliant with current environmental regulations and on track to stay compliant with the pertinent pending regulations. The Commission should find that the record supports a finding that the Stipulation satisfies Factor Three.

4. *Factor Four*: The impact that a closure of the generating plants would have on electric prices and the resulting effect on economic development within the state.

AEP Ohio discussed factor four and specifically the severe financial impact of closure in its Initial Brief (at 53-58). Specifically, AEP Ohio detailed the record support for substantial economic benefits of the proposal and the presence of the units in the Ohio towns they are located. In short, Mr. Vegas also testified to the economic benefit of the PPA Proposal on economic development based on the stable price structure and continued operation of the units to keep thousands of Ohioans employed. (AEP Ohio Ex. 1 at 10.) The proposed PPA Units employ over 1,600 workers and provide $121 million of direct annual payroll in Ohio. (AEP Ohio Ex. 1 at 25.) As discussed in the Company's Initial Brief (at 54-55), some indirect benefits include more than 4,000 additional jobs and nearly $244 million of additional income to the State. Mr. Vegas testified that the units have added almost $11.5 million in Ohio property tax annually. Mr. Allen also provided testimony and supporting studies valuing the ongoing value of the PPA Units' operation at $650 million.

The Opposing Intervenors criticize AEP Ohio's economic analysis under factor four. They argue that the testimony provided by AEP Ohio did not focus enough on market prices and it favored the impact on the Ohio regions impacted by the closure of the plants. (ELPC/OEC Br. at 50-51; OCC Br. at 84, 87; RESA Br. at 42-43, 49.) AEP Ohio discussed the impact of the PPA Proposal throughout the record and briefing. Mr. Vegas testified to the need to keep the

PPA Units in service to avoid greater volatility in market prices. (AEP Ohio Ex. 1 at 8.) He testified that retiring plants are being replaced by gas-fired units or not being replaced at all, increasing the market's overall reliance on gas and reducing the region's reserve margin. (*Id.* at 8.) Mr. Vegas, and other witnesses, detailed the concerns of relying solely on gas and the market volatility that can ensue with such a market structure. (*Id.* at 8-10.) AEP Ohio detailed Dynegy's self-interested view of the plant closure on market prices. (AEP Ohio Br. at 93-94). Their entry into the PJM market started with the opportunity for profit is predicted from volatile pricing as a result of retiring units and the impact on tightening reserve margins. (Tr. X at 2557; AEP Ohio Ex. 15 at 3.) Dynegy's strategic business plan in Ohio for the next few years is premised on the volatility that the closure of plants produced for market prices. Further closures, including the PPA Units, would only further benefit the Dynegy plan to take advantage of market volatility and increased prices for customers. While that result would benefit Dynegy's business plan, it certainly would not benefit Ohio customers, Ohio towns and the Ohio economy.

Another argument offered to criticize AEP Ohio's analysis under factor four is that AEP Ohio did not account for the potential economic benefit of new plants that could be built if the current plants retire. (ELPC/OEC Br. at 50-51; OMAEG Br. at 48-49; RESA Br. at 49.) Mr. Allen explained that his analysis was not intended to determine if other substitutes would replace the economic centers of these communities, and instead the analysis was developed to determine the impact in the communities if the plants were not there. (Tr. VII at 1705-1820.)

The expectation by Opposing Intervenors that there will be new plants built in Ohio to replace the loss of these current community economic engines is not supported by the record. AEP Ohio exposed the true market opinion of unregulated generator Dynegy on the status of new construction at hearing. As summarized in AEP Ohio's Initial Brief (at 57), Dynegy's corporate position is again different from the position Dynegy provides the Commission in testimony. Dynegy's corporate documents shared with investors state that the new build hype is overblown and that there are too many barriers to building in the present environment. The lack of true wide-scale construction is also supported by the testimony of MAREC witness Burcat, discussed in AEP Ohio's Initial Brief (at 56-57), when he discusses that the focus of the energy markets is on the short-term, but the generators must recover costs over the long term. (MAREC Ex. 1 at 5.)

Even if there were some level of significant new construction, there is no guarantee it would be in Ohio, in the areas that would be impacted by the closure of existing facilities. Dynegy holds itself as a new investor in Ohio and an expert on how markets should work. But the Commission and Ohio should look closely at the message they are really sending and their commitment to the market. As pointed out by Dynegy witness Ellis, the market does not require that generation or real investment be made here within the state of Ohio. Dynegy is a Texas company. Mr. Ellis admitted that nearly all of its senior executives are based in Houston, Texas, a state without any Dynegy generation assets.[9] (Tr. X. at 2551.) More importantly, Dynegy does not believe that location of the generation assets within any particular state is an important issue; they are focused on the overall market footprint. His prefiled testimony stated that the laws of physics dictate that not all states can be net exporters of electricity. (Dynegy Ex. 1 at 8.) Dynegy's position is that "as long as customers are being served safely and reliable, it is most beneficial to provide energy via the most competitive, cost effective manner." (Dynegy Ex. 1 at 8.) When pressed at hearing on why the location within a state might matter, he stated that there

[9] Apparently, in the time between Mr. Ellis' admission to the lack of senior leadership in the state of Ohio on the stand in his initial testimony in October of 2015 and his testimony in January of 2016, Dynegy may have moved a senior employee to an office in Cincinnati, Ohio. (Tr. Vol XXI at 5361.)

could be cost components or other technical reasons to locate generation in certain areas, such as voltage support. (Tr. X at 2553.) Noticeably absent from Dynegy's Texas-based business plan was the impact on towns and families here in Ohio. Any new generation plant will be built by new generators like Dynegy focused on the most profitable location anywhere within the PJM system. Dynegy's focus ignored the real impacts here in Ohio. AEP Ohio's evidence, testimony and proposal are focused on the retail impact for customers and the economy here at home in Ohio.

A number of the Opposing Intervenors also took exception to the admission of the economic models attached to the testimony of Company witness Allen and admitted into evidence. (OCC Br. at 84-85 131-138 OMAEG Br. at 47; P3/EPSA Br. at 40; RESA Br. at 43.) The nature of the concerns raised by the Opposing Intervenors shows that the parties do not understand the purpose of the study and how it relates to this particular factor for Commission review. OMAEG is also concerned with the regional approach in the model; it argues that the model is not respected and is less sophisticated than other models, that the assumptions are not accurate and that the benefits from closure are not considered. (OMAEG Br. at 47-48.) OCC's attacks on the model are focused on its witness Noah Dormady's critiques in his testimony. OCC attacks the use of the model; the application of the model; and criticizes the inputs and the simplicity involved in the model inputs, including the change in prices after closure and Clean Power Plan compliance costs. (OCC Br. at 131-139.)

Mr. Allen expressed the limited purpose of using the economic model for purposes of factor four for the Commission. He testified that his view is that the economic base model is a fairly transparent model that allows easy understanding of the inputs and outputs. (Tr. XVII at 4289.) He added that the model was applied to determine the economic impact of the plants on the communities today. (Tr. VII at 1810.) He stated that it is beneficial because it is a simple test focused on taking the wage of an employee in an area and seeing how the goes beyond the paycheck and impacts the local community. (Tr. VII at 1804.) Specifically, Mr. Allen explained the purpose of the model:

> What they are trying to do is look at how employment in a facility like a manufacturing facility or a power plant has impacts beyond just the direct impact of those employees. We all know that when an employee works at a power plant, he earns a wage, he takes that wage, and he spends it in service industries within those communities. That has a multiplier effect. That's what the economic base theory is doing is trying to understand that when you have one employee working at a power plant or any other type of facility, that the dollar doesn't just stop there, that you have to look at the downstream effects on the economy. That's what this is doing.

(Tr. VII at 1804.) The analysis therefore looks at the wage of the employees and the support provided by the existence of the facility in the area.

No other party presented alternative modeling for Commission consideration leaving AEP Ohio's model as the only record evidence. A similar analysis was provided in a reasonable arrangement proceeding to determine the value of the facility on the economy.[10] The study provided to the Commission in that case looked at employee compensation, the employer's impact on the region and the indirect responsibility for jobs in the region, as well as tax base. (*Id.* at 13.) The Commission discussed the fact that parties to the case claimed a negative effect of the proposed reasonable arrangement, but that no party presented evidence in the record which quantified that negative effect. (*Id.* at 3-4.) This is analogous to the present proceeding where OCC challenges the work done by AEP Ohio, but sits only in a critical role and provides the

[10] *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC, July 15, 2009 Opinion and Order.

Commission no alternative view to compare the study performed by AEP Ohio. AEP Ohio's study is appropriate and provides the Commission the best and only evidence of record. The Commission is presented with a straight-forward test that is easy to understand, and the Commission has used before in the *ESP III* proceeding. (Tr. VII at 1782.)

The record contradicts OCC's claim attacking the model. (OCC Br. at 132, 138-39.) Company witness Allen testified that the model is still in use and provided examples of the World Bank, Texas A&M Department of Agriculture, the Utah Department of Workforce Development and the Forestry Department. (AEP Ohio Ex. 51 at 8-9; Tr. XVII at 4296, 4308; Tr. VII at 1801; OMAEG Ex. 21, 22. As the Commission is aware, WAA-2 was already used by the Commission in the ESP III proceeding. When discussing the Texas A&M brochure at hearing, Mr. Allen testified that the brochure indicates that the model "is a useful tool to describe a local economy and provides a framework to analyze the impacts from changes in economic activity." (Tr. XVII at 4297; OMAEG Ex. 21.)

The testimony and model used are appropriate for use by the Commission in this proceeding. The criticisms of the model are without merit when compared to the purpose for review under the factor. The goal was to provide a simple model for use by the Commission to address the impact of the loss of these units. Company witness Allen testified that "the fact that a model is more complex does not make the model more accurate. It just makes it more complex to complete the analysis and usually makes the inputs and outputs less transparent." (Tr. XVII at 4291.) AEP Ohio applied the model it felt was appropriate for application in this case, similar to how Texas A&M and the Utah Department of Workforce apply the model.

Some Opposing Intervenors also seek to undermine the Examiner's decision to admit the studies and attack the validity of the study based on the fact that is was sponsored by Company witness Allen on behalf of AEP Ohio. (OCC Br. at 84-85; OMAEG Br. at 47; P3/EPSA Br. at 40; RESA Br. at 43.) The parties go to great lengths to attack the educational background of Mr. Allen and take issue that he as a manager on behalf of AEP Ohio sought a study from an economist within AEPSC to provide analysis to the Commission. The assertions that he was unable to offer the simple Company models run by economists at AEP are without merit, run counter to Commission practices and fail to provide Company witness Allen with the appropriate level of respect. Mr. Allen is qualified to sponsor reports and studies in testimony developed for the Commission in regulatory proceedings. Mr. Allen is a Nuclear Engineer who also has a Master of Business Administration from the Ohio State University. (AEP Ohio Ex. 10 at 1.) In his tenure with AEP, Mr. Allen has served in the Business Planning and Corporate Financial Forecasting groups and was the Director of Operating Company Forecasting. (*Id.*) He currently serves as the Managing Director of Regulatory Case Management for AEP. (*Id.*) Mr. Allen testified that he directed Dr. Holiday, an economist at AEPSC, to run the model at his request. (Tr. VII at 1780.) Mr. Allen also had input into the decision making that went into the model from the gathering of the data to the more detailed decisions on how to account for factoring in the Indiana units and cross state leakage (Tr. VII at 1781, 1783, 17844.)

The Opposing Intervenors' argument could lead to utility companies doubling the number of witness in some cases to cover all the issues. That is not necessary. Mr. Allen is familiar with regulatory proceedings and serves as the Managing Director of Regulatory Services. Requesting and sponsoring reports and studies to support regulatory filings is part of his job. He testified that he understood how to read and interpret reports like the model (Tr. VII at 1800), and the concepts in the model are the same as those he studied in his MBA program (Tr. VII at 1805). The comments and arguments attacking Mr. Allen's credentials are without merit and inappropriate. The studies are valid and should continue to be relied upon by the Commission.

AEP Ohio developed a record to show compliance with factor four. The issues raised by the Opposing Intervenors fail to address the severity of the risk faced by Ohio communities and customers. Approval of the Stipulation will provide a hedge against the expected volatility by which entities like Dynegy that would financially benefit from the closure of the PPA Units.

5. *Additional Requirements:* The PPA Proposal satisfies the *ESP III* decision's four additional requirements.

a. *First Requirement:* Rigorous Commission oversight of the Rider, including a process for substantive review and audit.

As discussed in AEP Ohio's Initial Brief (at 61-68), the PPA Proposal as modified by the Stipulation provides numerous opportunities for the Commission to conduct a rigorous review of PPA Rider costs and revenues. In this proceeding, the Commission will determine whether the proposed Affiliate PPA is beneficial for ratepayers and, as part of that process, will determine whether it is prudent for AEP Ohio to pass on Affiliate PPA legacy costs through the PPA Rider. Then, the Commission will continue to exercise rigorous *ongoing* oversight and review of Affiliate PPA costs incurred by AEP Ohio through the proposed PPA Rider audit process, which will involve both *accounting* review of previously approved PPA costs and *managerial* review of AEP Ohio's decisions under the contract regarding new PPA costs. (*See generally* AEP Ohio Ex. 10 at 10.) Opposing Intervenors offer a number of scattered critiques of this oversight process, but all of their arguments are meritless.

Multiple Opposing Intervenors claim that the annual financial and managerial audits proposed by AEP Ohio are inadequate because Opposing Intervenors will allegedly be barred from participating in those audit proceedings. (*See* OCC Br. at 88, Wal-Mart Br. at 9; OMAEG Br. at 50.) But there is no basis for these assertions. AEP Ohio intends the annual PPA Rider managerial and financial audit cases to follow the well-established procedures of AEP Ohio's current Fuel Adjustment Clause audit process. (AEP Ohio Ex. 10 at 10.) Although it is the Commission's decision whether to permit Opposing Intervenors in any proceeding, including audits, the Commission has repeatedly allowed various parties to intervene in AEP Ohio's FAC audits. AEP Ohio expects that the Commission will do the same here.

Wal-Mart argues that the Commission's oversight will somehow be diminished by the fact that AEP Ohio can be outvoted by AEPGR and AEPSC on the PPA Unit Operating Committee. (Wal-Mart Br. at 9.) But the interests of AEP Ohio and AEPSC are aligned, and AEPSC will not jeopardize AEP Ohio's retail recovery of PPA costs by voting in a way that it knows will result in a disallowance.

Wal-Mart further alleges that the proposed Commission review process for the PPA Rider is faulty because it will be limited to "after-the-fact compliance review." (*See* Wal-Mart Br. at 8.) But that is simply false. As explained in AEP Ohio's Initial Brief (at 65-66), AEP Ohio has committed to seeking prudence "pre-approval" from the Commission for any significant investment decisions or other major PPA Unit decisions. (Tr. I at 92-93.) This means that the Commission will have an opportunity to review the prudence of AEP Ohio's decisions in exercising its contractual rights to approve major capital expenditure and other PPA Unit decisions *before* those decisions are made.

In a similar vein, OCC criticizes AEP Ohio's proposal for failing to provide a precise definition of the kinds of "significant investments" for which AEP Ohio will seek prudence pre-approval. (OCC Br. at 89.) But it is unrealistic for OCC to expect such a rigid definition. AEP Ohio has committed to seek prudence pre-approval for specific significant investments such as repowering decisions, environmental retrofits, and other substantial capital investments. (Tr. I at

183.) AEP Ohio has also committed to seeking prudence pre-approval before making any retirement decisions regarding the PPA Units. (Tr. XX at 4997-98.) Because there are a variety of potentially "significant" decisions for which AEP Ohio may exercise its contractual rights over the PPA Units, any more rigid definition would unnecessarily restrict AEP Ohio's ability to seek prudence pre-approval from the Commission. Moreover, any risk of *not* seeking a prudence pre-approval falls on AEP Ohio, not ratepayers. If AEP Ohio declines to seek prudence preapproval for a particular PPA Unit cost, then AEP Ohio runs the risk of the Commission finding AEP Ohio's actions imprudent and disallowing cost recovery. In that scenario, customers would be made whole through adjustments to the PPA Rider, and AEP Ohio would suffer the financial consequences of the disallowed recovery. As a result, customers are protected in the event that AEP Ohio declines to seek prudence pre-approval and recovery of related costs is ultimately disapproved.

OCC further argues that the early termination provisions of the Affiliate PPA would have a chilling effect on the proposed Commission oversight of PPA Rider costs. (OCC Br. at 141.) But the *revised* Affiliate PPA reflected in the Stipulation limits the early termination provisions to an extremely narrow set of circumstances – specifically, "*discontinuation* of retail cost recovery." (*See* Joint Ex. 1, Attach A, ¶ 3 (emphasis added); P3/EPSA Ex. 10 at 10.) Accordingly, the Affiliate PPA termination provisions will not apply to an ordinary disallowance of AEP Ohio's cost recovery under an annual PPA Rider audit insofar as the disallowance is not a total "discontinuation" of cost recovery. The early termination provisions of the Affiliate PPA, therefore, will not chill the Commission's oversight of the Rider.

As for P3/EPSA, they offer two criticisms of the proposed review process, and they are as perplexing as they are meritless. First, P3/EPSA argue that the Stipulation review provision is limited to a review of *bidding behavior* and does not include a review of PPA Rider *costs*. (P3/EPSA Br. at 42.) But that is simply false. AEP Ohio's PPA Proposal as modified by the Stipulation contains detailed provisions for the Commission to conduct annual financial and managerial audits of both PPA Rider revenues and costs. (*See* AEP Ohio Br. at 61-68.) Second, P3/EPSA argue that the Commission cannot meaningfully evaluate the proposed review process because the PPA contract itself was not introduced by AEP Ohio in its case-in-chief. But AEP Ohio introduced a PPA term sheet in its case-in-chief, which included a detailed explanation of the PPA "Operating Committee" as well as other "buyer's prudence" provisions that form the basis of the Commission's ongoing oversight of PPA Rider costs. (*See* AEP Ohio Ex. 2, Ex. KDP-1 at 1.) AEP Ohio then provided amendments to the term sheet as an attachment to the Stipulation, which discussed, among other things, the proposed changes to the early termination provision addressed above. (*See* Jt. Ex. 1, Attach. A.) In addition, the rigorous Commission review process proposed by AEP Ohio was discussed by multiple AEP Ohio witnesses. (*See, e.g.*, AEP Ohio Ex. 1 at 27; AEP Ohio Ex. 10 at 10.) That was more than sufficient to describe the review process AEP Ohio proposes. In any event, the PPA contract *was* introduced as an exhibit – and by P3/EPSA itself. (*See* P3/EPSA Ex. 10.) Thus, it is fully a part of the record and available for the Commission's review.

b. *Second Requirement*: A commitment to full information sharing with the Commission and its Staff.

As discussed in AEP Ohio's Initial Brief (at 68-69), the PPA Proposal as amended by the Stipulation reflects a commitment to full information sharing with the Commission and Staff. Opposing Intervenors make various attempts to criticize AEP Ohio's commitment to information sharing, but all these attempts fall flat.

P3/EPSA and OMAEG argue that AEP Ohio's information-sharing commitment is inadequate because the Affiliate PPA *itself* does not provide the Commission the right to audit AEPGR's books. But of course the Commission is not a party to the Affiliate PPA. Rather, *AEP Ohio* is the Affiliate PPA "buyer," and the Affiliate PPA does give AEP Ohio substantial "Books and Records" and "Audit" rights, including a right "to examine the records of [AEPGR] to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made pursuant to the Agreement." (P3/EPSA Ex. 10 at 17.) In the Stipulation, moreover, AEP Ohio committed to provide "AEPGR fleet information on *any cost component* . . . pursuant to a reasonable Staff request (as determined by the Commission)." (Jt. Ex. 1 at 7 (emphasis added).) Thus, the Affiliate PPA – combined with AEP Ohio's commitments in its PPA Proposal as modified by the Stipulation – gives the Commission substantial visibility into PPA Rider costs that would be incurred by retail customers.[11]

OCC, for its part, acknowledges that Affiliate PPA "term sheet provides that AEPGR will keep . . . all necessary books of record, books of account, and memoranda of all transactions involving the PPA Units" and that AEP Ohio has committed to providing the Commission "summaries *and details* about the information contained in the books and records for OVEC and AEPGR." (OCC Br. at 89 (emphasis added.)) Yet OCC criticizes this proposal on the ground that "[s]uch summaries and details 'may or may not' include the actual books themselves." (*Id.* at 90.) This argument epitomizes the flimsiness of Opposing Intervenors' critiques. The Affiliate PPA provides AEP Ohio a right to inspect AEPGR's records (P3/EPSA Ex. 10 at 17),

[11] This also refutes RESA's bizarre criticism that AEP Ohio did not propose a method by which the Commission could "subpoena" information from AEPGR. (RESA Br. 44.) Putting aside the fact that AEP Ohio does not control the laws under which government bodies can issue subpoenas, no such subpoena will be necessary given AEP Ohio's contractual rights and its commitment to comprehensive information-sharing with the Commission.

and AEP Ohio has committed to providing Staff and the Commission any information necessary to evaluate any PPA Rider cost component, so long as the request is reasonable. (Jt. Ex. 1 at 7.) If Staff makes a reasonable request for information, AEP Ohio will provide it, and AEP Ohio witness Allen made clear that the Commission is the ultimate arbiter of whether a Staff request is "reasonable." (Tr. XX at 4983.) That constitutes full information sharing.

Opposing Intervenors' remaining critiques of AEP Ohio's proposed information sharing are equally meritless. P3/EPSA and RESA argue that AEP Ohio's proposed information sharing for the PPA Rider is inadequate because "Staff will have to know what to ask for in order to receive information." (PE/EPSA Br. at 42; RESA Br. at 44.) But just as with AEP Ohio's Fuel Adjustment Clause audit process, Staff will be provided an itemization of costs being flowed through the PPA Rider in the annual PPA Rider audits. Staff will be able to ask for follow-up information concerning any of those itemized cost components, or any make any other reasonable information request related to PPA Rider costs and revenues.

Opposing Intervenors also complain that, under the Stipulation (*see* Jt. Ex. 1 at 7), Staff agrees to treat any AEPGR fleet information disclosed in the audit process as confidential. (*See* P3/EPSA Br. at 43; OMAEG Br. at 51.) But confidential treatment of proprietary fleet data is already a commonplace feature of the Fuel Adjustment Clause audit process, as well as virtually *all* Commission proceedings that involve confidential trade secrets. *See, e.g.*, R.C. 4901.16 (Staff prohibited from divulging confidential information); OAC 4901-1-24(A)(7) (protective orders permitted to protect a "trade secret or other confidential research, development, commercial, or other information"). Confidentiality of proprietary information is a critical component of the Commission's review of public utilities; it is not a reason to reject this or any stipulation.

RESA argues that there is no provision for information sharing with respect to the OVEC units. (RESA Br. at 44.) Not true. As an OVEC member, AEP Ohio has certain rights to OVEC information, and insofar as Staff makes a reasonable request for the OVEC information in AEP Ohio's possession, AEP Ohio will provide it. (*See* Sierra Club Ex. 3 at 18 (Section 9.08).) Indeed, AEP Ohio's OVEC entitlement has been recovered in rates before, and the access to OVEC information that the Commission and Staff will have under the PPA Proposal will not be meaningfully different than the access they had when OVEC was previously included in rates.

Lastly with respect to information sharing, P3/EPSA and RESA argue the Commission and Staff will have no access to information about AEPGR's market bids for its other units that are not part of the Affiliate PPA. (P3/EPSA Br. at 43; RESA Br. at 44-45.) Again, not true. As an initial matter, Staff regularly requests and receives access to bidding data for numerous participants in the PJM energy and capacity markets. (*See* Tr. XVI at 3977-78.) Thus, Staff already has access through PJM to the information referenced by P3/EPSA and RESA. In any event, pursuant to the Stipulation (*see* Jt. Ex. 1 at 7), Staff can request access to AEPGR fleet information as part of its annual PPA Rider audit process, and so long as the request is reasonable (as ultimately determined by the Commission), the information will be provided. AEP Ohio has a strong track record of cooperating with Staff data requests in the Fuel Adjustment Clause audits and in other proceedings. It will be the same with the PPA Rider.

c. ***Third Requirement:*** **An alternative plan to allocate the Rider's financial risk between both AEP Ohio and its ratepayers.**

OCC claims that the PPA Proposal completely transfers all risks associated with the continued operation of the PPA Units to AEP Ohio's customers. (OCC Br. at 142.) This position is premised on the OCC's own faulty quantitative analysis of the projected PPA Rider impact, which AEP Ohio addresses elsewhere. *See, infra,* Part IV.B.1. OCC wrongly relies, in part, on Staff's objections to the Amended Application (OCC Br. at 90, 144) – even though Staff has signed the Stipulation in support of the modified PPA Proposal and stated on brief that its concerns have been resolved. Any reliance on the criticisms levied against the Amended Application ignores changes made in Stipulation such as a $100 million customer credit commitment and the $86 million savings associated with the reduced ROE. (Jt. Ex. 1 at 5-6; AEP Ohio Ex. 52 at 14.)

RESA also complains that the PPA Proposal shifts market and environmental risks to customers during the PPA Rider term. (RESA Br. at 13-15.) OMAEG acknowledges that the credit commitment reduces cost, but then somehow denies that is a risk reallocation and concludes that the PPA Proposal insulates AEP Ohio from "any risk whatsoever." (OMAEG Br. at 52-53.) P3/EPSA superficially claims there is no "designated" risk plan since that was not explicitly titled as such in the Stipulation or supporting testimony (P3/EPSA Br. at 43-45.) Kroger piles on by relying on OCC's flawed cost projection and criticizing the customer credit provision as not applicable in early years. (Kroger Br. at 4.) Of course, the risk allocation comes from the substantive evaluation of the relative risks associated with the PPA Proposal, not from a title or label attached to certain provisions.

The Stipulation itself is the alternative plan that reallocates risk in major ways, as acknowledged by Staff and the other Signatory Parties. OCC also incorrectly alleges that the risk of liquidated damages from a disallowance places too much risk on customers. (OCC Br. at 91.) This allegation ignores the substantial changes made in the Stipulation that limit the liquidated damages to the narrow circumstance where the Commission completely extinguishes cost recovery under the PPA Rider. (Jt. Ex. 1, Att. A; P3/EPSA Ex. 10, § 2.3.)

P3/EPSA sets forth a list of potential PPA costs and portrays them as additional risks placed on customers. (P3/EPSA Br. at 44.) This list is beside the point and proves nothing, since all of those things were incorporated into the quantitative benefit projections performed by AEP Ohio. P3/EPSA admits the disallowance risk exists, but unreasonably denies the customer credit guarantee places risk on AEP Ohio. (*Id*. at 43.) P3/EPSA also criticizes the fact that the PPA is not tied to unit availability (*id*. at 16-17), even though that is a standard feature of regulated utility PPAs. Those regulated utility arrangements often involve sharing of wholesale margin revenue (whereas, the PPA Rider actually flows through 100% of PPA revenues).

It is clear that the Stipulation placed additional risk on AEP Ohio and reduced risk on customers – while the risk embedded in the original proposal also stayed with AEP Ohio. For example, AEP Ohio retains the undisclosed risk of future disallowances, the $86 million risk of reduced ROE under the PPA, and the $100 million customer credit commitment. Opposing Intervenor criticisms are result-oriented arguments designed to undermine the PPA Rider, even though the Stipulation injected significant additional risk for AEP Ohio and struck a reasonable balance.

Last but not least, *amicus* PJM weighs in on risk allocation in two significant and related ways. First, PJM decrees with respect to the Capacity Performance program that “risk of non-performance, or under performance, must align with the party that can mitigate the risk – in other words, the unit owner.” (PJM Br. at 8-9; see also P3/EPSA Br. at 25-26.) This recommendation is based on PJM’s (or, more accurately, PJM’s legal counsel’s) subjective feeling about the intention behind the capacity performance rules. The quotation from a FERC order in a separate case (PJM Br. at 9) has no bearing on the issue and does not establish that FERC’s intention matches with PJM’s on this point. And the reality is that this blunt approach would not recognize the complexities of the PPA. As has been extensively discussed in the record, the PPA is uniquely designed to provide a mixture of contractual obligations on the seller (AEPGR, who is the owner of the PPA Units) and the buyer (AEP Ohio, who is the retail utility): there are a host of "buyer's prudence" provisions that give AEP Ohio rights and obligations that affect operations and economics of the plant – most notably in this regard including dispatch strategies and instructions. (P3/EPSA Ex. 10 § 3.5.) Thus, PJM's all-or-nothing approach does not fit with the terms of the PPA or the evidentiary record that it did not participate in developing. The PPA and the evidentiary record would suggest that the correct answer on who would be responsible for any capacity performance penalty is "it depends." More precisely, unless AEP Ohio is responsible for an imprudent decision or action in managing or implementing the PPA terms, a capacity performance charge should be treated as any other cost associated with operation of the units and passed through the wholesale PPA and ultimately the retail PPA Rider.

As a related matter, PJM's second recommendation exposes a similar flaw in its over-simplified approach that is also disconnected from the evidentiary record. PJM also recommends that the Commission "should ensure that the Stipulation does not provide an avenue for AEP Ohio to lessen [the impact of] those incentives by seeking recovery of those penalty provisions from Ohio customers." (PJM Br. at 9.) Again, PJM attempts to go beyond the rules and improperly reach into retail rate matters. It is not PJM's place to say what should and should not be recovered through retail rates – and FERC has not provided for anything of the sort in adopting the Capacity Performance regime. Decisions about the recovery of Capacity Performance penalties by retail customers is a matter that falls exclusively within the jurisdiction of state commissions, and FERC's approval of PJM's Capacity Performance rules did not provide otherwise.

PJM's ideological approach simply does not work in the real world. To say that a plant operator must incur the risk of penalties and internally absorb it without being able to reflect it or recover it elsewhere is unrealistic. In the PJM market construct, these risks would be reflected in higher offer prices. Moreover, that logic, carried to its conclusion, would also suggest that the plant owner must keep all of the capacity revenues and not factor those into the sale of capacity or energy from the plant. On the contrary, all businesses recover the costs of doing business as part of their product transactions and sales revenues. Regarding operation of plants in a cost-based regulatory environment, one must take the bad (costs) with the good (revenue) and prudently manage the overall plant to provide service at a net value for customers.

In short, PJM's recommendations are disconnected from both the requirements of the Capacity Performance regime and the realities of retail ratemaking. PJM attempts to bootstrap wholesale market rules into retail policy and improperly seeks to enlist the Commission to extend PJM's authority in ways that go beyond the PJM market rules. But asking the Commission to effectively impose an additional PJM market rule on AEP Ohio is improper because doing so would exceed the Commission's jurisdiction. It is also unfair, since PJM's recommendations effectively manufacture a special rule for the PPA Proposal that does not apply to other similarly-situated market participants. It is unclear why PJM seeks such an unfair approach, but this is not the forum for extending or modifying PJM market rules. The Commission should not attempt to apply federal market rules by reading emanations and penumbras between the lines based on PJM's subjective interpretations. PJM is perfectly capable of enforcing its wholesale market rules and can enlist the FERC, if necessary, to do so – but should not be inserting itself in retail ratemaking decisions that fall within the exclusive jurisdiction of this Commission.

As a limited *amicus* brief participant, PJM was not permitted to submit testimony and is thus limited to advocating general policy matters based on the existing evidentiary record. But PJM's recommendations on brief are conspicuously disconnected from the record and any factual basis. It is obvious that PJM seeks to submit its original recommendations proffered (and rejected) in testimony – without providing a proper evidentiary basis or key factual support. Both of its recommendations should be rejected.

In sum, the allocation of risks under the PPA Proposal should be left undisturbed because it is already properly balanced and appropriate.

d. ***Fourth Requirement:*** **A severability provision to continue the ESP in the event the rider is invalidated.**

AEP Ohio established in its Initial Brief how the PPA Proposal satisfies the fourth requirement for severability. (AEP Ohio Br. at 72.) The only substantive criticism on this point came from OCC, who complained that AEP Ohio should provide for a retroactive customer refund if the PPA Rider is reversed or vacated on appeal. (OCC Br. at 45.) But the lack of this feature is a matter of following established Ohio law and cannot be reasonably considered a shortcoming of the Stipulation or the PPA Rider. *See e.g. In re Columbus Southern Power Co*., 128 Ohio St. 3d 512 (2011). Consequently, the Commission should find this requirement is fulfilled.

B. The provisions in the Stipulation, as a package, benefit ratepayers and the public interest.

1. Based on the evidence of record, customers are expected to sufficiently benefit from the Rider's financial hedging mechanism and the Stipulation as a whole.

a. Opposing Intervenors' criticisms of the financial benefit of the Stipulation are misguided.

In its Initial Brief, AEP Ohio showed that there is a reasonable expectation of a long-term financial benefit to customers from the proposed PPA Rider. (AEP Ohio Br. at 73-79.) In that regard, AEP Ohio explained the manner in which AEP Ohio witness Pearce developed forecasts of revenues and costs under the version of the PPA Rider proposed in the Amended Application (AEP Ohio Ex. 3 at 11-20, Ex. KDP-2.) AEP Ohio explained that, in order to prepare those forecasts, Dr. Pearce relied upon various data, including the supporting information provided by AEP Ohio witnesses Bletzacker (a long-term forecast of PJM wholesale power prices) and Hawkins (the appropriate capital structure and return on equity for use in the Affiliate PPA, initially set at 11.24%). AEP Ohio further noted that the results of Dr. Pearce's forecasts for the generating units whose costs and revenues are included in the PPA Rider are displayed in Exhibit KDP-2 to his Direct Testimony, AEP Ohio Exhibit 3. AEP Ohio also explained that AEP Ohio witness Allen subsequently developed a revised version of Dr. Pearce's analysis, modified primarily to incorporate the changes wrought by the Stipulation. In particular Mr. Allen's revised analysis shortened the period under analysis to January 1, 2016 through May 31, 2024 (to be consistent with the end of the term for the PPA Rider under the Stipulation), reduced the return on equity used to determine PPA costs from a formula rate set initially at 11.24% to a fixed 10.38% for the term of the PPA Rider (also required by the Stipulation), and incorporated the results of PJM's recent Capacity Performance auctions for the 2016/17, 2017/18, and

2018/19 delivery years. (AEP Ohio Ex. 52, Att. A, Items 1 & 2; AEP Ohio Ex. 52, Ex. WAA-2; Tr. XVIII at 4568-69.)

AEP Ohio explained in detail in its Initial Brief (at 73-79) how the record supports the conclusion that, overall, the proposed PPA Rider benefits customers by using a diversified portfolio, sourced from 20 generation units, to provide a cost-based hedge against market prices; and that it provides a more balanced approach than relying solely on the market. (AEP Ohio Ex. 3 at 19.) Accordingly, Exhibit WAA-2 to Mr. Allen's Stipulation Testimony provides the basis for estimating the net financial benefit that the PPA Rider's hedging mechanism will provide to AEP Ohio's customers over the term of the Rider.

Nevertheless, several Opposing Intervenors have questioned whether customers are likely to sufficiently benefit from the PPA Rider's financial hedging mechanism. Their criticisms are without merit.

i. The 5% high and 5% low load cases were helpfully presented to illustrate the asymmetric impact that weather and other load variability factors can have on electric prices.

OCC contends that the wide variation in rate impact results that correspond to the 5% high and 5% low load cases that Dr. Pearce sponsored (AEP Ohio Ex. 3, Ex. KDP-2), and in the revised version of that analysis that Mr. Allen sponsored (AEP Ohio Ex. 52, Ex. WAA-2) indicates that AEP Ohio's PPA Rider proposal is too uncertain to be approved. (OCC Br. at 155-56.) Dynegy, in a similar fashion, infers from this variation in rate impacts that result from the 5% high and 5% low load cases that it is not practical to forecast future rate impacts. (Dynegy Br. at 26.) This criticism misses the point of the sensitivity analyses that Dr. Pearce and Mr. Allen provided.

The point of the 5% high and 5% low load scenarios is to show that the PPA Rider has more "upside" than "downside". That analysis demonstrates that if loads increase due to weather volatility and/or a strengthening economy, AEP Ohio customers, both shopping and default service customers alike, will be exposed in an asymmetric manner to the resulting higher wholesale prices, which the PPA Rider will then partially offset. On cross-examination regarding his Stipulation testimony, Mr. Allen again explained the asymmetric manner in which load increases lead to disproportionate increases in wholesale prices (and which Exhibit KDP-2 and Stipulation Exhibit WAA-2 confirm) as follows:

> [Stipulation Exhibit WAA-2 is attempting to reflect] the range of outcomes that one would expect to occur over a number of years within PJM where, in some years, the load is going to be higher than weather normal and some years it's going to be lower than weather normal, but trying to show the effect than an increase in load above normal has an asymmetric effect on market prices as compared to lower load in the market.

(Tr. XVIII at 4574.) Mr. Allen demonstrated why the high and low load cases are important to review in considering the PPA Rider's true value as a hedge (as opposed to estimating the overall net credit/charge question, which is evaluated addressed by reviewing the average values over the study period):

> We wouldn't charge customers a true-up or an annual rate based upon the average of the high and low load forecast cases. That case is there solely to provide the Commission an estimate of the net benefit over the entire period, not to identify what the hedge value is in any one period, the hedge value, and that's why we included the five higher and lower load forecast cases, to give an indication to the Commission of the value of the hedge that we are proposing here.

(Tr. XVII at 4405-06.)

Criticisms of the type that OCC and Dynegy have made, which incorrectly assume that the high and low load cases are intended to estimate how large the credits or charges might be on a cumulative basis over the course of the Rider's life, are without basis. It is the average of the high and low load cases that can be used to provide an estimate of the net benefit of the Rider's rate impacts over the life of the Rider.

ii. It is appropriate to include PJM Capacity Performance Resource revenues in the PPA Rider's rate impact projections.

Mr. Allen incorporated the results of PJM's recent Capacity Performance auctions for the 2016/17, 2017/18, and 2018/19 delivery years into his revised version of Dr. Pearce's analysis of the PPA Rider's rate impacts. (AEP Ohio Ex. 52, Ex. WAA-2; Tr. XVIII at 4568-69.) Kroger contends that PJM Capacity Performance Resource revenues are speculative and should not be taken into account when estimating the Rider's rate impacts. (Kroger Br. at 3-4; Kroger Ex. 2 at 11.) This contention is clearly misguided. Even OCC witness Wilson agrees that it is appropriate to include the results of the recent PJM Capacity Performance Resource auctions in estimates of the Rider's rate impacts. (OCC Ex. 35 at 9.)

iii. Forwards-based methods of forecasting future wholesale electric energy prices are flawed and render financial projections using such data unreliable.

OCC criticizes the retail rate impact analyses for the PPA Rider that AEP Ohio has sponsored. OCC's criticism is based on the testimony of its witness Wilson, who contends that his forwards-based approach to forecasting wholesale electric power prices is superior to the Long Term North American Energy Market Forecast ("Fundamentals Forecast") that AEP Ohio witness Bletzacker sponsored and which Dr. Pearce (and Mr. Allen) relied upon as the source of wholesale prices for their analyses of the Rider's rate impacts. (OCC Ex. 35 at 7-16; OCC Br. at 55-59, 101-103, 154-56.) Other parties also have contended in their initial briefs that the forwards-based approach that OCC witness Wilson sponsors should be used to evaluate the rider's rate impacts. (Kroger Br. at 4; ELPC/OEC Br. at 23; Dynegy Br. at 25-26; OMAEG Br. at 41; ELPC/OEC Br. at 22.) ELPC/OEC, for their part, also rely heavily on testimonies of

Sierra Club witness Chernick and IGS witness Leanza, both of whom also relied heavily on forwards prices in their testimonies, as a basis for criticizing Mr. Bletzacker's forecast and the rate impact analyses that Dr. Pearce and Mr. Allen sponsored. (ELPC/OEC Br. at 20-23.) Notably, Sierra Club and IGS, both of which are Signatory Parties to the Stipulation, are no longer advocating the positions that those two witnesses advanced in their testimonies. The criticisms of AEP Ohio's rate impact analyses that these parties make that are based on the use of forwards pricing are meritless.

Mr. Bletzacker explained in his Rebuttal Testimony (AEP Ohio Ex. 50 at 1-8) and AEP Ohio argued in its Initial Brief (at 82-91) in detail that the use of forwards prices to predict the net impact of the PPA Rider is fundamentally flawed in a number of ways. First, forwards prices are not a forecast of future spot market prices. Rather, a forward price represents a price to which a buyer and seller agree based on their respective goals for that particular transaction, goals that have no connection to what future spot prices actually might be. Second, even if forwards prices were based on what transacting parties believe future spot prices will be, the market for electric energy forwards is illiquid, except for the very nearby, short-term period and, therefore, cannot provide a sound basis for a long-term forecast in any event. Third, it is inappropriate to use forwards prices in the manner Mr. Wilson (and Mr. Chernick) advocates because the volatility of long-term futures contract prices are synchronized to the volatility of *current* spot market prices, not factors relevant in the long term. Thus, forwards prices do not account for, among other things, the potentially very significant impact the Clean Power Plan Final Rule will have on energy prices in the future. Fourth, even Mr. Wilson implicitly recognizes that there are no forwards prices available for nearly half of the PPA Rider's study period; thus, Mr. Wilson does not even rely upon actual forwards prices after October 2020 in his analysis because he does not believe that suitable forwards price information exists after that point. Instead, for the post-October 2020 period Mr. Wilson simply uses the monthly forwards prices he picked for the twelve-month period of November 2019 through October 2020 and then repeatedly recycles them as proxies for forward prices for the November 2020 through December 2024 portion of the period under analysis.

Notably, while Mr. Wilson attempts to respond to certain of these criticisms in a conceptual or argumentative manner in his Supplemental Direct Testimony, neither he nor OCC in its Initial Brief

even tries to rebut the point that, except for the very nearby, short-term, period, the market for electric energy forwards is illiquid. In that regard, as of October 20, 2015, CME Group reported no Open Interest for NYMEX AD Hub Day-Ahead electric energy forwards prices for the Off-Peak contract after May 2017 (AEP Ohio Ex. 48) and no Open Interest for the On-Peak contract after December 2017 (AEP Ohio Ex. 47). Accordingly, the record does not even support a basis for the forwards prices Mr. Wilson used for a significant portion of the period prior to November 2020, the point after which even he admits they are no longer available.

Consequently, the Commission should reject the use of these forwards-based approaches to forecasting wholesale electric energy prices and estimating net rate impacts of the PPA Rider.

iv. The 2013 Fundamentals Forecast of wholesale power prices sponsored by AEP Ohio witness Bletzacker is reasonable and Opposing Intervenors' flawed attempts to revise the forecast produce bogus results.

As AEP Ohio demonstrated in its Initial Brief (at 79-82), the 2013 Fundamentals Forecast released at the end of 2013 was the appropriate long term forecast to use in the financial impact analysis for the PPA Rider. Several Opposing Intervenors have argued that AEP Ohio should not have relied upon its 2013 Fundamentals Forecast (Dynegy Br. at 25; ELPC/OEC Br. at 18-23; OMAEG Br. at 37; Wal-Mart Br. at 6.) Instead, they contend that AEP Ohio should have used the 2015 Fundamentals Forecast in this proceeding instead, which they contend was available for use at the time that AEP Ohio prepared and filed its Amended Application in this proceeding on May 15, 2015. Alternatively, certain of the Opposing Intervenors contend that piecemeal adjustments should be made to the 2013 Fundamentals Forecast and, then, to the rate impact analyses that use the results of that forecast. (OCC Br. at 55-59, 101-103, 105-106; ELPC/OEC Br. at 18-23.) These arguments are without merit

First, as Mr. Bletzacker testified (Tr. V at 1410), the 2015 Fundamentals Forecast was not finalized, released, and available for use at that time.[12] Second, to the extent that the Opposing Intervenor criticisms are that AEP Ohio should have delayed filing its Amended Application and supporting testimony until it could incorporate the 2015 Fundamentals Forecast into its filing, Mr. Bletzacker and Mr. Allen explained that such an approach would be a recipe for never-ending delay. Mr. Bletzacker explained that the process of preparing Fundamentals Forecasts is an essentially continuous and iterative one. There is always another Fundamentals Forecast just over the horizon. (Tr. V at 1430-31.) If AEP Ohio had to keep waiting for the next forecast to be completed and released, it would never have been able to submit its Amended Application. As Mr. Bletzacker concluded: "So you have to stop the process somewhere and the 2013 Fundamentals is a fine place to stop." (*Id.*) Mr. Allen reinforced this point, explaining that if the applicant had to continually update its filing as new forecast data became available, the

[12] OMAEG's assertion that the 2015 Fundamentals Forecast was available for use in this proceeding as of April 24, 2015, and that AEP Ohio "tried to keep this forecast bottled up"(OMAEG Br. at 37-38) is patently false. Mr. Bletzacker explained definitively that, while a model run was completed on April 24, 2015, the 2015 Fundamentals Forecast was not finalized and released for use until after the Amended Application was filed on May 15, 2015. (Tr. V at 1404-1405.)

regulatory review and approval process would grind to a halt, essentially precluding the applicant from gaining timely review of its request. (Tr. XVIII at 4667.)

It is appropriate to rely upon information that is available when an application is filed, and it is accepted practice in regulatory proceedings to do so. Accordingly, AEP Ohio did in this proceeding the same thing it ordinarily does, which is to use the forecast available when it makes its filing and then continue to rely upon that forecast through the course of the proceeding. (Tr. XVIII at 4667.)

In any event, the criticisms of these Opposing Intervenors, particularly those of ELPC/OEC and OCC, are really that the Commission should make piecemeal revisions, first, to the 2013 Fundamentals Forecast and, next, to Dr. Pearce's and Mr. Allen's estimates of the PPA Rider's rate impacts (Exhibit KDP-2 and Exhibit WAA-2) based on adjustments that Sierra Club witness Chernick and OCC witness Wilson advocate. (ELPC/OEC Br. at 20-23; OCC Br. at 55-59, 101-103.) However, because the revisions that Mr. Chernick and Mr. Wilson recommend are supported in part, or in whole, by the use of forwards prices, they are not reliable and should be rejected for the reasons provided in detail above. (AEP Ohio Ex. 50 at 1-8.)

Moreover, revising the 2013 Fundamentals Forecast and AEP Ohio's rate impact analysis in a piecemeal fashion, as Opposing Intervenors such as OCC and ELPC/OEC essentially recommend doing, is inappropriate. As Mr. Bletzacker explained, in the preparation of a long-term forecast, the relationships between all components must be recognized and fitly-joined through iterative use of forecasting models to ensure proper correlation. (*Id.* at 1-2.) Piecemeal revisions do not comport with that standard.

The Commission should reject Opposing Intervenors' criticisms of AEP Ohio's use of the 2013 Fundamentals Forecast. Instead, a rule of reason should be applied. In that regard, Mr.

Bletzacker confirmed that the 2013 Fundamentals Forecast was properly and reliably prepared, that it was the only Fundamentals Forecast available for use at the time AEP Ohio prepared and submitted its Amended Application and supporting testimony in this proceeding, and therefore that it was reasonable for AEP Ohio to use it in this proceeding. He specifically stated that, to the extent that Dr. Pearce (and, thus, Mr. Allen) relied upon the 2013 Fundamentals Forecast information to generate projections regarding the rider revenues and costs, those projections were "based on a forecast that's within what I would call a band of credibility." (Tr. V at 1432.)

v. Load projections used in AEP's 2013 Fundamentals Forecast are reliable.

ELPC/OEC contends that the load projections Mr. Bletzacker used in the preparation of the 2013 Fundamentals Forecast are inherently flawed in several respects. First, ELPC/OEC criticizes the Fundamentals Forecast methodology because it does not include an explicit factor for energy efficiency measures that might be implemented to comply with the Clean Power Plan. Second, ELPC/OEC believes that the amount of energy efficiency that Mr. Bletzacker does incorporate into the forecast is not consistent with existing Ohio law. In addition, ELPC/OEC notes that in the AEP Ohio-specific long-term forecasts that AEP Ohio filed with the Commission in 2013 and 2015, AEP Ohio's forecasts showed a downward adjustment in its company-specific load projections from one forecast to the next. Finally, ELPC states that the impact of capacity performance penalties resulting from PJM's introduction of the Capacity Performance Resource product is not reflected in the 2013 Fundamentals Forecast. As a result, ELPC/OEC believes that the 2013 Fundamentals Forecast's load projections are flawed and, consequently, the PPA Rider impact analyses that AEP Ohio has prepared that rely upon the forecast are also flawed.

These criticisms are without merit. Contrary to the implication of ELPC/OEC's first argument, Mr. Bletzacker did not fail to account for the impacts of the Clean Power Plan, including energy efficiency programs that might be implemented to comply with it. as Mr. Bletzacker testified, included in the forecast is a carbon burden, or tax, of approximately $15/metric ton. (AEP Ohio Ex. 6 at 8.) This is a dispatch burden (Tr. V at 1475) on all the generators included in the forecast. Therefore, the $15/ton burden is a proxy for the costs of implementing the CPP nationwide, regardless of whether the compliance plan involves a supply-side measure or a demand-side measure (like energy efficiency).

ELPC/OEC's second criticism is also misguided. The amount of energy efficiency included in the forecast is for the NERC region, not the Ohio state-specific level. (IGS Ex. 4, at 3.) In addition, there is no basis for assuming, as ELPC/OEC does, that the baseline year that the NERC region efficiency gains are measured against is the same baseline year that the Ohio statute uses. So, the comparison that ELPC/OEC makes in order to try to support its criticism is "apples to oranges." In a similar fashion with regard to ELCP/OEC's next criticism, neither the long-term forecast submitted to the commission for AEP Ohio's service territory in Ohio for 2013 – nor that report for 2015 – is a substitute for the broader regional perspective that the Fundamentals Forecast relies upon. Again, ELPC/OEC's criticism is based upon an inapposite comparison.

The point that ELPC/OEC attempts to make regarding the forecast of capacity prices provided by the 2013 Fundamentals Forecast also is misguided. The Fundamentals Forecast calculates the projected capacity prices as the difference between the total revenue required by marginal generating units that is not provided by energy revenue. (Tr. V at 1388.) If, or when, it becomes clear that PJM's capacity pricing approach is inconsistent with the Fundamentals

Forecast's methodology, it is more likely that PJM's capacity pricing approach will have to change to become consistent with the fundamental laws of economics upon which the forecast methodology is based.

ELPC/OEC's criticisms of the methodology through which the Fundamentals Forecast calculates capacity prices should be rejected.

b. Opposing Intervenors' non-quantitative critique of the Stipulation's value is without merit.

OCC argues that, even though the PPA Rider may be projected to convey a net benefit to customers, the other provisions of the Stipulation are projected to impose a net cost – thereby concluding that the package of provisions in the Stipulation renders customers "worse off" than they would be if only the PPA Rider were adopted by itself. (OCC Br. at 31.) Of course, under this logic, no Stipulation imposing new or increased rates would pass muster. Moreover, it ignores the benefits conveyed for the cost imposed – for things like utility service, network investment and EE/PDR programs.

OCC also complains that the cost of the Conesville Unit co-firing investments, the Competition Incentive Rider and the solar/wind projects are not reflected in AEP Ohio's cost projections. (OCC Br. at 44, 47-48, 52-53.) Each of these items will be considered in separate cases and the Commission will be able to assess whether they present an incremental or net benefit in that case, based on the facts and circumstances presented at that time. There is no reason to presume, as OCC does, that a negative value should be assigned to any of these provisions in the Stipulation. The Signatory Parties certainly ascribe value to them and, if the Commission adopts them in the future cases, it will do so based on its assessment of net benefit/value. More to the point, OCC's perspective fails to recognize the important policy value of promoting retail competition, investing in fuel diversity and promoting renewable energy.

P3/EPSA rails against the so-called monetary inducements for parties to sign the Stipulation – even trying to sum up the annual and cumulative nominal value of specific provisions. (*Id*. at 69-71.) Aside from missing the mark of evaluating public interest value of the provisions, P3/EPSA's mathematical exercise is misleading in part and incorrect in part. Many of the items listed are dollars that would have been spent without the Stipulation on similar or identical programs – they are merely earmarked here and still represent prudent and cost-effective program expenses and network investments. Further, the attempted quantitative analysis contains errors and faulty assumptions, like the assumption that OPAE will receive the same funding into the future when that is not committed to in the Stipulation. Moreover, P3/EPSA erroneously includes money paid to IEU as part of a Global Settlement involving several cases unrelated to the PPA Rider. Thus, P3/EPSA's argument in this regard is flawed and should be discarded.

P3/EPSA also spends several pages establishing that AEP Corporation supports the PPA Proposal. (P3/EPSA Br. at 13-16.) That AEP Corporation supports the PPA Proposal should surprise no one, given that two of its significant business units affirmatively support the proposal – and it is really beside the point. The important thing is that the Commission will independently assess the benefits of the Stipulation package, including the PPA Proposal, based on the record and in considering Ohio law and energy policies. So, it should not really matter whether any particular outside party favors or opposes the PPA Proposal.

Finally, P3/EPSA offers its own subjective views as an outsider of the Stipulation by nitpicking a series of provisions in the Stipulation by subjectively appraising them as having minimal or no value. (*Id*. at 71-72.) This, too, is a misplaced argument since the Signatory Parties attributed value to the provisions and included them for that reason. Wal-Mart puts forth a similar set of general complaints and criticisms about the Stipulation – some of which is simply outdated and aimed at items that are no longer even reflected in the Stipulation.[13]

AEP Ohio summarized with extensive detail the benefits of the Stipulation (beyond fulfilling the *ESP III* decision factors and requirements) in Part VI.B.1 of its Initial Brief and will not repeat that discussion here. (AEP Ohio Br. at 73-91.) AEP Ohio is satisfied that it has demonstrated the extensive customer and public interest and quantitative benefits of the Stipulation. Of course, it will be the Commission's job (not the Opposing Intervenors' job) to independently confirm the package benefits customers and the public interest.

2. Populating the PPA Rider has the unique 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.

Opposing Intervenors address the mounting market volatility and issues facing the retail customer with a similar theme-denial. At least that denial is the public position taken before the Commission in this proceeding. As discussed in the Company's Initial Brief (at 93-94) at least one Opposing Intervenor (Dynegy) is presenting one view of the world to the Commission but building its operation and telling investors an entirely different story. The other Opposing Intervenors appear to ignore compelling record evidence detailing the market volatility and the countering effect the PPA rider can have on that volatility. (See AEP Ohio's Initial Brief (at 73) for a further discussion on the benefits of the financial hedge.)

Despite the cross examination of Dynegy witness Dean Ellis and the exposure of the corporate plans it continues to advocate that all is well and there is no volatility concerns on the

[13] For example, Wal-Mart spends nearly a page of its short brief complaining about former Section 2.4 of the PPA, which has been removed. (Wal-Mart Br. at 4-5.) Based on feedback from the Signatory Parties, AEP Ohio and AEPGR agreed to delete the provision permitting unit removal where both parties agree that it no longer makes economic sense to include the unit. *See* P3/EPSA Ex. 10 at 10 (shows Section 2.4 being deleted).

horizon based on the historic PJM data presented in the direct testimony of Dynegy witness Ellis and P3/EPSA witness Cavicchi. (Dynegy Br. at 10-13.) This is the same historical data that Mr. Ellis agreed on cross-examination was not based on Dynegy's actual company forecasts for the company. (Tr. X at 2567.) As detailed in the Company's Initial Brief (at 93-94) Dynegy as a corporate entity is counting on volatile markets and high energy prices; Dynegy executives are telling investors that price scarcity premiums may be substantial and that its position in 2017 is largely open to reflect their corporate bias that there will be higher energy prices and increased volatility yet to be recognized in forward markets. It strains all credibility for Dynegy to file a brief advocating the opposite of how it has set up its business and how it is operating in the market. Dynegy is not a regulated company and the closure of the AEP units would further help its bottom line. The Commission must decide if it is going to listen to Dynegy the actor in the market that is setting up operations and celebrating the impending price volatility and high energy prices, or the Dynegy that is at the Commission using old data it admits does not match its corporate forecasts to advocate against an instrument that seeks to stabilize prices and protect customers from the high energy prices the Dynegy officers are predicting.

The other Opposing Intervenors are equally skeptical of the volatile markets and high energy prices predicted by AEP Ohio and the corporate officers at Dynegy when talking to investors. RESA expresses a concern that the entire model is some type of conspiracy created solely to benefit the corporate parent. (RESA Br. at 26.) OCC argues that AEP cannot point to any information in the record showing customers have experienced any retail rate volatility. (OCC Br. at 156.) ELPC/OEC echoes the disbelief that there is a volatility concern to address in both the short and long term that current tools cannot already address. (ELPC/OEC Br. at 38-44.) OMAEG takes a more contrarian approach just asserting that the whole idea is a solution in search of a problem and that laddering staggering and fixed contracts can address any problems. (OMAEG Br. at 44-46.) Putting aside the Dynegy admissions corroborating the pending increase in volatility, the Company also provided extensive evidence of the market volatility.

Company witness Allen addressed many of the Opposing Intervenors arguments offered on brief in his rebuttal testimony in the first phase of the hearing. The alternative options of laddering and staggering and fixed price CRES contracts discussed by OMAEG (at 45-46), Dynegy (at 29), and RESA (at 26-28), are not adequate to address the issue. (See AEP Ohio's Initial brief (at 96-98) for the discussion on the ability of fixed contracts to address the problem.) Mr. Allen testified that laddering and staggering are designed to smooth out changes in SSO prices during a shorter period, versus the PPA rider mechanism designed to hedge against a much longer period. (AEP Ohio Ex. 51 at 2-3.) In response to OCC's argument that Staff previously had concerns with the rider mechanism and those promoting laddering and staggering (OCC Br. at 157), it bears pointing out that Staff is now a Signatory Party so any citation to the Staff only serves to support that the Staff is now comfortable with facts and agrees that moving forward with the PPA rider is an appropriate path even with the continued use of laddering and staggering.

Mr. Allen also described another potential benefit of the PPA rider approach, which is the potential for a credit. P3/EPSA argued that the rider aspect creates volatility because it is an extra charge/credit on the bill. (P3/EPSA Br. at 24.) Mr. Allen explained that the credit/charge works in concert with the volatile market countering the peaks and valleys, and that there is the potential for a larger credit when the weather is extreme. (Tr. XVII at 4243.) He provided an example in this rebuttal testimony that assumed a date from the first quarter of 2014 and the potential for a $5.14 credit for three months as a result of the market at that time. Specifically, Mr. Allen testified:

> AEP Ohio customers experience an 18% increase in usage over the expected weather normal level of usage resulting in an increase in monthly bills of approximately $15 (Columbus Southern Power Rate Zone) to $22 (Ohio Power Rate Zone). Conservatively assuming that the true-up value for the quarter was a $54M credit, each residential customer using 1,000 kWh per month would see a monthly credit of $5.14 for three months. As a result, residential customers would have seen a credit equal to approximately a quarter to a third of the weather related increase that they experienced.

(AEP Ohio Ex. 51 at 3, *see also id.* Ex. WAA-R2.) This is an important aspect of the rider and a benefit to be able to flow benefits back to customers sooner.

P3/EPSA, Dynegy, and OCC raise concerns with the quarterly billing and the impact it could have on retail customers if they are already facing a volatile market and not knowing if it will be a charge or credit. (P3/EPSA Br. at 23-24; Dynegy Br. at 30, OCC Br. at 156.) AEP Ohio initially proposed an annual true-up and was criticized for the delay in reflecting market conditions. The Stipulation adopts the quarterly true up process. Mr. Cavicchi criticized the annual true-up in his pre-filed direct testimony. When asked his preference between the quarterly and annual he was unwilling to say he would choose quarterly over annual but did represent that because the rider's movement will be countercyclical to market changes, he thought a quarterly adjustment may actually represent that more accurately because there's a much closer linkage. (Tr. XIV at 3525.) Mr. Allen testified that the Company was in agreement with moving to quarterly true-ups in the first phase of the hearing based on feedback from parties (Tr. XVIII at 4519.) The Opposing Intervenors failed to express a preference for one true-up period over another, beyond Mr. Cavicchi's reluctant support for the quarterly period.

Mr. Allen responded directly to P3/EPSAs argument the volatility is more of a daily market issue and not a yearly issue. (P3/EPSA Br. at 133.) Mr. Allen testified on rebuttal that he agreed with Mr. Cavicchi that hourly energy prices are more volatile than longer term prices, but that it was important not to assume that longer term prices will not still be quite volatile. (*Id.* at 7.) Mr. Allen presented data for the period of 1998 through 2014 that showed year-over-year changes in energy prices are very significant. (AEP Ohio Ex. 51 at 7-8.) He presented a chart that showed that the year-over-year change in the PJM real time load weighted LMP can range from 15% to 45%. (*Id.* at 8; *see also id.* Ex. WAA-R.) He testified that only 5 of the 15 years had annual changes of less than 15%. (*Id.*)

The Opposing Intervenors also argue that the Commission cannot approve the rider proposal because AEP Ohio cannot guarantee the exact level of the rider or credit. (RESA Br. at 32-33; OCC Br. at 156.) The legal standard the Commission is applying can be found in the section of this and the prior Company brief dealing with the official standard. However, it is appropriate to address the arguments that there is some fatal flaw because AEP Ohio is unable to identify the exact charge or credit or that AEP Ohio is somehow confused between the four forecasts it presented to the Commission in evidence. (RESA Br. at 32-33.) AEP Ohio offered a number of scenarios applying the Company forecast on Exhibit KDP-2 attached to the testimony of Dr. Pearce and updated for the Stipulation and attached to the Settlement testimony of Company witness Allen as Modified KDP-1. Mr. Allen fully explained the benefits and utilization of the multiple views of the forecast when discussing the Modified KDP-2 at the Settlement hearing.

> There's a confidence level around whether it will occur within that range. It could occur outside that range, but this is a reasonable confidence level and it's actually more data than what we typically present in cases that we thought this was important to show a range of outcomes. Typically, a company would produce just a weather normalized case and what we thought was helpful here is to show a range of outcomes so people could understand that the rider isn't expected to produce a single set of forecasted net revenues over time but that it's going to be a range and that range will vary and it will be counter to the market.

(Tr. XVIII at 4583- 84.)

RESA's assertion on AEP Ohio's inability to provide certainty of the credit or charge (at 33) exposes RESA's fundamental misunderstanding of forecasts. Mr. Allen explained the basis of forecasts and the need to true-up to actuals due to circumstances beyond a company's control. The different scenarios provide the Commission a longer term view of likely impacts. While one year may be an anomaly on the low load side another year could be an anomaly on the high load side. The data provided is the appropriate amount of data to show the workings of the mechanism and assist the Commission in understanding how different load levels impact the long term implementation of the rider, compared to the weather normalized example.

Finally, RESA argues that the initial customer impact of the PPR rider mechanism is detrimental to the entire class. (RESA Br. at 34.) The Stipulation calls for a $4 million annualized credit for the start of the rider to alleviate costs. The Stipulation also includes credits provided by the Company on the back end of the term if certain levels of revenue are not realized by the units. This represents more of the security sought by RESA and other Opposing Intervenors. It is important to point out that the rider does not have to be a credit every quarter to provide a benefit. The point of the rider is to stabilize rates and avoid volatility. The ability to lower rates when the market is extremely high also provides for a charge when prices are low, but it is that hedge or countermeasure that provides security to protect customers from the worst days in the market. OEG witness Baron testified to his experience with hedges in the gas industry and opined that there is value to a hedge even if it ends up as a net cost to customers. (Tr. XI at 2999-3000.) Based on the evidence of record, however, customers are reasonably expected to receive a net financial benefit overall for the period covered by the financial projections.

3. The Stipulation advances the public interest and conveys significant benefits to customers that promote Ohio energy policies.

In his testimony, AEP Ohio Witness Allen makes it clear that the Stipulation (Jt. Ex. 1) was designed to provide adequate, safe, reliable, and predictably priced electric service, and support economic development and job retention in Ohio (AEP Ex. 52 at 13). Further, the Stipulation provides "transformative" additional benefits that go beyond AEP Ohio's initial proposal to support retail rate stability and economic development for Ohio and to benefit customers and the public interest. (*Id.* at 14.) Those benefits are described in great detail within AEP Ohio's Initial Brief (at 99-130). Those commitments made by AEP Ohio within the Stipulation clearly advance the public interest, convey significant benefits to customers and materially advance Ohio's energy policies.

It is important to note that PUCO Staff, whose role is to represent, as it was clearly posited by OCC Witness Dr. Noah Dormady, "all customers, residential, industrial, commercial, as well as the regulated entities themselves such as Ohio Power" (Tr. XXII at 5635), supports AEP Ohio's contention that the Stipulation and its terms are not only in the public interest and provide significant benefits to ratepayers, but also advance Ohio's energy policies. In its initial brief, Staff comments that the benefits of the proposed Stipulation to the public are "large and broad" (Staff Br. at 7), the Stipulation "benefits ratepayers and is in the public's interest" (*id.* at 13) and the Stipulation "promotes a number of state policies expressed in Ohio Revised Code 4928.02" (*id.*). In fact Staff uses words like "abundant benefits" in its initial brief to describe the commitments made in the Stipulation and indicates that those benefits "further the important goals of the General Assembly." (*Id.* at 17.)

Some Opposing Intervenors ineffectively attempt to question whether certain benefits committed to by AEP Ohio and the signatory parties in the Stipulation advance energy policy, advantage customers and are materially relevant. They indicate that portions of the Stipulation which require AEP Ohio to commit to make future filings and assume certain contingencies are not in the public interest (*see, e.g.*, OCC Br. 43; RESA Br. 52) and if included in the Stipulation should all be decided now. But these future filings will necessitate additional Commission review and oversight, thereby guaranteeing that the most current Ohio energy policies will then be applied. Through the Stipulation, AEP Ohio is solidifying a present commitment to make those future filings. It is important to recognize that those anticipated filings will based upon the facts and circumstances attendant when filed, not aged and outdated information, and the Commission will be able to apply the most advanced policies and analysis then available. Technology and innovation are moving at a breakneck pace. Comprehensive energy policy, nationally and in Ohio, is still maturing and in certain cases, as with the Clean Power Plan ("CPP"), the full complement of directives and requirements are not yet finalized.

Some Opposing Intervenors incorrectly assert that the public interest is not benefitted because the Stipulation contains provisions that require certain ratepayers to provide revenues that will be distributed amongst all ratepayers and in other circumstances requires all ratepayers to provide revenues that will be distributed amongst a limited number of ratepayers. For example, OMAEG claims that the Supplier Consolidated Billing Program "commandeers distribution customers into supporting initiatives that will only benefit CRES signatories and customers of those CRES signatories" (OMAEG Br. at 55) and opines that the expansion of the IRP tariff is inappropriate because it only benefits a unique group of IRP customers and is to be funded by other ratepayers. (*Id.* at 58.) Those specific Stipulation benefits, while applying to only a limited portion of ratepayers, exist to support and facilitate the advancement of Ohio energy policy. The Supplier Consolidated Billing Program is intended to squarely address the mandates promulgated by Ohio Revised Code 4928.02(C) and (E) to encourage customer choice, while the IRP tariff is intended to address the aspiration of Ohio Revised Code 4928.02(N) and advance economic development in Ohio. While it should be clear that these benefits are in the public interest and advance energy policy in Ohio, OMAEG is of a different opinion. Although the sincerity of and commitment to that opinion is questionable, as the OMAEG, while expressing its objection to the expansion of the IRP tariff, admits in its brief that "there may be some justification for grandfathering or continuing a similar type of demand response program for economic development purposes." (*Id.*)

ELPC/OEC claims that AEP Ohio has failed to recognize that the Stipulation, through its energy efficiency and demand reduction efforts, creates a "perpetual Catch-22 for the Commission and AEP Ohio Customers." (ELPC/OEC Br. at 45.) ELPC/OEC alleges that energy efficiency and demand response programs will actually "harm" customers by lowering the revenue of the PPA units. (*Id.* at 46.) The fallacious claim is that those programs would work to lower wholesale market prices by reducing peak loads. (*Id.*) AEP Ohio witness Allen provided comment during cross-examination that energy efficiency and peak demand reduction "have the effect of reducing the total peak within the AEP zone which ultimately results in moving down in the production curve in PJM which results in more stable rates for customers." (Tr. XVIII at 4565.) Clearly, that information, as provided Mr. Allen, is illustrative as to why the ELPC/OEC's theory is not well founded. Thus, the problem that ELPC/OEC alleges exists, appears alternatively, to be an assurance of the production of stable rates for customers in both the near term long term. With its hallowed existence in our current cultural lexicon, one should not need to read Joseph Heller's novel to clearly understand that the comparison by ELPC/OEC of the effect of the Stipulation's energy efficiency and demand reduction programs on the revenues of the PPA units, to a "Catch-22" is really not a paradox, but rather a solution.

Several Opposing Intervenors attack the benefits of the conversion of Conesville 5 and 6 to natural gas co-firing, by incorrectly asserting that units originally designed and built to operate on coal are most cost efficient and cost effective while burning coal and that operating such units on natural gas will put them at a competitive disadvantage in the wholesale marketplace. (*See* Dynegy Ex. 2; OMAEG Br. at 55.) AEP Ohio has already addressed this issue and in a manner that should alleviate Dynegy and OMAEG's fears. The Stipulation, by its terms, in Section III D.9.b, commits AEP Ohio and its affiliates to maximizing the usage of natural gas at the units when it is available and economic. (Jt. Ex. 1 at 19-20.) The units will only dispatch into the wholesale marketplace when the unit cost is less than the then-current market price. AEP Ohio has committed to operating Conesville 5 and 6 in a manner that, in contradiction to OMAEG and Dynegy's assertions, will maximize cost efficiencies and obtain cost effectiveness, thereby increasing the hedging benefits of the sale of Conesville 5 and 6 generation into the market and ultimately protecting and preserving the economic upside for the ratepayer. As discussed in AEP Ohio's Initial Brief (at 116), unlike Dynegy, AEP Ohio's willingness to convert to gas co-firing at a number of its traditional coal burning units clearly illustrates how committed AEP Ohio is to embracing and advancing Ohio's energy policies.

For these reasons and numerous others discussed in Part VI.B.3 of the Company's Initial Brief, the Stipulation clearly advances the public interest, conveys significant benefits to customers and materially advances Ohio's energy policies. (AEP Ohio Br. at 119-130.)

D. The positive MRO test findings made in the *ESP III* decision are still applicable and will only enhanced through adoption of the Stipulation.

As AEP Ohio explained in its Initial Brief, if the Commission agrees that the PPA Proposal contained in the Stipulation will provide long term net benefits to customers and approves the PPA Proposal, it will be because the Commission recognizes that the benefits of the proposal will exceed the proposal's expected costs. (AEP Ohio Br. at 131-32.) Thus, the PPA Rider will constitute an additional quantitative and qualitative benefit of the *ESP III* that can be added to the benefits that the Commission has already recognized in the *ESP III* case. (*Id.* at 132.) The Commission should reject Opposing Intervenors' arguments challenging the MRO test findings.

OCC, OMAEG, RESA, and P3/EPSA argue that the Commission must quantify the impact of the Signatory Parties' PPA Rider proposal in this case by conducting another MRO test for AEP Ohio's ESP III. (OCC Br. at 160-162; OMAEG Br. at 61; RESA Br. at 36-38; P3/EPSA Br. at 28-29, 33, 45.) But it is unnecessary to do so if the Commission determines that the PPA Rider is a net benefit to customers, as AEP Ohio has explained, because the net positive impact of the PPA Rider will only make the ESP that much *more* favorable in the aggregate than the expected results of an MRO.[14] It is a simple matter of arithmetic to add the net positive benefits of the PPA Rider proposal to the existing net positive results of the *ESP III* MRO test. Thus, the Commission does not need to conduct an additional MRO test in this case.

OCC, OMAEG, and P3/EPSA also are incorrect in their assertion that the PPA Rider will result in net charges to customers over the remaining portion of the *ESP III* term. (*See* OCC Br. at 67-68, 162-163; OMAEG Br. at 61; P3/EPSA Br. at 34.) These arguments are based on OCC

[14] Were the Commission to decide that the PPA Rider proposal was not a net benefit to customers, it would also be unnecessary to engage in an additional MRO test analysis, because the Commission would not approve the Stipulation if that were the case.

witness Wilson's flawed analysis, which AEP Ohio addressed at length in its Initial Brief (at 82-90). These arguments also inappropriately ignore the PPA Rider's substantial quantitative and qualitative benefits, which the Commission must also consider in addition to its expected costs. Exhibit WAA-2 to AEP Ohio witness Allen's supplemental direct testimony demonstrates that even before the many qualitative benefits of the PPA Rider are considered, the rider will provide a net quantitative benefit to customers of more than $209 million over the remaining ESP III term. (AEP Ohio Br. at 132 (AEP Ohio Ex. 52, Ex. WAA-2).)

Finally, P3/EPSA's argument that the Commission should deny the PPA Proposal beyond the current ESP III term because AEP Ohio has not demonstrated that the proposed Expanded ESP III will be more favorable in the aggregate than an MRO represents a fundamental misunderstanding on P3/EPSA's part about the nature of the Stipulation's PPA Rider proposal. (*See* P3/EPSA Br. at 51-52.) Contrary to P3/EPSA's characterization, the Signatory Parties are not requesting that the Commission approve collection of the PPA Rider in a future ESP term in this proceeding. Rather, as Section III.A.5 of the Stipulation makes clear, the Signatory Parties have agreed that PPA Rider recovery will extend through May 31, 2024 "*presuming an extension of the ESP III term through May 31, 2024.*" (Jt. Ex. 1 at 7 (emphasis added).) As the Stipulation makes clear, AEP Ohio will file an application to extend the ESP III term through that date by separate application by April 30, 2016. (*Id.* at 10.) That application will include "[a]n analysis of the statutory market rate offer comparison test." (*Id.*) Thus, that proceeding, not this one, is the appropriate proceeding in which to evaluate whether AEP Ohio's future, yet-to-be-filed expanded ESP application passes the statutory test.

Because the PPA Rider will confer a net benefit on customers over the term of ESP III, as set forth above and in AEP Ohio's Initial Brief, the Commission should approve the rider and add that net benefit to the already significant benefit of the ESP that the Commission recognized in the *ESP III* case.

V. THE STIPULATION PACKAGE DOES NOT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE OR PRACTICE.

A. The PPA Proposal is not an impermissible "subsidy" but rather is fully consistent with existing wholesale market structures.

As discussed in AEP Ohio's Initial Brief (at 133-44), there is no basis for Opposing Intervenors' claims that the PPA Proposal is an impermissible "subsidy" that is "inconsistent" with the wholesale PJM markets. Indeed, all of the arguments on this topic made by Opposing Intervenors' Initial Briefs were already addressed in AEP Ohio's Initial Brief. (*See id.*) Nonetheless, AEP Ohio will briefly review its responses to Opposing Intervenors' erroneous allegations of harm to PJM's markets.

As an initial matter, however, it is again important to point out that Opposing Intervenors' alleged effects on the PJM markets are outside the scope of this proceeding and the Commission's jurisdiction. (*See* AEP Ohio Initial Brief 134-35.) The Commission's responsibility is to focus on the likely effect of the PPA Proposal on *retail* rates – in particular, the PPA Proposal's likely stabilizing effect on retail rates. Even if there were effects of the PPA Proposal on the wholesale markets, they are not relevant to this proceeding as they are not within the scope of the Commission's regulatory authority.

In any event, even if the Commission were to address Opposing Intervenors' claims regarding alleged effects on the PJM markets, all of Opposing Intervenors' arguments are refuted by a simple, widely acknowledged fact: The element of the PPA Proposal that Opposing Intervenors believe will harm PJM's markets – the Affiliate PPA's cost-based compensation model – is already *commonplace* in PJM. Indeed, many parties' Initial Briefs gave the impression that the only generation resources in PJM are independent power producers whose revenues are fully dependent on market prices. (*See, e.g.*, Dynegy Br. at 7-21; RESA Br. at 19-23; Oregon[15] Br. at 5-8.) Opposing Intervenors may wish it were so, but in reality, nothing could be further from the truth. Although there are many independent power producers in PJM, there are also numerous entities in PJM that receive cost-based compensation for generation in a manner that is indistinguishable from the PPA Proposal here.

As described in AEP Ohio's Initial Brief (at 135-38), there are tens of thousands of megawatts of generation in PJM that fully participate in PJM's energy and capacity markets *and*, separately, also receive cost-based compensation from retail ratepayers – just as would be the case under the PPA Proposal. Accordingly, Opposing Intervenors' claims that the PPA Proposal would be a "subsidy" that is "inconsistent" with the PJM markets (*see, e.g.*, IMM Br. at 7-8; Oregon Br. at 5-6; Dynegy Br. at 13-17) are demonstrably false. Something cannot be "inconsistent" with PJM market structures if it is – and for many years has been – commonplace in PJM.

Likewise, there is no basis for Opposing Intervenors' fears that the PPA Proposal will somehow distort the PJM markets. Several Opposing Intervenors argue that the PPA Proposal will "transfer all costs and operating risks from AEPGR to AEP Ohio's" customers and, as a result, will skew the incentives for bidding the PPA Units' capacity in the PJM capacity markets. (OCC Br. at 109-11; *see also* IMM Br. at 2-3; Oregon Br. at 5-7; Dynegy Br. at 8.) For one thing, this pejorative description of the PPA Proposal is incomplete in several respects. By purchasing the output of the PPA Units at a cost-based rate, and passing on to ratepayers the net credits or charges that result from selling the output on the PJM markets, AEP Ohio is providing ratepayers a cost-based hedge against fluctuating market prices. Thus, although ratepayers will

[15] This Brief will refer to the Oregon Clean Energy Center, LLC as "Oregon."

take on the "costs and operating risks" of the PPA Units in the sense that they will pay a net charge in the event that PJM market prices are low, ratepayers will only pay these net charges in times when other components of their electric rates are low. Critically, moreover, the PPA Proposal will also "transfer" from AEPGR to AEP Ohio's ratepayers all of the monetary *benefits* of selling the PPA Units' output on the PJM markets when market prices are *high*. That is, if market prices rise in the future, ratepayers will receive net credits under the PPA Rider. In this way, the PPA Proposal transfers both the risk *and the reward* of selling the PPA Units' output, and as a result, it provides ratepayers a countercyclical hedge against fluctuating market prices.

As for the alleged effect on the "incentives" to bid the PPA Units' capacity in the PJM capacity markets, long experience with cost-based compensation models in PJM demonstrate that the "distortions" and "price suppression" that Opposing Intervenors fear are highly unlikely to manifest. Opposing Intervenors claim that the PPA Proposal's cost-based compensation model will cause the PPA Units' capacity bids to be lower than without the PPA Proposal – and that this, in turn, will depress capacity prices and discourage the siting of new generation in Ohio and elsewhere in PJM. (*See, e.g.,* OCC Br. at 107; Dynegy Br. at 15-16; Oregon Br. at 5-7; IMM Br. at 2-3.)[16]

But if the PPA Proposal will provide the bidding "incentives" that Opposing Intervenors claim it will, then the same incentives also would be faced by the tens of thousands of megawatts of generation in PJM that already receives cost-based compensation. Yet since the inception of

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[16] In addition to arguing that the PPA Proposal will encourage the PPA Units' capacity to be bid *lower* than it otherwise would, OCC also claims that the PPA Units' capacity could be withheld from the PJM auction in an effort to increase capacity revenues for AEPGR's other units. (*See* OCC Br. 107, 110-111.) But the PPA Units will not be bid in such a manner as to manipulate the capacity market. To ensure that this is the case, there are PJM regulations and FERC rules that prohibit market manipulation. Moreover, the Commission will conduct a rigorous oversight of the PPA Units' capacity market bids, and if the Commission determines that the Units' output was bid by AEP Ohio in a manner that was imprudent, it may adjust the PPA Rider to the benefit of retail customers. *See supra* Section IV.A.5.a.

the PJM capacity markets, capacity resources with cost-based compensation have participated in the PJM capacity auctions without any of the "distortion" or price suppression that Opposing Intervenors fear. Indeed, Dr. Bowring, the PJM Independent Market Monitor ("IMM" or "Market Monitor"), testified that "every auction" that has been conducted in PJM has "produced competitive results, and the behavior of participants was competitive." (Tr. XXI at 5256.) If the existing tens of thousands of megawatts of generation with cost-based compensation could participate for years in the PJM markets without endangering the markets' "competitive results," neither will the PPA Proposal's mere 3,000 megawatts (out of a total of 180,000 megawatts in PJM).

Opposing Intervenors' remaining "subsidy" arguments fare no better. Dynegy and Oregon complain that the PPA Proposal will give AEPGR an advantage over Dynegy, Oregon, and other independent plants. (Dynegy Br. at 18; Oregon Br. at 5-7.) But Dynegy and Oregon already must compete with numerous other generators in PJM that receive cost-based compensation, and when Dynegy and Oregon decided to purchase or build generation in PJM, they knew that cost-based compensation was already commonplace in the market and in no way prohibited by existing PJM rules.

Dynegy also argues that the PPA Proposal is a "subsidy" that will lead to inefficient operations at the PPA Units, and may lead to problems at the jointly owned plants. (Dynegy Br. at 19-21.) But this argument gives no regard for the Commission's ability to review the level of the PPA Rider costs incurred by AEP Ohio in the Commission's annual PPA Rider audits. As described above, *see supra* Section VI.A.5.a, the Commission will conduct annual managerial audits of PPA Unit costs included in the PPA Rider, evaluating whether AEP Ohio has prudently exercised its contractual "buyer's prudence" rights under the Affiliate PPA to review and approve certain costs, such as operations and management budgets and capital expenditures. (*See also* AEP Ohio Br. at 62-68.) Thus, to the extent the manner in which the PPA Units are being operated has increased costs to AEP Ohio's retail customers under the PPA Rider, the Commission will have full visibility into these issues and, through its annual prudence review of AEP Ohio's actions in exercising its contractual "buyer's prudence" rights, the Commission can take steps to address the issues – including disallowing AEP Ohio's cost recovery, if appropriate. As an independent power producer, Dynegy lacks experience with this kind of Commission prudence review of power plant expenditures. But the Commission, Staff, and AEP Ohio know from long experience prior to 1999 that Commission prudence review is an effective method to ensure that retail customers do not bear the burden of increased costs that result from generation facilities that have been inefficiently operated. That includes, in particular, prudence review of the costs incurred in connection with the operation of the very PPA Units at issue here, which for years were included in AEP Ohio's cost-based rates. There are no grounds to believe that the PPA Proposal is an improper "subsidy" that will lead to inefficient operations at the PPA Units.

Finally, RESA confusingly argues that the other examples of cost-based compensation for generation in PJM are "irrelevant" because the Affiliate PPA does not meet the definition of "vertically integrated utility" in Section 5.14(h)(6)(vii) of Attachment DD of PJM's Open Access Transmission Tariff ("OATT"). (RESA Br. at 25.) To the extent it makes any sense at all, this argument is a non-sequitur. Section 5.14(h) of the OATT is the Minimum Offer Price Rule ("MOPR"). The MOPR contains an exemption for certain new plants that meet the definition of "self-supply." *See* OATT Attach. DD § 5.14(h)(6). One of the many ways of qualifying for the self-supply exemption is to qualify as a "vertically integrated utility," which is defined in Section 5.14(h)(6)(vii), which RESA cites.

The relevance of these provisions is difficult to fathom. As AEP Ohio has repeatedly noted, the PPA Units are not – and will never be – subject to the existing MOPR tariff provisions. (Tr. XXI at 5243.) Thus, whether the PPA Units qualify for the MOPR self-supply exemption is irrelevant. Moreover, insofar as RESA is implying that the PJM tariff somehow applies different bidding rules to vertically integrated utilities *outside* the context of the MOPR, RESA is wrong. The rules governing the PJM capacity auctions bids make no distinction between "vertically integrated utilities," other types generation resources that receive cost-based compensation (such as the PPA Units under the PPA Proposal), and generation resources that do not receive cost-based generation at all. To the contrary, all of those types of generation have been subject to the same PJM tariff rules and have participated for years in the PJM energy and capacity markets without causing any harm to those markets. (Tr. XXI at 5256.) Adopting the Stipulation and the PPA Proposal will not harm the PJM markets either.

B. The Commission should reject PJM's attempt to impose an additional bidding requirement on AEP Ohio that does not apply to any other existing generator in PJM.

As discussed above, *see* Part IV.A.5.a., as part of the rigorous oversight that the Commission will conduct over AEP Ohio's incurrence of PPA Rider costs and revenues, the Commission will review the prudence of AEP Ohio's decisions in selling the output of the PPA Units on the PJM markets. In its amicus brief, PJM makes clear that it is "not supporting or opposing" the Stipulation, but it nonetheless makes a suggestion for how the Commission should exercise its review of AEP Ohio's sales of the PPA Units' output. Specifically, PJM argues that the Commission should "make clear that a reasonable offer behavior for AEP Ohio would be to offer the units covered by the PPA into the PJM markets at a level no lower than their 'actual costs' as that term is understood by PJM." (PJM Br. at 4-5.) PJM is concerned that, without this clarification, the PPA Proposal could "incentivize these [PPA Units] to bid below their costs, which, in turn, will have a suppressing effect on prices" in PJM. (*Id.* at 5.) The Commission should reject PJM's proposal.

PJM in no way suggests that its proposed "bidding rule" is a part of – or required by – the PJM tariff. To the contrary, other than the MOPR, which does *not* apply to the PPA Units (Tr. XXI at 5243), the rules governing the PJM capacity auctions do not require any minimum bids from any existing generation resources. Thus, PJM is essentially asking the Commission to impose an additional "PJM tariff requirement" on the PPA Units. That request is plainly improper here because it falls well outside the Commission's jurisdiction. AEP Ohio intends to fully comply with all PJM tariff requirements – and any other applicable rules – in bidding the PPA Units' capacity. The Commission may review the prudence of AEP Ohio's bidding activity *within PJM rules*, but asking the Commission to effectively impose an additional PJM bidding rule on AEP Ohio is improper.

PJM's proposal is also profoundly unfair, since PJM is asking this Commission to impose an additional bidding rule on the PPA Units that PJM has never sought for any other existing generator in PJM that receives cost-based compensation. As discussed above, there are tens of thousands of megawatts of generation in PJM that participate fully in the PJM energy and capacity markets but also receive – and for many years have received – cost-based compensation from retail ratepayers. The State Commissions that regulate those generation resources are empowered to review the prudence of the generators' PJM capacity market bids. But PJM has never filed an amicus brief before any other State Commission seeking to impose its additional "bidding rule" on other generators with cost-based compensation. For instance, PJM has never asked the Virginia State Corporation Commission to "make clear that a reasonable offer behavior for [Dominion] would be to offer [its generation] at a level no lower than [its] 'actual costs' as that term is understood by PJM." (PJM Br. at 4-5.) PJM's proposal, therefore, reflects am unjust double-standard, especially given that Dominion's 18,000 megawatts of generation constitutes six times the capacity of the PPA Proposal.

As for PJM's concerns over a "suppressing effect on prices" (PJM Br. at 5), it is critical for the Commission to clarify, again, that the PPA Proposal is aimed at providing stability to *retail* rates, and the issue in this proceeding is whether to allow the proposed *retail* rate recovery of net credits or charges.[17] The PPA Proposal is in no way designed to affect wholesale rates or wholesale markets. In any event, the response to PJM's concerns about price suppression is the same as the response to Opposing Intervenors' similar concerns: If the existing tens of thousands of megawatts of generation with cost-based compensation in PJM could participate for years in the capacity markets without affecting the markets' "competitive results" (Tr. XXI at 5256), then the alleged bidding "incentives" for the PPA Units' mere 3,000 megawatts will not distort the markets either.

C. The Market Monitor's desire to change the MOPR is no reason to deny the PPA Proposal.

Unlike PJM, which effectively asks the Commission to impose an additional bidding requirement on AEP Ohio that does not apply to any other capacity seller in PJM, the Market Monitor makes clear that he wishes to see the PJM tariff rules changed to require minimum bids for *all* generation with cost-based compensation in PJM. (*See* IMM Br. at 8-9; *see also* AEP Ohio Br. at 141 (describing the numerous entities to which the Market Monitor would like the MOPR to apply).) AEP Ohio's Initial Brief fully responds to the Market Monitor's proposal and

[17] As noted in AEP Ohio's Initial Brief, moreover, the Commission has well-established authority, under the *Pike County* doctrine, to review the prudence of AEP Ohio's actions with respect to wholesale purchases whose net costs are passed on to retail ratepayers. *See* AEP Ohio Br. 58-61 (citing, among others, *Pike Cty. Light & Power Co. v. Penn. Pub. Serv. Comm'n*, 77 Pa. Commw. 268, 237-74 (1983)).

explains why it presents no reason to deny the Stipulation or PPA Proposal. *See* AEP Ohio Br. at 140-44. In short, the Market Monitor's MOPR proposal would affect dozens if not hundreds of stakeholders in PJM and would be exceedingly controversial. In any event, that the Market Monitor believes that the current PJM MOPR rules may need to be changed should not affect the Commission's analysis here. The Commission should evaluate the PPA Proposal based on the PJM rules that *currently* exist, not based on alternative rules that the Market Monitor (or any other party) might wish to see enacted.

D. FERC's affiliate restrictions will not apply to the Affiliate PPA so long as the Commission continues to find that AEP Ohio's customers have adequate retail choice and are protected from affiliate abuse.

ELPC/OEC invoke FERC's affiliate restrictions – in particular, FERC's heightened standard for reviewing affiliate transactions announced in *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991) ("*Edgar*") – as grounds for denying the PPA Proposal and the Stipulation. But the Commission should deny ELPC/OEC's invitation to apply any FERC standards here. Some Opposing Intervenors have already filed a FERC complaint regarding the Affiliate PPA, *see* FERC Docket No. EL-16-33-000, and adjudicating that complaint is the province of FERC, not this Commission.

In any event, insofar as the Commission is concerned about the FERC standards invoked by ELPC/OEC, the Commission should know that ELPC/OEC did not accurately describe those standards. Most importantly, on February 5, 2014, FERC granted AEP Ohio a waiver of FERC's affiliate sales restrictions (which include the requirement to apply the *Edgar* standard) in order "to allow market-based rate sales between Ohio Power and its affiliates." *See* Letter from Steve P. Rodgers, Director, Division of Electric Power Regulation–West, to Steven J. Ross, Attorney for AEP Energy Partners, Inc. and Ohio Power Company, FERC Docket Nos. ER14-593-000 et al. (Feb. 5, 2014). This means that AEP Ohio may enter into the Affiliate PPA with AEPGR without first seeking FERC preapproval of the contract. It also means that FERC has affirmatively found that the affiliate restrictions invoked by ELPC/OEC – including the *Edgar* standard – do not apply to the Affiliate PPA or any other transactions between AEP Ohio and AEPGR.[18]

Moreover, there is every reason to believe that FERC will continue to exempt the Affiliate PPA from its affiliate restrictions – and *not* evaluate it under the *Edgar* standard – in response to the FERC complaint recently brought by some Opposing Intervenors. FERC's waiver of its affiliate restrictions for AEP Ohio was based on FERC's previous waiver of affiliate restrictions for FirstEnergy. *See FirstEnergy Solutions Corp.*, 125 FERC ¶ 61,356 (Dec. 23, 2008); *FirstEnergy Solutions Corp.*, 128 FERC ¶ 61,119 (July 31, 2009). In granting FirstEnergy's waiver, FERC made findings applicable to all Ohio "franchised utilities" (i.e., electric distribution companies such as AEP Ohio and the FirstEnergy utilities), and waived its affiliate restrictions for all transactions between Ohio franchised utilities and their affiliates.

First, FERC found that the affiliate restrictions should not apply in Ohio because Ohio retail ratepayers have the ability to shop for generation supply and, as a result, are not "captive customers." *See* 125 FERC ¶ 61,356, ¶ 27. In making that finding, FERC expressly rejected intervenors' arguments that retail ratepayers in Ohio are "captive" because they must pay some non-bypassable charges. *See id.* ¶¶ 13, 28. FERC made clear that "[i]t is not the role of [FERC] to evaluate the success or failure of a state's retail choice program." *Id.* ¶ 28. Instead, FERC

[18] Citing *AEP Generation Resources, Inc.*, 145 FERC ¶ 61,275 (2013), ELPC/OEC claim that FERC reviewed the 2014-15 "transition" power supply agreement ("PSA") between AEP Ohio and AEPGR under the *Edgar* standard. (*See* ELPC/OEC Br. 32.) But ELPC/OEC have misread the case they rely on. In *AEP Generation Resources*, FERC *declined* to apply the *Edgar* standard on the ground that "the PSA [was] a short-term agreement for a transition period that supports the Ohio Commission's restructuring efforts." 145 FERC ¶ 61,275, ¶ 23. In any event, *AEP Generation Resources* was decided in 2013, *before* the February 2014 FERC order granting AEP Ohio a waiver of the affiliate restriction rules. Thus, even if FERC applied *Edgar* in *AEP Generation Resources* (it did not), it has since held that *Edgar* does not apply to transactions between AEP Ohio and AEPGR.

deferred to *this Commission's* finding that there was adequate retail choice in Ohio notwithstanding the existence of some non-bypassable charges. *Id.* ¶¶ 28, 30-31; *see also* 128 FERC ¶ 61,119, ¶¶ 16-17.

Second, FERC waived the affiliate restrictions for Ohio utilities for an alternative, independent reason: FERC found that, "even if the Ohio Regulated Utilities' retail customers met the definition of captive customers under [FERC]'s regulations," it would still be appropriate to waive FERC's affiliate restrictions because *this Commission* has the ability to protect ratepayers from any affiliate abuse. *See* 128 FERC ¶ 61,119, ¶¶ 18-20 ("[T]he Ohio Commission now has, and will continue to have, the ability to ensure a properly developed procurement plan and to oversee a fair administration of such a plan in order to protect retail customers."). That is, FERC found that, because *this Commission* can review the prudence of AEP Ohio's affiliate transactions, this Commission can protect ratepayers from affiliate abuse, and there is no reason for FERC to apply its own affiliate restrictions to protect those same ratepayers. *Id.* ¶ 20.

Accordingly, although it is not for this Commission to apply FERC's rules or to adjudicate Opposing Intervenors' FERC complaint, FERC has recognized that this Commission does have an important role to play in ensuring that AEP Ohio's affiliate restriction waiver continues to apply. Specifically, if the Commission approves the Stipulation and the PPA Proposal, it should make two findings:

First, the Commission should reiterate its long-held opinion that there is retail competition in Ohio, and that AEP Ohio's customers are not "captive," notwithstanding the existence of some non-bypassable charges (including the PPA Rider). Because FERC has recognized that it is "not the role of [FERC] to evaluate the success or failure of a state's retail choice program," 125 FERC ¶ 61,356, ¶ 28, FERC will defer to the Commission's finding that AEP Ohio's customers are not captive.

Second, the Commission should make clear that, in approving the Stipulation, the Commission is affirmatively finding that the PPA Proposal accords with all Ohio corporate separation laws and regulations and that the evidence in the record of this proceeding contradicts the affiliate abuse concerns raised by various Opposing Intervenors. The Commission should expressly recognize that the PPA Proposal gives the Commission numerous, detailed opportunities to protect ratepayers from any alleged "affiliate abuse." All aspects of the PPA Proposal and its impacts on retail customers have been presented to the Commission for its careful review in this proceeding. And as discussed throughout AEP Ohio's Initial Brief and this Reply Brief, the Commission should find that the Affiliate PPA is a prudent wholesale purchase with many benefits for retail customers. That finding necessarily entails that the PPA Proposal does not reflect any alleged "affiliate abuse." And FERC will defer to that Commission finding when it determines whether its prior order granting the affiliate restriction waiver should remain in place notwithstanding the existence of the Affiliate PPA. *See* 128 FERC ¶ 61,119, ¶¶ 18-20.

E. The Stipulation and PPA Proposal are not preempted by federal law.

OMAEG and OCC again argue that the PPA Proposal and PPA Rider are preempted by the Federal Power Act. (OMAEG 16-20; OCC Br. at 20-27.) Numerous Opposing Intervenors (including OMAEG and OCC) raised the very same arguments in AEP Ohio's *ESP III* case, and the Commission dismissed those arguments, finding that the PPA Rider was lawful and that any questions of preemption "are best reserved for judicial interpretation." *ESP III*, Opinion and Order at 26. There is no reason for the Commission to revisit that determination. The preemption arguments raised by OCC and OMAEG here are identical to the preemption arguments that they and other parties made in the *ESP III* proceeding, and nothing has changed that would warrant a different approach at this late stage.

In any event, Opposing Intervenors' preemption arguments remain as baseless and misguided as they were before. Under the Federal Power Act, States retain near plenary authority to determine the *retail* rates paid by end-use customers. *See* 16 U.S.C. § 824(b); *see also, e.g.*, *FERC v. Elec. Power Supply Ass'n*, Nos. 14-840, 14-841, 2016 WL 280888, at *14 (U.S. Jan. 25, 2016) (explaining that § 824(b) "reserv[es] regulatory authority over retail sales . . . to the States"); *Fed. Power Comm'n v. S. Cal. Edison Co*., 376 U.S. 205, 214 (1964) (in the Federal Power Act, Congress preserved "state regulation of a sale at local retail rates to ultimate consumers"). And *retail* rates are the only issue in this proceeding. As discussed in AEP Ohio's Initial Brief (at 59-61), the Commission is not being asked to approve the Affiliate PPA *itself* or to hold that any of the rates or terms of the Affiliate PPA are just and reasonable. Rather, this proceeding is limited to the *retail rate treatment* of the costs or credits that AEP Ohio would seek to pass through to retail customers as a result of the Affiliate PPA and OVEC entitlement. Specifically, the Stipulation proposes that the "net credits or costs of [the Affiliate PPA] be reflected in AEP Ohio's *retail rates* by including the [Affiliate PPA] in the PPA Rider." (Jt. Ex. 1 at 4 (Stipulation § III.A.1) (emphasis added); *see also id. at* 5 (Stipulation § III.A.2) (same for OVEC entitlement).)

Moreover, as discussed in AEP Ohio's Initial Brief (at 59-61), the Commission's authority under the Federal Power Act to determine the retail rate treatment of the Affiliate PPA also includes authority to review the prudence of AEP Ohio's decision to enter into the Affiliate PPA. *See Pike Cty. Light & Power Co. v. Penn. Pub. Serv. Comm'n*, 77 Pa. Commw. 268, 237-74 (1983) (distinguishing FERC's jurisdiction "to determine whether it is just and reasonable for *[a power supplier] to charge* a particular rate" from a state commission's jurisdiction to determine "whether it is just and reasonable for *[a utility] to incur* such a rate as an expense" (emphasis added)). Under the *Pike County* doctrine, state utility commissions have a long history of reviewing the prudence of a utility's wholesale purchases for the limited purpose of deciding whether to permit retail rate recovery. And numerous state and federal courts, as well as FERC itself, have confirmed that *Pike County* prudence review is grounded on a State's retail ratemaking authority under the Federal Power Act. *See, e.g.*, *Cent. Vt. Pub. Serv. Corp.*, 84 FERC ¶ 61,194, ¶ 61,975 (1998) (endorsing the *Pike County* doctrine); *Pub. Serv. Co. of N.H. v. Patch*, 167 F.3d 29, 35 (1st Cir. 1998); *Ky.-W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 837 F.2d 600, 609 (3d Cir. 1988); *cf. Nantahala Power*, 476 U.S. at 972 (assuming that States may consider whether a wholesale purchase is prudent for purposes of retail ratemaking).

In light of this long and well-established precedent recognizing that States may determine the retail rate treatment of retail utilities' wholesale purchases, Opposing Intervenors' preemption arguments fail. OMAEG and OCC argue that the PPA Proposal is preempted under the reasoning of the recent decisions in New Jersey and Maryland. *See PPL Energyplus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014), *pet'n for cert. pending* (Sup. Ct. Nos. 14-634, 14-694); *PPL Energyplus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), *cert. granted sub nom. Hughes v. Talen Energy Marketing, LLC* (Sup. Ct. No. 14-614). (*See* OMAEG Br. at 17-19; OCC Br. at 20-22.) 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 exclusive jurisdiction to establish wholesale prices and terms. *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 Proposal 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 proposes to *voluntarily* enter into the Affiliate PPA (and has already voluntarily entered the OVEC contract). Moreover, unlike the programs in *Solomon* and *Nazarian*, the PPA Proposal does not involve the Commission dictating the prices or terms of the wholesale contract, nor does the PPA Proposal 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 Affiliate PPA with that counterparty through a voluntary contractual arrangement. In approving the Stipulation and PPA Proposal, the Commission is not tasked with approving the prices or terms of the Affiliate PPA; its task is limited to determining the *retail rate treatment* of the costs that AEP Ohio would seek to pass through to retail customers under the Affiliate PPA and OVEC entitlement. The prices, terms, conditions, and counterparties of those wholesale transactions have been voluntarily determined by the two counterparties (AEP Ohio and AEPGR) in accordance with FERC regulations and without any interference from the Commission.

In addition, as it did in its briefing in the *ESP III* proceeding, OCC focuses on the fact that, as proposed, AEP Ohio will sell the power purchased through the Affiliate PPA into the

PJM market. (OCC Br. at 20-22.) That is, OCC does not argue that the PPA Proposal is preempted because it will set the price that the PPA *generator* will receive (as in *Solomon* and *Nazarian*). Instead, it argues that the PPA Proposal is preempted because it purportedly establishes the price that *AEP Ohio* will receive for *its* sales of PPA power at PJM. (*See id.*) 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 Affiliate PPA. Under that arrangement, AEP Ohio will purchase the output of the PPA Units from AEPGR and then sell that output at PJM, passing on any balance or deficit to retail ratepayers through the PPA Rider. AEP Ohio's earnings will not rise and fall with the PJM market price, but that is only because of the *retail* credit or charge that *retail* ratepayers will earn or pay under 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 *a retail utility* (AEP Ohio). As discussed above, States have near plenary authority to determine the amount of money that retail ratepayers must pay utilities for retail service, and that is all that is at issue in this proceeding.

Indeed, as discussed above, States throughout PJM's footprint have established retail rate regimes under which utilities receive retail charges (or pay retail credits) that supplement the price received for the utilities' wholesale sales. This is true for Dominion's 18,000 megawatts of generation; the generation of municipal and cooperative utilities in all thirteen PJM states; and the power purchased by numerous utilities in PJM through wholesale transactions. *See supra* Section V.A; AEP Ohio Br. at 135-38. Thus, if OCC's reasoning were correct, it would lead to the absurd conclusion that the retail rate regimes for utilities throughout PJM (and in Ohio before corporate separation) are preempted because the utilities' earnings do not reflect 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 costs incurred under utilities' wholesale purchases, irrespective of the price in the wholesale market. That accords with the division of authority in the FPA, and no case – least of all *Solomon* and *Nazarian* – has held differently. The PPA Proposal and Stipulation fall squarely within that State retail ratemaking authority.

F. The PPA Proposal is permitted under Ohio law and the cost-based compensation model represents sound State regulatory policy.

1. General challenges by Opposing Intervenors under R.C. Chapter 4928 lack merit.

Various parties continue to portray the PPA Proposal as being contrary to Ohio law and policy, in direct conflict with the *ESP III* decision's determination that the PPA Rider is authorized under the ESP statute and consistent with Ohio energy policy under R.C. 4928.02. For example, RESA argues that approving the PPA Proposal would "effectively re-design the regulatory framework by taking Ohio backwards." (RESA Br. at 20.) Similarly, OCC argues that the PPA Rider and its underlying cost-based compensation run counter to the competitive environment of SB 3 and SB 221. (OCC Br. at 28-29, 96, 98-100.) In a similar vein, Wal-Mart complains that a cost-based PPA modified by the Stipulation still reflects "fundamental unfairness" for customers. (Wal-Mart Br. at 3-4.) Also lining up in that same queue was the Market Monitor, whose preference favors a pure market approach to what he calls a quasi-market approach (the latter of which includes cost of service retail regulation) – based on his personal views about the long-term dilutive effect on competition; Dr. Bowring also posits that the cost-based regulatory approach puts too much risk on customers. (IMM Br. at 7-8, 3-4.) Finally in this regard, Kroger offers its own subjective assessment that cost-based regulation is too risky for customers these days. (Kroger Br. at 2-4.) The Opposing Intervenors' advocacy for a pure market approach (based on the current low market prices) conflicts with both the General Assembly and the Commission; more specifically, intervenor arguments ignore the structure and flexibility reflected in the current SB 221 regulatory framework and the direct findings in the *ESP III* decision. As such, the Commission should reject the chorus of invitations to reverse course and stay on the path of rate stability and flexible regulatory solutions.

Opposing Intervenors conveniently ignore the fact that in 2008 when SB 221 was being considered for enactment, competitive markets had still not developed as contemplated in SB 3.[19] The General Assembly passed SB 221 to change Ohio's regulatory framework once again. And the General Assembly turned a sharp corner when it passed SB 221; most notably, the singular provision in RC 4928.14 requiring market-based SSO rates was repealed and was replaced with the choice for a utility to pursue an MRO or an ESP. Under the MRO option, there was a new and extended period of transition created to reach fully market-based rates. R.C. 4928.142. Unlike the prevailing assumption during passage of SB 3 that market rates would be lower than regulated rates, the passage of SB 221 was premised upon market rates being higher

[19] *Consumers' Counsel v. Pub. Util. Comm.*, 128 Ohio St. 3d 512, 513 (2011).

than existing rates; thus, it established a new and extended transition period to very gradually subject customers to market rates over a period of 6-10 years but this new MRO option could only be pursued if the utility proposed it. *Id.* Further, the General Assembly could not have envisioned the lower prices driven by shale gas or the major economic recession, both of which are significant events that developed after passage of SB 221. More to the point, SB 221 does not require unconstrained market rates without regard to customer rate impacts. On the contrary, SB 221 supports continued emphasis on rate stability. And the Commission – unlike the Opposing Intervenors – has appropriately kept rate stability high among its priorities.

The Opposing Intervenors' complaint that it has taken over a decade to get to fully competitive SSO ignores the factual history of the 15 years since passage of SB 3 in Ohio. The original market development period was five years, starting in 2001 and lasting through 2005. The Rate Stabilization Plans lasted three years, from 2006 through 2008, avoiding substantial rate increases. SB 221 was enacted to pull back from the market-based rates cliff. AEP Ohio's first ESP under SB 221 was from 2009-2011 and saved customers $1.5 billion. *ESP I*, Opinion and Order at 72. The Commission also found that AEP Ohio's *ESP II* was more favorable than the market rate option while accelerating the path toward a fully-competitive SSO procurement process and providing for a retail stabilization rider as a primary feature of that rate plan. *ESP II*, Opinion and Order at 77. And in the *ESP III* decision, the Commission again found that "rate stability is an essential component of the ESP." (*See* AEP Ohio Br. at 10-13, citing *ESP I*, *ESP II* and *ESP III* decisions as consistently explicitly and prominently emphasizing rate stability.)

AEP Ohio will not repeat the arguments made in Part II.B of its Initial Brief (AEP Ohio Br. at 13-15), where it already demonstrated in detail how the Opposing Intervenors openly disagree with the key findings made by the Commission in the *ESP III* decision. But the

Commission has already explicitly found that the PPA Rider is authorized under the ESP statute and supported by Ohio energy policy and it should not revisit or modify those findings in this case. Rather, the Commission should continue forward and implement those findings to advance the PPA Rider.

Implementing the PPA Rider is not a "step backward" regarding competitive issues but merely builds on the same tradition and regulatory history of protecting rate stability while advancing competition – it is actually Opposing Intervenors' position that would be a "step backward" from that well-established regulatory context and long history of rate impact sensitivity and real-world pragmatism by the Commission. In that same tradition, the PPA Proposal is a creative and practical solution to real-world rate volatility problem facing customers. It is a valid and helpful solution within the current statutory paradigm to mitigate over-reliance on short-term market prices. In considering adoption of the Stipulation, the Commission should continue its trajectory of moving toward competition while being mindful of – and addressing – customer rate impacts and market price volatility through population of the PPA Rider with the Affiliated PPA and OVEC contractual entitlement.

2. Specific challenges by Opposing Intervenors under R.C. 4928 are also without merit.

a. There is no anticompetitive cross-subsidy.

OCC argues that the PPA Rider would violate R.C. 4928.02(H)'s prohibition against anticompetitive subsidies flowing from a distribution service to a generation service. (OCC Br. at 100-101.) OCC's claim under R.C. 4928.02(H) is built on the flawed premise that characterizes the PPA Rider as a distribution charge. Collecting generation costs through a distribution charge would be problematic. As the Supreme Court has ruled under SB 3, R.C. 4928.02(H) "prohibits public utilities from using revenues from competitive generation service components to subsidize the cost of providing noncompetitive distribution service, or vice versa."[20] But the PPA Rider is not a distribution charge and does not involve a distribution service; it is a generation-related rider that would recover generation-related costs. As the Commission has already found:

> In response to the arguments raised by various intervenors that the PPA rider would violate R.C. 4928.02(H), which requires the Commission to ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies, we find that, contrary to intervenors' claims, the rider would not permit the recovery of generation-related costs through distribution or transmission rates. As discussed above, the PPA rider, whether charge or credit, would be considered a generation rate.

ESP III, Opinion and Order at 26; *see also id*. at 21 (PPA Rider provides a generation-related service to all customers). The Commission has already squarely rejected OCC's argument in the *ESP III* decision and should reinforce its findings again in this case.

b. The PPA Rider does not amount to untimely stranded costs.

OCC also raises worn and repeatedly-rejected argument claiming that the PPA Rider amounts to untimely stranded cost under R.C. 4928.38 and wrongly characterizes the PPA Proposal as a customer-funded bailout. (OCC Br. at 96-98.) In the *ESP III* decision, the Commission directly rejected the characterization by OCC and others of the PPA Rider as permitting unlawful transition revenues in violation of R.C. 4928.38 and SB 3 – because, among other reasons, the PPA Rider is authorized by the ESP statute enacted as part of SB 221. *ESP III*, Opinion and Order at 26. Moreover, the evidence of record in this case supports a finding

[20] *Elyria Foundry Co. v. Pub. Util. Comm*., 114 Ohio St. 3d 305, 2007-Ohio-4164, ¶ 50. Of course, the *Elyria* decision was issued under SB 3 and prior to the enactment of SB 221. This is significant because the General Assembly authorized the Commission to establish nonbypassable charges – to be paid by all customers – in conjunction with approving ESPs that can include both generation and distribution rate adjustments. *See* R.C. 4928.143 (ESP statute); 4928.144 (phase-in statute). Thus, the types of charges that could or could not be collected on a nonbypassable basis under SB 3 has changed under SB 221. In any case, for purposes of R.C. 4928.02(H), the Court interpreted the provision to prohibit recovery of competitive generation service revenues through a distribution charge – circumstances that do not apply to the PPA Rider.

customers are expected to receive a net quantitative benefit over the term of the PPA Rider. In short, there is no legal or factual basis to support the notion that the PPA Units are stranded investments.

c. The Stipulation does not seek to amend the ESP in this proceeding and, instead, properly divides the requested relief between this case and the upcoming ESP extension filing.

P3/EPSA argues that the PPA Proposal in the Stipulation is a "brand new proposal" that goes beyond the scope of this rider case and that the Commission does not have the authority to approve the PPA Rider beyond the term of the current ESP. (P3/EPSA Br. at 57-60.) In support of this argument, P3/EPSA claims that "the Stipulating Parties have agreed (provision III.A.5) that the PPA rider recovery will extend through May 2024." (*Id*. at 57; see also RESA Br. at 30-31.) P3/EPSA also claims "there is no approved PPA rider" and that the Commission rejected the proposal in the *ESP III* case. (*Id*.) This flawed argument is premised on a mischaracterization of both the *ESP III* decision and the Stipulation; the Stipulation was intentionally designed to avoid this problem.

In referencing Section III.A.5 of the Stipulation that proposes that the rider extend through May 2024, P3/EPSA conveniently left out the conditional phrase "and presuming an extension of the ESP III term through May 31, 2024" which makes clear that the extension of the rider is dependent upon the ESP extension being granted. (Jt. Ex. 1 at 7.) Moreover, Section IV.F of the Stipulation makes the entire Stipulation dependent upon: (i) continued existence of the PPA Rider through rehearing and appeal, and (ii) an outcome of the application to extend the ESP III term consistent with the terms of the Stipulation. (*Id*. at 36.) Of course, Section III.C of the Stipulation makes clear that the issues listed therein (most notably, the extension of the ESP III term to coincide with the extended PPA term) will be taken up through a separate application – with the Commission deciding all of those issues separately in that proceeding. (*Id*. at 10-13.)

Thus, P3/EPSA is simply wrong in claiming that the Stipulation asks for relief that can only be granted in an ESP proceeding; those matters that should be decided in an ESP proceeding are deferred for precisely that purpose in the ESP case.

Further, contrary to P3/EPSA's assertion that "there is no approved PPA rider" and that the Commission rejected the proposal in the *ESP III* case, the Commission did approve the PPA Rider as a zero placeholder rider in the *ESP III* decision. As the Commission found:

> Accordingly, the Commission authorizes AEP Ohio to establish a placeholder PPA rider, at an initial rate of zero, for the term of the ESP. We note that the Commission has, on prior occasions, approved a zero placeholder rider within an ESP. *ESP 2 Case*, Opinion and Order (Aug. 8, 2012) at 24-25; *In re Duke Energy Ohio, Inc.*, Case No. 08-920-EL-SSO, et al., Opinion and Order (Dec. 17, 2008) at 17; *In re Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co.*, Case No. 08-935-EL-SSO, et al., Second Opinion and Order (Mar. 25, 2009) at 15. The Commission emphasizes that we are not authorizing, at this time, AEP Ohio's recovery of any costs through the placeholder PPA rider. Rather, AEP Ohio will be required, in a future filing, to justify any requested cost recovery. All of the implementation details with respect to the placeholder PPA rider will be determined by the Commission in that future proceeding.

ESP III, Opinion and Order at 25. This passage makes it abundantly clear that the Commission authorized the PPA Rider and deferred implementation details to the case at bar – P3/EPSA is simply wrong in its understanding of the *ESP III* decision.

Indeed, the PPA Rider was contained in the compliance tariff filed and approved in the *ESP III* proceeding and remains in AEP Ohio's tariffs. As with most tariffs and riders, the PPA Rider has no expiration date and remains in place indefinitely until the Commission terminates it or otherwise replaces the tariff. Of course, the PPA Rider presently remains a zero rate until such time that the Commission populates the rider with one or more PPAs. This is the same procedure the Commission has used before – not only in the cases referenced in the above quotation but also for AEP Ohio's prior ESP. In the *ESP II* decision, the Commission approved the Generation Resource Rider (GRR) and conducted a subsequent rider proceeding to determine whether the Turning Point solar project PPA should populate the GRR. Contrary to P3/EPSA's argument, that approach is permissible and appropriate under the statute. On a practical level, P3/EPSA's argument would prevent significant efficiency and it simply makes no sense to suggest that riders can only be administered in an ESP case. One can quickly appreciate this point by searching the Commission's website for "EL-RDR" cases – in doing so, it is manifestly evident that a plethora of cases exist to administer riders separate and apart from ESP proceedings (though many of the riders were originally created as part of an ESP order as with the PPA Rider) and that is a practical necessity that is clearly permissible.

In similar fashion, RESA's claim is incorrect that Section III.I of the Stipulation improperly asks the Commission to approve provisions of a future ESP in this proceeding. (RESA Br. at 30-31.) Section III.I of the Stipulation is conditioned on the ESP extension being granted in the separate proceeding, but is not seeking for such a ruling in this case. (*See* Jt. Ex. 1 at 36 (Section IV.F.).) Thus, the Stipulation correctly divides the requested relief between this proceeding and the Extended ESP request that is yet to be filed.

d. The renewable development commitment does not violate R.C. 4928.143(B)(2)(c).

P3/EPSA argues that solar development commitment in Section III.I of the Stipulation violates Division (B)(2)(c) of the ESP statute as a request for new generation, which also necessitates a prerequisite finding of need. (P3/EPSA Br. at 62-64.) Contrary to P3/EPSA's unfounded assumption, Division (B)(2)(c) of the ESP statute does not apply to the PPA Rider. It does not involve serving load like the facilities covered by Division (B)(2)(b) and (c). Unlike the new generation projects envisioned in Division (B)(2)(b) and (c) of the ESP statute, the PPA Rider is a financial hedging mechanism and does not result in AEP Ohio serving load of either shopping or non-shopping customers. The Commission found that Division (B)(2)(d) provides authority for the PPA Rider (*ESP III*, Opinion and Order at 26), so the requirements associated with other portions of the ESP statute are neither relevant nor controlling.

As to arguments like a prerequisite finding of need for the generation, the Stipulation language is rather broad in proposing that the Commission "consider among other relevant matters the economics and proposed PPA Price associated with each project." (Jt. Ex. 1 at 31.) In any case, these issues do not need to be resolved in this case and can be sorted out in the subsequent proceedings after AEP Ohio files an actual renewable project based on known facts and circumstances. What the Commission is doing with respect to Section III.I in adopting the Stipulation is simply accepting AEP Ohio's commitment to develop and file for approval of the projects, which commitment is subject to the terms and conditions spelled out in the language of Section III.I. The Commission is not bound to approve any or all of the projects and has broad latitude under the Stipulation language and the applicable statutes to consider all relevant matters and make all appropriate findings.

Finally in this regard, P3/EPSA also claims that the rate design provision in Section III.I.3 unreasonably binds the Commission. (P3/EPSA Br. at 64.) While this provision specifies how any approved charge would be collected, that was necessary to get consensus around this hallmark development commitment. It is a reasonable rate design and is certainly within the Commission's discretion to accept as part of adopting the Stipulation. It does not prejudice the Commission in considering whether to approve or deny a given project.

e. PPA Rider does not violate R.C. 4928.17 or AEP Ohio's approved corporate separation plan.

RESA claims that the PPA Rider violates the corporate separation statute, R.C. 4928.17 because it will involve provision of a "competitive" generation service by AEP Ohio, it will perpetuate functional separation for OVEC and result in the entanglement of AEP Ohio and

AEPGR employees. (RESA Br. at 45-49.) Not surprisingly, P3/EPSA and Dynegy – both represented by the same legal counsel as RESA – echo nearly identical arguments. (P3/EPSA Br. at 60-62; Br. at 45-49; Dynegy Br. at 33-36.) In any case, these overlapping arguments all suffer from the same fundamental defects. As a threshold matter, these corporate separation statutory arguments overlook several obvious flaws.

First, the prefatory language in R.C. 4928.17 makes it clear that the corporate separation mandates do not apply if something is authorized in the ESP statute, R.C. 4928.143. *See* R.C. 4928.17(A) ("Except as otherwise provided in sections 4928.142 or 4928.143 or 4928.31 to 4928.40 of the Revised Code and beginning on the starting date of competitive retail electric service, no electric utility shall . . . .") The provision at issue here, 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. Thus, it would conflict with this explicit exception to argue that a charge permitted under the ESP statute would simultaneously be prohibited under the corporate separation statute. It makes sense that the corporate separation statute would defer to the ESP statute because the former is aimed at ensuring that competitive generation services remain competitive – it is not aimed at SSO service or anything else being provided by an EDU under the ESP statute. Consequently, the argument that the PPA Rider violates the corporate separation statute is fundamentally flawed at the outset.

Moreover, nothing in the ESP statute refers to competitive generation service and none of the services provided by an EDU under the ESP are competitive services – notwithstanding that they include generation. EDUs are not CRES providers that are certified under R.C. 4928.08. Further, an EDU cannot separate from itself and provide SSO service at the same time. Moreover, regardless of whether an EDU procures its SSO supply from an auction, the provision of SSO service is not a competitive retail electric service. If that were so, R.C. 4928.146 would not be necessary (that statute permits an EDU to provide competitive generation service in the service territory of another EDU). Further, it is also obvious that a *nonbypassable* stability charge under the ESP statute (like the PPA Rider) cannot be considered a charge for competitive service.

Another major flaw in RESA's corporate separation 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. 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."

In any case, the PPA structure necessarily means that AEP Ohio does not own the generation assets and is buying the power from another separate corporate entity. And nothing in the Revised Code or the Commission's Code of Conduct prohibits affiliate transactions; indeed, Division (B)(2)(a) explicitly permits affiliate PPAs in providing SSO service. Rather, the only requirements are that AEP follow its corporate separation plan and applicable laws and regulations (like OAC 4901:1-37-04) when conducting such transactions. AEP is committed to following the code of conduct and all applicable state and federal laws.

In particular, all of the terms of the PPA have been disclosed and there have been detailed discussions in the record about how the contract will be implemented and how this approach complies with the corporate separation plan and code of conduct. For example, AEP Ohio witness Allen confirmed that There will be separation of that information so that AEPGR does not have access to that competitive information related to the PPA units when it's making its bidding decisions for its remaining unregulated assets. (Tr. XVIII at 4486.) Mr. Allen elaborated on AEP's compliance efforts:

> That's why we have a code of conduct to ensure that the type of information that's inappropriate to share with individuals making decision for our competitive fleet, they don't have information from our regulated assets and we wholeheartedly apply – or wholeheartedly follow those code of conduct rules.

(Tr. XVIII at 4487.) The Opposing Intervenors have not established any actual problem or violation with the approved corporate separation plan or the affiliate code of conduct. If such problems arise in the future, the Commission (and its Staff) is fully capable of enforcing AEP Ohio's corporate separation plan and the code of conduct rules.

Finally, regarding the argument by RESA, P3/EPSA and Dynegy that functional separation would perpetuated for OVEC, that is discretionary to the Commission and there is no time limit in the statute for a transition to full corporate separation. Obviously, the facts have not changed since the time of the corporate separation ruling that permits AEP Ohio to retain the contractual entitlement and there is no reason to expect the outcome should change. And the more limited 8-year term of the PPA Rider should also alleviate any concerns in that regard. If the Commission accepts the PPA Proposal, it would be superfluous for AEP Ohio to continue trying to divest OVEC during the PPA Rider term.

In sum, there are no corporate separation problems with the PPA Proposal.

G. Opposing Intervenors' remaining substantive arguments against the Stipulation are meritless.

1. The Commission has an adequate evidentiary basis upon which to evaluate the prudence of the Affiliate PPA.

RESA also contends that AEP Ohio did not offer its Affiliate PPA as part of its "case in chief" and, consequently, AEP Ohio did not present the Commission with the "best evidence" needed to support the Amended Application. Accordingly, RESA argues that AEP Ohio failed to carry its burden of proof. (RESA Br. at 31-32.) The Commission has before it the Revised Affiliate PPA, which uses Sierra Club Exhibit 2 as the starting point, and which will include the changes listed on Attachment A to the Stipulation. Thus, there is no evidentiary deficiency that would prevent the Commission from performing its prudence review and confirming that it is prudent for AEP Ohio to enter into the Revised Affiliate PPA. RESA's burden of proof argument should be rejected.

2. Section III.C.11 of the Stipulation does not contravene R.C. 4928.6613.

Section III.C.11 of the Stipulation confirms that nothing in the Stipulation affects a customer's opt-out right under R.C. 4928.6612, as that provision was enacted in 2014 by S.B. 310. Specifically, Section III.C.11 provides that IRP tariff customers may opt out of the opportunity to obtain direct benefits from AEP Ohio's EE/PDR plan as provided in S.B. 310. ELPC contends that this provision conflicts with R.C. 4928.6613, which provides that no account properly identified in the customer's verified opt-out notice under R.C. 4928.6612 shall be subject to any cost recovery mechanism under R.C. 4928.66 or eligible to participate in, or directly benefit from, programs arising from electric distribution utility portfolio plans approved by the Commission. (ELPC/OEC Br. at 57-58.)

There is no conflict between a customer's participation in the IRP tariff and exercise of its opt-out rights under R.C. 4928.6612. The IRP tariff and the credit that it provides to IRP customers has been available to eligible customers since before S.B. 310 was enacted and has remained available to them while S.B. 310 has been in effect. There is no conflict between the rights of eligible customers to opt out of the opportunity to participate in AEP Ohio's portfolio plan programs while still taking interruptible service under, and obtaining the credits provided by, the IRP tariff. Notably, by transitioning 50% of the costs of the IRP tariff credits to the EDR, the portion of the cost of those credits being recovered through the EE/PDR has been reduced by that same amount and the mechanism for recovery of those costs, accordingly, has been aligned to that extent with the economic development purpose of the tariff and its credits. Also worth noting is the fact that the IRP tariff credits are not addressed by or funded through the current EE/PDR Portfolio Plan.

3. The Stipulation's contingency transition plan under R.C. 4928.143(E) is appropriate and lawful.

In Section III.J of the Stipulation, the Signatory Parties agree how, in several specific requests, transition out of an ESP with a term greater than four years would be accomplished, under the fourth-year test required by R.C. 4928.143(E). Dynegy contends that establishing guidelines now, in a prior proceeding to any such transition, that provide guidance regarding how certain important issues regarding how such a transition would be accomplished, is not possible. Rather, Dynegy contends that establishing such guidelines for such a transition outside of and in advance of a related ESP proceeding is not permissible. (Dynegy Br. at 32-33.) Dynegy's position is unduly constrictive, unreasonable, and incorrect. As the Commission is well aware, it has the authority, and has exercised its authority, to address ESP-related implementation issues outside of specific ESP or ESP-related proceedings. A prime example of this was the Commission's decisions in Case No. 09-786-EL-UNC, Finding and Order (June 30, 2010), and Entry on Rehearing (August 25, 2010), that addressed certain aspects of how it would implement the significantly excessive earnings test (SEET) for Ohio's electric distribution utilities. If the Commission can establish guidelines for how it will implement the annual retrospective SEET for an EDU under R.C. 4828.143(F), outside of the EDU's ESP proceeding, certainly the Commission can establish guidelines for how it will implement the prospective four-year SEET of R.C. 4928.143(F), including transitional provisions for that statutory process in the event of a termination of the ESP. Dynegy's argument to the contrary should be rejected.

4. OMAEG's criticism that certain Stipulation provisions amount to inappropriate and disfavored "direct payments" is mistaken.

OMAEG criticizes certain provisions of the Stipulation as involving inappropriate and disfavored "direct payments" to Signatory Parties. (OMAEG Br. at 63-34.) These criticisms are meritless. For example, OMAEG's contention that it is unfair for customers to bear half of the cost of a pilot CRES Supplier Consolidated Billing Program (Stipulation Section III.D.7) ignores the facts that (1) the participating CRES supplier will be bearing half of the pilot program costs; (2) the results of the pilot program benefit all customers that choose, or have the option to choose, a CRES supplier; and (3) the portion of the pilot program's costs that AEP Ohio will bear will be eligible for recovery in a future rate proceeding in which the Commission will review them prior to approving their recovery from customers.

The funding provided for OPAE to manage the Community Assistance Program ("CAP") pursuant to Stipulation Section III.D.3 is $200,000 for 2016 and then 5% of the CAP annual budget in 2017. That management fee is an amount comparable to what OPAE received to manage the CAP previously when it was the third-party administrator of the program during the 2012 through 2014 period. (Tr. XVIII at 4556-4562.) Thereafter, OPAE's appointment to administer the CAP and the amount it will be paid to do so will be subject to future Commission approval on an annual basis. (Tr. XIX, at 4877.) The management fee is compensation for management and administrative tasks that must be performed, and for which OPAE is particularly qualified to perform, based on its prior experience. This is not a direct payment to a party of the type that the Commission has discouraged in the past.

The funding for OHA under Stipulation Section III.D.2 is not a direct payment to OHA. Rather, it is funding for energy efficiency/demand reduction programs for OHA's member hospitals. The funding benefits customers, prospectively, by educating and incenting them to utilize their electric service efficiently and cost-effectively. It also is not the type of direct payment that the Commission has indicated any reluctance to approve in the past.

The expansion in the IRP program, pursuant to Stipulation Section III.C.7, which will be subject to Commission approval in the ESP extension proceeding, is also not a direct payment to Signatory Parties. It is designed, in part, as an economic development tool that ultimately provides benefits broadly, well beyond the rate benefits it provides to the customers that subscribe to the IRP tariff.

The commitments that AEP Ohio has made to develop 900 MWs of renewable energy resources in Stipulation Section III.I is also subject to future Commission review and approval. In any event, it does not and will not involve any direct payments to any Signatory Parties.

Finally, the payment to IEU is made in connection with a Global Settlement Agreement that resolves a number of outstanding disputes, and which primarily relates to the resolution of disputes other than those arising from this proceeding. Moreover, the cost of that payment will be borne by AEP Ohio, not customers.

OMAEG's assertion that these provisions are antithetical to sound ratemaking principles is meritless.

5. OMAEG's claims that the Stipulation denies customers protections and undermines certainty in Commission orders are also baseless.

OMAEG contends that Section IV.D of the Stipulation, which confirms that if a court of competent jurisdiction invalidates the PPA Rider, no amounts collected pursuant to the PPA Rider will be refunded, is one-sided and unreasonable. (OMAEG Br. at 65-66.) It is not. If the

PPA Rider is approved and goes into effect and ownership, investments in, and operation of the PPA units are conducted in reliance upon that approval, it is very appropriate that the financial results provided by the PPA Rider are not retrospectively unwound.

OMAEG also claims that the Stipulation is unreasonable because it proposes to alter several features of AEP Ohio's ESP III, including the scope of the IRP tariff and the duration of the DIR. (OMAEG Br. at 66-67.) This criticism is also meritless. The Stipulation commits AEP Ohio to proposing changes to the IRP tariff (Section III.C. 7) and an extension of the DIR (Section III.C.1) as part of its commitment to apply for an extension of its current ESP III. Contrary to OMAEG's claim, those commitments do not "destabilize" the Commission's current ESP III orders. In any event, OMAEG can raise its arguments on this point in the ESP extension proceeding, after AEP Ohio has filed its application for approval of that extension.

6. The Stipulation's proposed allocation of EE/PDR, IRP, and PPA Rider credits and costs does not violate any regulatory principle or practice.

As the Commission knows, and as AEP Ohio explained in its Initial Brief, the Commission has great discretion in matters of rate design. (AEP Ohio Br. at 152.) Because the Commission has such broad discretion, its approval and adoption of the Signatory Parties' proposals regarding collection of certain EE/PDR Rider costs, including 50% of IRP credits, through the EDR Rider and the allocation of PPA costs and revenues will not violate any regulatory principle or practice. (*Id.* at 152-153.) OCC and Kroger criticize the Signatory Parties' proposed rate design. (OCC Br. at 68-69; Kroger Br. at 4-5.) Their arguments, however, are without merit.

OCC criticizes the Signatory Parties' proposal to transfer 50% of IRP credits from the EE/PDR Rider to the EDR rider because doing so, according to OCC, results in the allocations of the EE/PDR and EDR being "no longer based upon cost causation." (OCC Br. at 68.) But as

AEP Ohio pointed out in its Initial Brief, OCC's position on this issue is directly contrary the position OCC took only 10 months ago in the *ESP III* case. (AEP Ohio Br. at 153.) Indeed, OCC advocated for the very treatment that it now calls "arbitrary," arguing in *ESP III* that the costs of the IRP credits *should* be collected through the EDR to ensure that all customers pay for them. (*Id.*, citing *ESP III*, OCC Mem. Contra AEP Ohio AFR at 28 (Apr. 6, 2015).) Otherwise, OCC argued, certain mercantile customers could receive the benefits of the IRP-D without paying anything for them. (*Id.*) OCC has offered no explanation for its about face on this issue.

Moreover, OCC witness Fortney – the only witness upon which OCC relies for its present position on this issue – testified at hearing that he was only "vaguely" familiar with the fact that certain large customers can opt out of the EE/PDR, that he was not familiar with the Commission's order on the IRP, that he did not know that the Commission attributes an economic development benefit to the IRP process, and that he did not know that 50% of FirstEnergy's interruptible credits are recovered through its economic development rider as the Signatory Parties propose here. (Tr. XXI at 5372-74.) OCC's present argument, in the face of its opposite position on this issue last year and its own witness's lack of familiarity with AEP Ohio's EE/PDR Rider and IRP program, is unavailing and should be disregarded.

So too should OCC's and Kroger's arguments regarding the PPA Rider's rate design. OCC contends that the Signatory Parties' proposed allocation of the PPA rider by demand is inappropriate. (OCC Br. at 69.) As AEP Ohio noted in its Initial Brief, OCC witness Fortney *agreed* at hearing that a demand allocation in rate design is appropriate for the IRP credits. (AEP Ohio Br. at 153 (citing Tr. XXI at 5387).) He also agreed that the Commission has discretion in the allocation of costs. (Tr. XXI at 5372.) For its part, Kroger agrees that a demand allocation is appropriate but argues that the PPA rider should recover costs from customers on a demand basis as well. (Kroger Br. at 5.) Neither OCC nor Kroger, however, has offered any evidence to support its rate design proposal. OCC witness Fortney professed at hearing that he was *not* making any recommendation regarding what allocation would be appropriate. (*Id.* at 5379-80; AEP Ohio Br. at 153.) And he has not performed any study or analysis regarding the proposed allocation that OCC now advocates. (Tr. XXI at 5381-82.) Kroger witness Higgins did not even address rate design in his testimony in this case, let alone provide any study or analysis regarding Kroger's proposal that PPA rider costs be recovered on a demand basis. (*See* Kroger Ex. 2.) As AEP Ohio explained in its Initial Brief, in the absence of any analysis to support either OCC's or Kroger's position, it is inappropriate to modify the Signatory Parties' proposed rate design. (AEP Ohio Br. at 154.) It is also clear, given the Commission's broad discretion over such matters, that the Signatory Parties' proposed rate design does not violate the third prong of the three-part test for stipulations.

H. OCC's challenges to evidentiary rulings are untimely and misguided.

In an effort to unnecessarily prolong and further torture an already thorough evidentiary process, the OCC has, in its brief, requested that this Commission reverse certain procedural and evidentiary rulings made by the Hearing Examiners during the Evidentiary Hearing. (OCC Br. at 163). The OCC posits that the Hearing Examiner's rulings which properly excluded testimony regarding the substance and content of privileged discussions between and among the Stipulating Parties, and quashed the subpoenas issued by the OCC to force Signatory Parties to appear and testify during the evidentiary hearing, were wrongly decided. (Id). Further, the OCC would now have the Commission reverse those rulings, reopen the proceeding and allow Opposing Intervenors to force Signatory Parties to produce witnesses for cross-examination regarding these privileged Stipulation settlement discussions, and further inquire into the Stipulations' satisfaction of the precedential three-prong test. (*Id.* at 163-64.)

The Hearing Examiner's rulings precluding the additional testimony the OCC seeks to force is proper and correct. The Attorney Examiner Entry that established the procedural schedule in this proceeding provided for two specific deadlines for testimony relating to the Stipulation, one for supporting and one for opposing testimony. Entry (December 15, 2015 Entry) at ¶ 9. The OCC failed to timely file or bring forth the testimony it sought to present through compulsion of additional witnesses at the Evidentiary Hearing, long after testimony deadlines had passed. If there were critical questions that remained unanswered, The OCC should have previously provided its own testimony within the time allotted or explore these issues on cross examination of the appearing witnesses. No harm or prejudice has resulted by requiring the OCC to follow the originally established procedural schedule. Testimony was presented by AEP Witness Allen and the OCC had the opportunity to examine him regarding the Stipulation. Alternatively, the evidentiary hearing process itself would be undermined if this Commission were to grant parties dominion to require the participation of witnesses for settling parties who otherwise would not, or perhaps could not, provide testimony. Such a requirement would create and perpetuate a profound disincentive to entering into stipulated settlements. As discussed by Counsel for AEP Ohio in oral argument at hearing on January 4, 2016 (*see* Tr. XVIII at 4438-60), an extremely negative precedent would result from requiring parties to a stipulation to produce hearing witnesses merely because they signed a stipulation. (*Id.* at 4439.) Imposing such a requirement is likely to deter parties from becoming signatory parties to future stipulations and would create a chilling effect regarding settlement discussions in general. If granted, the OCC's subpoenas would have essentially acted as a "penalty" for settlement.

Further, it is not unusual that only one witness be presented to testify and be subject to cross-examination regarding a stipulated settlement in front of the Commission. In this instance, AEP Ohio's sponsoring witness, Mr. Allen, was fully prepared to answer any questions concerning the Stipulation, and compulsion of testimony from the signatory parties' employees concerning the Joint Stipulation was improper. There is no requirement that more than one witness be presented, in fact, the Commission's own rules expressly recognize that not all signatory parties may provide relevant, admissible testimony concerning a stipulation. O.A.C. 4901-1-30 provides that "parties who file a full or partial written stipulation . . . must file or provide the testimony of at least *one* signatory party that supports the stipulation" (emphasis added). Here, AEP Ohio was that one signatory party. The Commission's rules require no additional testimony from other signatory parties. Reversing the Hearing Examiner's rulings regarding the subpoenas, and compelling such testimony, as a result of OCC's improper attempt to force testimony would simply discourage these and other parties from ever becoming signatory parties to any future negotiated stipulations.

I. All parties were afforded due process in this case.

After 21 days of hearing – including 5 days of hearing on the Stipulation – and voluminous discovery that AEP Ohio responded to on an expedited basis, certain Opposing Intervenors argue that they have been denied procedural due process in this case. (*See* OMAEG Br. at 12-14; RESA Br. at 59-62.) Although acknowledging that the procedural schedule set for the Stipulation-phase portion of this case is "fully within the Commission's discretion" (*see* RESA Br. at 61), these parties nonetheless complain that they did not have adequate time to conduct discovery or prepare for hearing. Tellingly, none of these arguments is supported by any evidence showing that these parties have been (or that any party has been) prejudiced in any way. Other than merely claiming prejudice, neither of these parties offers any evidence or explanation as to how the time period in this case actually caused any prejudice.

The facts belie OMAEG's and RESA's due process complaints. After 16 days of hearing on a multitude of issues related to AEP Ohio's PPA Rider proposal, during which 38 witnesses testified, the parties had an additional 21 days to prepare for the hearing after the Joint Stipulation was filed in this case. *See* Entry (Dec. 15, 2015). That time period is not an unusually brief length of time between the filing of a stipulation and a hearing in a case such as this, where only one rider is at issue. *Accord FirstEnergy ESP 3*, Case No. 12-1230-EL-SSO, Opinion and Order at 47 (July 18, 2012) (holding that 52 days was not an unusually brief period of time between the filing of a stipulation and the hearing in an SSO proceeding); *AEP Ohio Capacity Case*, Case 10-2929-EL-UNC, Entry at 3 (Mar. 14, 2014) (scheduling hearing to begin within 34 days of the scheduling entry). Moreover, all parties were contacted and aware that the Stipulation was being negotiated and prepared. (*See* AEP Ohio Mem. Contra Jt. Mot. to Extend Procedural Schedule at 3 (Dec. 18, 2015).) Thus, OMAEG and RESA were on notice of the issues with which they disagree well before the Stipulation was filed and had the opportunity to begin developing their opposition on those issues weeks in advance of the Attorney Examiner's procedural Entry.

Additionally, although the Attorney Examiner's December 15, 2015 scheduling Entry shortened discovery response times to seven days, AEP Ohio responded to voluminous substantive discovery requests that it received later that same day in as quickly as two days. (*Id.*) The parties opposing the Stipulation also conducted numerous depositions in the weeks leading up to the January hearing and cross-examined Company witness Allen at the evidentiary hearing for two-and-a-half days – with counsel for OMAEG's and RESA's cross-examinations lasting more than a day. (*See* Tr. Vol. XVIII-XX.) They also presented testimony opposing the Stipulation from an additional 11 witnesses. (*See* Tr. Vol. XX-XXII.) In the face of all of the discovery proceedings to date in this case, it is disingenuous for Opposing Intervenors to now claim that they lacked adequate time to conduct discovery or prepare their case.

It is also not a deprivation of due process that this case and FirstEnergy's ESP proceeding were scheduled close in time to one another. As the Commission has recognized, it is vested with broad discretion in the management of its dockets. *See, e.g., In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Advanced Meter Opt-Out Service Tariff*, Case No. 14-1160-EL-UNC, *et al.*, Entry at 2-3 (Sept. 16, 2015); *In the Matter of the Application of Ohio Power Company for a Limited Waiver of Ohio Adm. Code 4901:1-35-10*, Case No. 15-386-EL-WVR, Entry at 4 (Apr. 22, 2015). Administrative efficiency and the Commission's consideration of the same or similar issues is multiple proceedings often factor into the Commission's scheduling decisions. Thus, to the extent the Commission coordinated the scheduling of this case with FirstEnergy's ESP proceeding in order to address both companies' PPA rider proposals at or around the same time, the Commission did not act unreasonably in doing so.

OMAEG also complains that the Commission unreasonably denied PJM's late-filed motion to intervene in this case. (OMAEG Br. at 14-16.) Tellingly, PJM itself has not challenged that ruling. As an initial matter, it is inappropriate for OMAEG to now challenge the Commission's decision affecting another entity's intervention in this case, particularly where the affected entity itself has not done so. Moreover, OMAEG raises no arguments in its initial brief that were not already thoroughly considered in the January 7, 2016 Entry denying PJM's motion. Thus, AEP Ohio relies upon and incorporates its amended memorandum contra PJM's motion to intervene, filed December 30, 2015, as if fully restated herein.

As the Attorney Examiner correctly noted in the January 7, 2016 Entry, PJM failed to demonstrate extraordinary circumstances warranting its extremely late request for intervention in this case, particularly given that it was on notice for months before it moved for intervention that AEP Ohio's PPA Proposal would include provisions for rigorous Commission oversight of the PPA, including periodic substantive review and audit. Entry at 6 (Jan. 7, 2016). That PJM and the IMM may be positioned slightly differently with respect to the wholesale issues of interest to those parties (*see* OMAEG Br. at 15-16) is insufficient to warrant PJM's untimely intervention. Finally, as the Attorney Examiner correctly recognized, PJM has had the opportunity to make its opinion about Section III.A.5.a of the Stipulation known through the filing of an amicus brief. Thus, neither PJM, nor any other party, was prejudiced by the denial of PJM's untimely motion. For all of these reasons, the Commission should disregard OMAEG's and RESA's misplaced due process arguments and OMAEG's complaints regarding PJM's intervention.

VI. OEG'S PROPOSED CLARIFICATIONS ARE INAPPROPRIATE, BUT ITS PROPOSED FINDINGS ARE REASONABLE IF DONE CORRECTLY

At the end of its brief in support of the Stipulation, the Ohio Energy Group ("OEG") advocates five "clarifications" claiming to reinforce the Stipulation and fulfill the intentions of its drafters/signers. (OEG Br. at 19-22.) In reality, three of the five items are substantive modifications and the other two are simply proposed findings that support the existing Stipulation. It is inappropriate for a Signatory Party to try and "re-trade the deal" through its post-hearing brief and AEP Ohio opposes any modifications to the Stipulation. But the proposed findings in support of the Stipulation are reasonable and not objectionable.

A. OEG's first "clarification" should be denied.

The first suggested clarification is apparently to categorically (and with permanence) state that no retirement-related costs associated with the PPA Units aside from the approved depreciation changes may be collected from retail customers. (OEG Br. at 19.) Some background about particular provisions in the Stipulation is helpful to understand why this requested clarification is either unnecessary or inappropriate. In Section III.A.6 of the Stipulation, AEP Ohio voluntarily agreed that it would request a Commission determination of the prudence of the costs that would be incurred by any future modification to the Affiliated PPA and agreed that AEP Ohio (not its customers) would be responsible for bearing any costs associated with changing depreciation rates not approved by the Commission. (Jt. Ex. 1 at 8-9.) In Section III.D.9.a of the Stipulation, AEP Ohio committed to pursue conversion of Conesville Units 5 and 6 to natural gas co-firing subject to cost recovery and other regulatory approvals. (Jt. Ex. 1 at 19.)

Hence, the only retirement costs that might be recovered from retail customers through the PPA Rider for the existing term (*i.e.*, through 2024) are those relating to: (1) depreciation changes approved by the Commission, or (2) the co-firing projects and Conesville Units 5 and 6. Both of these situations could involve a change in depreciation costs that AEP Ohio would seek to recover under the PPA Rider (*e.g.*, accelerated retirement of coal equipment relating to co-firing or the 2029/2030 retirement/refuel/repower commitments for Conesville Units 5/6 and Cardinal Unit 1). But both of those situations will be triggered in future cases and the Commission will get to comprehensively decide the issues based on a full understanding of the facts and circumstances presented at that time. These two categories were repeated no less than four times in the Stipulation and were clearly intended by the Signatory Parties to be exceptions to any prohibition on retirement-related cost recovery. (Jt. Ex. 1 at 20, 21, 26 (Stipulation Sections III.D.9.c, III.D.9.d, III.D.10, III.D.12.) The scope and effect of this language, as written and agreed to by the Signatory Parties, should not be expanded to go beyond the PPA Rider or beyond 2024 – because neither of those limits were agreed to in the Stipulation.

While OEG offers its view (at 19) that the intention of these provisions was to ensure that the PPA is treated more like a lease than like ownership, AEP Ohio's agreement to reduce the PPA to expire in 2024 was not an agreement that the PPA Rider would not be extended under any circumstances. And it is not difficult to imagine future circumstances where the Commission might approve such recovery related to a particular decision that involves retirement-related costs. For example, there could be future economic or regulatory circumstances that cause the Commission to want to extend the PPA Rider beyond 2024. Similarly, if it becomes necessary or helpful to the State of Ohio at some point (which could occur prior to 2024) for compliance with some existing or future environmental regulation for AEP to convert of Conesville Unit 5 to 100% natural gas on or before the Stipulation deadline of December 31, 2029, the Commission might deem it reasonable and prudent for ratepayers to absorb the cost of prematurely retiring coal equipment at the station. There could also be other circumstances where recovery of retirement-related costs through rates other than the PPA Rider might be permissible and desirable.

There are too many unknown circumstances and possible scenarios to blindly adopt a categorical prohibition as OEG suggests. Thus, the requested clarification goes beyond the Stipulation as written to try and solve future problems before they ever arise; doing so improperly attempts to address matters not agreed to in the Stipulation and, thus, has the effect of unilaterally modifying the negotiated agreement. Alternatively, if the requested clarification is merely intended to restate in a consistent manner what is already addressed in the Stipulation, it is completely unnecessary. Either way, OEG's first clarification should be rejected or ignored.

B. OEG's second "clarification" should be denied.

OEG's second requested clarification also improperly attempts to supplement and modify the terms as written and agreed to in the Stipulation, by differently addressing a situation that is already covered by the Stipulation. By its terms, the liquidated damages provision complained of by OEG is limited to the situation where the Commission discontinues cost recovery (*i.e.*, not just a disallowance of costs). (Jt. Ex. 1 at Att. A; P3/EPSA Ex. 10 at 10, § 2.3.) Again, OEG offers its own views about the intention behind the provision in order to improperly suggest a new clarification that it has come up with after negotiating and signing the Stipulation. But the record reflects that the provision – which was already gutted in its scope and application through negotiation – is meant to enforce the concept that "a deal is a deal" and that a future Commission should not abandon this Commission's agreement to accept the Affiliate PPA term agreed to by AEP Ohio without a balanced transition. It is certainly not a nefarious so-called "poison pill."

In any case, OEG's requested clarification effectively modifies language from another provision negotiated in the Stipulation involving severability, Section IV.D. (Jt. Ex. 1 at 35.) In that provision, the process is spelled out to cover the (unlikely) scenario where a court invalidates a provision such as the PPA Rider; the provision does not address ongoing applicability of provisions from the wholesale PPA contract. Even if a Court invalidates the PPA Rider, there is a chance that the Court's concerns could be addressed on remand and the PPA Rider could continue; that should not serve as an excuse to repudiate the Commission's approval of the Stipulation and discontinue cost recovery under the PPA Rider going forward. Granted, if the narrow premise of OEG's example actually did happen as stated (*i.e.*, a court decision ordering that "the Commission is legally required to discontinue cost recovery"), there would seem to only be a slim chance of full retail recovery by AEP Ohio of a payment under the liquidated damages provision. Nonetheless, the Commission should not attempt to blindly add conditions to the Stipulation without the benefit of actual facts and circumstances that might exist in that remote future situation. The Commission can address such a situation in the future and should not presume judicial reversal of the PPA Rider it approved in the *ESP III* decision as being lawful and grounded in sound policy considerations.

C. OEG's third "clarification" should be denied.

Next, OEG unilaterally attempts to again address and resolve a situation not addressed or resolved in the Stipulation through negotiation and agreement. Ironically, OEG's complaint again relates to re-negotiation of the deal-is-a-deal provision – saying that it should not be triggered even if the Commission decides to terminate the PPA Rider. OEG gives what it thinks is a really good reason the Commission might want to repudiate the PPA: if the Minimum Offer Pricing Rule (MOPR) is expanded in the future to encompass the PPA Units. And its argument is based on the explicit premise (OEG Br. at 20) that there would be no capacity revenue if a PPA Unit did not clear the BRA; the record reflects that this premise is false because AEP Ohio's stated intentions would be to either bid again in a supplemental auction or enter into a bilateral contract to optimize revenue in that situation. (Tr. XVIII at 4617.) In any case, it is improper for OEG to attempt after-the-fact to unilaterally renegotiate the deal and add to the long list of concessions made by AEP Ohio during negotiations – regardless of whether it would improve the situation of OEG or other customers. OEG's third clarification improperly attempts to modify the Stipulation and it should not be adopted.

D. OEG's requested findings are reasonable if done correctly.

OEG winds up its brief by requesting two findings. (OAEG Br. at 21-22.) Unlike the clarifications that seek to modify the Stipulation, these requested findings are well-intended to support the existing Stipulation and defend it. Importantly, however, the requested findings need to be approached carefully and done for the right reasons or they also could become problematic. With the caveats to be explained below, AEP Ohio does not object to them.

First, OEG asks (at 21) that the Commission find that there is no definitive evidence demonstrating that approval of the PPA Rider would distort the PJM markets. This would certainly be correct – and it would be supported by the record. While AEP Ohio does not object to this finding as proposed, the Commission should be clear in making it that the PPA Rider is aimed at retail ratemaking – the PPA Rider and the Commission's decision are not intended to affect the wholesale markets either by avoiding the retirements or by helping cause them.

Second, OEG asks (at 21-22) the Commission to find that the costs of the PPA Rider are projected to be below-market over the contract term to help defend a challenge under the FERC's *Edgar* affiliate transaction standards. As with OEG's other requested finding, this proposal should be acceptable if done correctly. AEP Ohio has certainly maintained throughout this proceeding that its projections of net benefit over the PPA term be accepted as the best evidence of such projections in the record. Thus, the Commission should determine that the PPA Proposal is beneficial for AEP Ohio's retail ratepayers and is consistent with Ohio statutory and regulatory principles. In so doing, however, the Commission should not apply the *Edgar* standards. Rather, as discussed above, *see supra* Section V.D, those standards are to be applied by FERC and FERC has granted AEP Ohio a waiver of FERC's affiliate restrictions (including the requirement to apply the *Edgar* standard). So, while it is important to find that the PPA Rider is expected to provide a net benefit to customers over the term because the cost-based rate will likely be lower than market revenues during the same period, that finding should not be made in the context of applying FERC regulations.

Moreover, although it is not this Commission's job to apply FERC's affiliate restrictions, there are two findings that the Commission can – and should – make in this proceeding that FERC will likely defer to: First, the Commission should reiterate its long-held opinion that there is retail competition in Ohio and AEP Ohio's customers are not "captive." Second, the Commission should make clear that, in approving the Stipulation, the Commission is affirmatively finding that the PPA Proposal accords with all Ohio corporate separation laws and regulations and that the evidence in the record of this proceeding contradicts the affiliate abuse concerns raised by various Opposing Intervenors. *See, supra*, Part V.D. FERC has traditionally deferred to similar findings by this Commission in evaluating affiliate transactions, and it will likely defer to such findings again insofar as it evaluates the Affiliate PPA in Docket No. EL 16-33-000.

VII. CONCLUSION

For the foregoing reasons, the Commission should adopt the Stipulation without modification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Reply Brief in Support of the Stipulation and Recommendation* has been served upon the below-named counsel and Attorney Examiners via electronic mail this 8th day of February, 2016.

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