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 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

NOBLE AMERICAS ENERGY SOLUTIONS LLC'S POST HEARING REPLY BRIEF

Respectfully submitted,

/s/ Michael D. Dortch
Michael D. Dortch (0043897)
Richard R. Parsons (0082270)
Kravitz, Brown & Dortch, LLC
65 East State Street, Suite 200
Columbus, Ohio 43215
Tel: (614) 464-2000
Fax: (614) 464-2002
E-mail: mdortch@kravitzllc.com
rparsons@kravitzllc.com

Attorneys for
NOBLE AMERICAS
ENERGY SOLUTIONS LLC

I. INTRODUCTION

Noble Americas Energy Solutions LLC ("Noble Solutions") is a certified power marketer of competitive retail electric service ("CRES") in Ohio under PUCO Certificate No. 01-052E(8). Noble Solutions focuses its marketing efforts within the State of Ohio on industrial and commercial consumers of electricity. Since nearly the initiation of these proceedings, Noble Solutions has been a participant in this docket as a member of the Retail Energy Supply Association ("RESA"), which moved to intervene in this proceeding on October 29, 2014 – less than one month after these cases were filed.

Recently, however, during the course of negotiations surrounding the Joint Stipulation and Recommendation filed December 14, 2015 in these proceedings (the "Stipulation"), Noble Solutions' interests unforeseeably diverged from those of RESA and some of its other members. When these conflicts arose, Noble Solutions immediately sought intervention in this proceeding pursuant to Ohio Rev. Code Section 4903.221 and Ohio Admin. Code Rule 4901-1-11(F), invoking the extraordinary circumstances exception and promising to accept the record in this case as it had been developed to that date. By this commitment, Noble Solutions assures this Commission and the parties to these proceedings that its late intervention is not unduly prejudicial to any other party. Noble Solutions is strictly limited to addressing only the evidence introduced by others, the legal arguments raised by those others, and the opinions and positions expressed by others.

II. STANDARDS OF REVIEW

The Supreme Court of Ohio has approved this Commission's reliance upon a three-pronged test to determine whether a settlement submitted to this Commission for consideration is just and reasonable result in light of the evidence:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties, where there is diversity of interests among the stipulating parties?

2. Does the settlement package violate any important regulatory principle or practice?

3. Does the settlement, as a package, benefit ratepayers and the public interest?

Consumers' Counsel v. Pub. Util. Comm., 64 Ohio St.3d 123, 126 (1992).

In addition, this Commission has already held that any utility's recovery of the costs of an affiliate power purchase agreement (PPA) as proposed by AEP Ohio in this case, must address certain specific factors, including:

1. The financial need of the generating plant;

2. The necessity of the generating facility, in light of future reliability concerns, including supply diversity;

3. A description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and

4. The impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state.

In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.142 in the Form of an Electric Security Plan, Case No. 12-2385-EL-SSO (hereafter, ESP III), p. 25.

III. ARGUMENT

Noble Solutions' decision to seek direct intervention in this proceeding, rather than rely upon its continued participation through RESA, was prompted by the sudden and unanticipated decisions of Interstate Gas Supply, Inc. ("IGS") and Direct Energy Services, LLC, Direct Energy Business, LLC and Direct Energy Business Marketing, (together, "Direct Energy") to cease their active opposition to AEP Ohio's proposal to allow taxpayers to subsidize the unregulated

generation business ventures of its affiliate, AEP Generation Resources ("AEPGR"). Aware that RESA may be reluctant to harshly criticize its own members, Noble Solutions was compelled to raise its own voice in protest against what it believes are changes that inappropriately shift the risk of generation from AEPGR to captive ratepayers through non-bypassable charges contemplated by AEP Ohio's proposed PPA rider.

First, this Commission should note that the position of these entities toward the PPA proposal was, and remains, crystal clear. IGS-sponsored the testimony of Mr. Matthew White, its General Counsel, Legislative and Regulatory Affairs, and Mr. Joseph Haugen, its Power Supply Manager, Supply and Risk, who is directly responsible for securing IGS's power supply, for representing IGS in the PJM Interconnection, Inc. stakeholder process and supervising IGS's demand response programs. Mr. White testified, unambiguously, that:

> **The adoption of the PPA Proposal would harm Ohio ratepayers and should not be adopted.** Specifically. . . [t]he technologies that have led to increased shale natural gas production have fundamentally altered the economics of electric generation such that coal generation has become much less competitive visa-vi natural gas generation - and this trend is only likely to become stronger. Compounding the difficult economics of coal, is the U.S. Environmental Protection Agency's ("EPA") Clean Power Plan which is likely to make coal even less economical with respect to renewable and natural gas generation . . . Reliability concerns also do not justify adoption of the PPA Proposal as new electric generation is getting built in Ohio and PJM's reserve margin have gone up in the 2018/2019 capacity auction; [and finally] The economic impact of the PPA Units also does not justify adoption of the PPA Proposal because approval of AEP's proposal will cost Ohio more jobs than it can expect to create.[1]

IGS' Mr. Haugen testified, in turn, that:

> The PPA is an ineffective hedge, it is not necessary to insulate against volatility, and it will harm the competitive market. Further, it is unreasonable and against the public interest to insulate AEPGR and its shareholders from the risk of the competitive market associated with the power plants incorporated in AEP's proposed PPA proposal ("PPA Units"). **The PPA, moreover, would provide a subsidy from distribution customers to support AEPGR's interest in a**

[1] Direct Testimony of Matthew White, p. 4-5.(Emphasis supplied.)

competitive service which will undermine Ohio's competitive retail electric markets and the competitive wholesale markets run by PJM.[2]

Noble Solutions agrees whole-heartedly with these positions and believes that the evidence provided in this case supports these statements.

Significantly, Noble Solutions notes that nothing in the Stipulation suggests that either Direct Energy or IGS have changed their position with respect to the market-damaging effects of the proposed PPA rider that is the subject of the Stipulation. In fact, the Stipulation itself plainly indicates that neither company actually *agrees* with AEP Ohio's proposal to enter into a PPA with its sister corporation, AEPGR.[3] Nor do IGS or Direct Energy *support* AEP's request that the costs of that PPA be borne by Ohio rate payers, via cost recovery through rates.[4]

A. The Stipulation Is Not a Product of Serious Bargaining Among Parties Representing a Diversity of Interests.

Astonishingly, neither IGS nor Direct Energy could bring themselves to even agree that the Stipulation satisfies the three-prong test approved by the court and traditionally employed by the Commission to evaluate the merits of stipulations which are the product of settlement discussions among parties.[5] The refusal of signatory parties to a stipulation to support the Stipulation is the first reason this Commission should reject the Stipulation and AEP's PPA proposal: The Stipulation does not meet the first prong of the court's test because the failure of signatories to support the stipulation does not exhibit serious bargaining among parties representing diverse interests. At most, a signatory party's refusal to support a stipulation should

[2] Direct Testimony of Joseph Haugen, p. 2-3. (Emphasis supplied.)
[3] See Stipulation, page, 4, footnote 2, in which both expressly "decline to participate" in the provision, even though they agree not to oppose it.
[4] See Stipulation, page, 4, footnote 3, in which both expressly "decline to participate" in the provision, even though they agree not to oppose it.
[5] See Stipulation, page, 33, footnote 14, in which both merely "agree not to oppose this provision."

be viewed with considerable skepticism, and the stipulation and evidence should be reviewed to determine whether the signatory status was simply purchased.

As exemplified in this case by the "approval" of IGS and Direct Energy (and the Sierra Club, as well), the Stipulation failed to address any of the fundamental criticisms these parties raised to the PPA scheme. Instead, the Stipulation simply became a vehicle for the award of unrelated concessions to its signatories. In this regard, it is significant that those concessions benefit the signatories, only. They do not benefit any market segment represented by those parties. For example, both pilot programs used to attract IGS and Direct Energy, the Competition Incentive Rider (CIR) and the Supplier Consolidated Billing Program are clear: AEP will meet with *signatory parties* to design and implement *pilot* programs of limited size and scope for the specific benefit of those entities, with no regard for the public interest. For instance, the CIR contemplates that an unspecified amount of charges shall be imposed on SSO customers in such an amount that intangible benefits are provided by the utility through that service that are not reflected in current SSO prices. This appears to be a discriminatory and predatory agreement by two CRES providers and AEP Ohio to increase customer rates to increase the difference between default SSO service and CRES provider service. This benefits three parties – the utility, Direct Energy and IGA -- to the detriment of customers and all other non-signatory parties. How can this be in the public interest?

Similarly, the Stipulation makes supplier consolidated billing ("SBC") available to Direct Energy and IGS that it does not make available to other competitive retail electric service CRES providers regardless of whether they dual bill or use a consolidated bill with the utility. The Stipulation authorizes Direct Energy and IGS, only, to participate in this program. The fact that this program was designed for the specific benefit of only two CRES providers strongly

indicates that the Stipulation was not a product of compromises by a broad segment of interested parties representing a diversity of interests. In this light, it appears that the two programs obtained by Direct Energy and IGS in exchange for those companies' removal of opposition to AEP Ohio's PPA rider through the Stipulation prove the truth of the saying that when you rob Peter to pay Paul, you can always rely on the support of Paul. Obtaining consent to the Stipulation through individually tailored incentives does not demonstrate the satisfaction of a diversity of interests—instead it shows only that the business objections of certain signatories were silenced – often by an application of ratepayer dollars.

B. Implementation of the Stipulation Will Violate Important Regulatory Principles and Practices.

Second, the Stipulation will violate important regulatory principles and practices. The fundamental principle behind Amended Senate Bill 3, even as later amended by Senate Bill 221 was to create and encourage competition in the retail electric service market. [6] It is therefore a fundamental regulatory principle that a rider shall not be used to shift costs and plant operational risks of a utility's affiliated, unregulated, business to the captive ratepayers of its regulated business.[7] That shift of costs and generation-related risks, however, is precisely what this Stipulation achieves. By requiring Ohio ratepayers to guarantee the profitability of AEPGR's plants, the Stipulation directly violates this well-established regulatory policy against non-bypassable ratepayer subsidization of AEPGR's unregulated business.

[6] *See, e.g.*, Ohio Rev. Code § 4928.02(H) (stating that it is the policy of Ohio to "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.").

[7] *See id.*; *see also* Ohio Rev. Code § 4928.17 (discussing the requirement of corporate separation between regulated and unregulated affiliates).

Furthermore, AEP Ohio's concessions to Direct Energy and IGS represent unreasonable preference among CRES providers as prohibited by Ohio Revised Code section 4905.35:

> (A) No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.

The concessions offered by AEP Ohio to IGS and Direct Energy through the Stipulation are flatly discriminatory in that these concessions are unavailable to other CRES providers similarly situated to IGS and Direct Energy even if they wanted to participate in them. Even worse, it appears that other CRES provider customers – including Noble Solutions' customers – will nonetheless pay half of the costs of implementing the program, as IGS and Direct Energy, the only two CRES to benefit therefrom, bear only one half the cost of implementing the billing program pilot. Since the Stipulation expressly allows only half of the costs to be paid by those two companies using the program, it is logical that the signatory parties to the Stipulation intend that other entities will pay the other half of those implementation costs. Noble Solutions believes that it is improper and unduly discriminatory for the business plans of two suppliers to be subsidized by all other competitors or their customers.

Again, the Stipulation creates a pilot program to establish a non-bypassable CIR as an addition to the SSO non-shopping rate above the SSO auction price.[8] The Stipulation expressly limits the parties allowed by AEP and signatory parties to discuss the CIR rate. Thus, this provision of the Stipulation excludes from participation every CRES provider that is not a signatory to that document. An implication of this exclusion is that because both IGS and Direct Energy are signatories to the Stipulation, they apparently do not believe that the Stipulation, and all of its market destructive provisions, warrant opposition. This appropriately raises the

[8] Stipulation, at § III.C.12.

question of whether those two entities will subsequently be advocates for the competitive market, customer interests or important public policies in the exclusionary discussions described in the Stipulation with AEP Ohio if the Stipulation is approved. Second, as noted, *supra*, the Stipulation authorizes development of a pilot SCB program for the benefit of Direct Energy and IGS, only, to the exclusion of non-signatory CRES providers.[9] Standing alone, he SCB and CIR programs in the Stipulation fail to achieve any meaningful competitive energy market improvements, and, when one considers the overwhelming damage the Stipulation will cause to retail competition through the PPA Rider that shifts the risk of AEPGR's unregulated generation facilities from its stockholders to Ohio ratepayers, these programs actually increase the anti-competitive harm from AEP's proposals.

Third, the Stipulation would extend the IRP tariff and will include credit in AEP's extension application.[10] This extension of the IRP tariff will be available for only (a) current IRP tariff customers, (b) signatory parties whose members qualify under the tariff and (c) non-opposing parties. Such discriminatory and unjust practices that exclude non-signatory parties directly contravene the important regulatory principle that agreements must be just and reasonable.[11] All of these terms violate the important regulatory policy that utility agreements must be nondiscriminatory. Thus, as a whole, the Stipulation is contrary to not just one, but multiple, fundamental regulatory principles in Ohio.

[9] Stipulation, at § III D.7.
[10] Stipulation, at § III.C.7.
[11] Ohio Rev. Code § 4928.02(A) provides that it is the policy of Ohio to "[e]nsure the availability to consumers of . . . nondiscriminatory, and reasonably priced retail electric service." Ohio Rev. Code § 4928.02(G) further provides that it is Ohio's policy to "[r]ecognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment."

C. The Stipulation Violates Important Federal Policy That Supports Competitive Retail Electric Competition.

Furthermore, the Stipulation also violates federal policy, as it plainly distorts the wholesale competitive energy markets through the AEP Ohio ratepayers' subsidization of AEPGR. The return on equity of 10.38% that the Stipulation provides to AEPGR through the PPAs is a subsidy that then allows AEPGR to under-price its competition in the wholesale market.[12] This subsidy disincentivizes construction of new, more efficient generating facilities and creates an uneven playing field for current generation competitors.[13] Reduced competition among generators will eventually result in higher prices for ratepayers in the long term as wholesale suppliers are priced out of the market due to the subsidization provided by the PPA rider to one wholesale market participant – AEPGR.

D. The Stipulation Will Harm Ratepayers and The Public Interest.

First, the SCB program does not benefit the retail market generally but benefits only Direct Energy and IGS. The costs of the pilot SCB obtained by IGS and Direct Energy as part of the Stipulation are only partially recovered from those two companies—all other CRES providers' customers are at risk for paying the other half of the costs of pilot implementation; whether they enjoy any benefit from it. It is improper for the business plans of two suppliers to be subsidized by all other competitors or their customers. The program does not account for CRES providers who dual-bill their customers.

Second, the CIR serves only the business plans of Direct Energy and IGS and does nothing to offset the profound charges imposed on all customers through the non-bypassable charges imposed by the PPA rider

[12] *See* Independent Market Monitor for PJM's Brief, at 5–8; and OMAEG's Brief, at 24–25.

[13] OMAEG Ex. 29 at 12–13 (Dr. Hill Direct Testimony).

Finally, in this case, AEP asks the Commission to conclude that ratepayers have a reasonable chance of receiving credits through the PPA Rider, whereas AEP's testimony supports the position that the plants that are the subject of the PPAs are on the "economic bubble."[14] The fact that AEP's fundamental foundation for its request in this case is internally inconsistent simply demonstrates that the Stipulation is not in the interest of ratepayers or the public. , The Stipulation should be rejected on this ground alone.

E. Notwithstanding the Stipulation, This Commission Should Reject the PPA Rider as Bad Public Policy that Undermines Both the Wholesale and Retail Competitive Markets.

The ultimate question in this case is not whether the Commission should approve of the terms of the Stipulation, because in the end a stipulation is nothing more than a recommendation regarding the outcome of a case by the signatories thereto. The positions taken by IGS, DirectEnergy, and even the Sierra Club, make it obvious that in this case the Stipulation is not even the recommendation of all its signatories.

The ultimate question which this Commission is left to answer is whether to allow AEP Ohio to enter into an affiliate power purchase agreement (even though lower priced offers have been made for the same electric power ***within this case*** – and in one such case by an owner of most of the same units), populate its PPA rider, and start charging Ohio consumers more for the privilege of continuing to do business with AEP. This is not a regulatory balancing act that weighs utility costs and generation risks against the public interest and finds an acceptable compromise that benefits both. Rather, this is a plain attempt to impose on ratepayers generation-related costs and risks belonging to AEPGR in exchange for the possibility that those customers will receive an ill-defined and quite possibly illusory benefit in the future. In this regard, the PPA rider as proposed by AEP Ohio does not appear to be structured as a valuable

[14] Tr. Vol. 1 at 47, 100-101.

service that is provided in exchange for payment, but rather as a cash extraction mechanism used to remove revenue from customers to the detriment of CRES providers and their customers and for the sole benefit of the AEP Ohio corporate family.

The objections of PJM"s independent market monitor (the "IMM"), and of Dynegy, Inc. ("Dynegy") warrant special consideration. Dynegy, of course is a merchant power provider that owns more than 11,000 MW of capacity within PJM, and co-owns many of the same units (the jointly owned units, or JOUs) that AEP Ohio seeks to subsidize in this proceeding. Dynegy testified that, if approved, AEP's PPA proposal will necessarily distort the ownership relationship at the JOUs. Dynegy is 100% correct. The perverse effect of the PPA proposal places AEPGR at a significant cost advantage to the non-PPA owner of the JOUs. Whereas co-owners are entirely dependent upon the efficiency of the JOUs in the market, AEPGR receives a guaranteed return of its costs under the proposed PPA, and in addition receives a return on quity at 10.38%. Those guarantees are disincentives to the efficient operation and capital investment in the PPA units. In short, AEPGR has no reason to maximize efficiency, reliability and profitability of the units, and has little incentive to consider any consolidation of ownership of the jointly-owned PPA units in the long term. Future investment in Ohio's existing generation plants certainly cannot be anticipated if the State decides to favor one owner over another.

More significantly, Dynegy cautions that AEP's proposal, as modified by the Stipulation, will distort the wholesale markets and negatively impact the retail market. The retail competitive market relies upon a fully functioning wholesale market in which numerous suppliers provide product offerings without an unfair advantage. If the stipulation is approved in its current form, AEPGR will enjoy an unfair competitive advantage because it will be subsidized by AEP Ohio's customers through non-bypassable charges, which include a 10.38% return on equity. There is

absolutely no legitimate purpose served by encouraging such distortion. The wholesale PJM market has been delivering long-term energy pricing stability for many years, and PJM is constantly seeking to improve upon its market-based construct. The distortions that the PPA proposal will introduce into the wholesale and retail markets are inconsistent with competition in the PJM wholesale power market, and will destabilize the retail market which is this Commission's concern. *See the February 1, 2016 Brief of Dynegy, Inc., pp. 8-18.*

Similarly, the IMM warns that the PPA Rider would not merely shift costs and risks from shareholders to customers. It will in addition remove incentives to make competitive offers in the PJM Capacity Market and at the same time provide incentives to make offers below the competitive level in the PJM Capacity Market. *See rhe February 1, 2016 Brief of the IMM, pp. 2-3.* Thus, the PPA Rider has the perverse effect of *encouraging* AEP to further distort PJM's capacity market auctions for its own benefit. That market works, in part, by transferring payments from those units that, through the capacity auction, are committed to run (and nonetheless fail to run), to other units that satisfy their capacity commitments. The PPA Rider, however, requires ratepayers to pay any performance penalties associated with the assets included in the PPA Rider. At the same time, AEPGR continues to retain any performance payments earned by other AEP units and not included in the PPA Rider, even if paid for in part by penalties on ratepayers. *See The February 1, 2016 Brief of the IMM, p. 5.* The conflict of interest is obvious.

In any event, if for no reasons other than the objections of a co-owner of a majority of the MW for which AEP Ohio seeks a subsidy, it should be clear that AEP has failed to make a convincing case regarding the financial need of the co-owned generation units; or the likelihood that future reliability concerns justify AEP's request. Thus, the Commission should deny AEP's

request, without regard to the Stipulation, on the basis that the evidence does not suggest that AEP has actually met the criteria this Commission has established as a condition precedent to approving any such proposal.

IV. CONCLUSION

For the foregoing reasons, the Commission should reject the Stipulation.

Respectfully submitted,

/s/ Michael D. Dortch
Michael D. Dortch (0043897)
Richard R. Parsons (0082270)
Kravitz, Brown & Dortch, LLC
65 East State Street, Suite 200
Columbus, Ohio 43215
Tel: (614) 464-2000
Fax: (614) 464-2002
E-mail: mdortch@kravitzllc.com

Attorneys for NOBLE AMERICAS ENERGY SOLUTIONS LLC

CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing were served via electronic transmission upon the persons listed below this February 8, 2016

Steven.beeler@puc.state.oh.us
Werner.margard@puc.state.oh.us
haydenm@firstenergycorp.com
jmcdermott@firstenergycorp.com
scasto@firstenergycorp.com
jlang@calfee.com
talexander@calfee.com
myurick@taftlaw.com
callwein@keglerbrown.com
tony.mendoza@sierraclub.org
tdougherty@theOEC.org
twilliams@snhslaw.com
jeffrey.mayes@monitoringanalytics.com
ricks@ohanet.org
tobrien@bricker.com
mhpetricoff@vorys.com
mjsettineri@vorys.com
glpetrucci@vorys.com
mdortch@kravitzllc.com
joliker@igsenergy.com
sechler@carpenterlipps.com
gpoulos@enernoc.com
sfisk@earthjustice.org
Kristin.henry@sierraclub.org
chris@envlaw.com
todonnell@dickinsonwright.com
rseiler@dickinsonwright.com
stnourse@aep.com

Attorney Examiners:
Sarah.parrot@puc.state.oh.us

mjsatterwhite@aep.com
msmckenzie@aep.com
dconway@porterwright.com
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
Kurt.Helfrich@ThompsonHine.com
Scott.Campbell@ThompsonHine.com
Stephanie.Chmiel@ThompsonHine.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
charris@spilmanlaw.com
Stephen.Chriss@walmart.com
Schmidt@sppgrp.com
Bojko@carpenterlipps.com
orourke@carpenterlipps.com
mfleisher@elpc.org
msmalz@ohiopovertylaw.org
cmooney@ohiopartners.org
drinebolt@ohiopartners.org
ghull@eckertseamans.com
msoules@earthjustice.org
jennifer.spinosi@directenergy.com
laurie.williams@sierraclub.org

Greta.see@puc.state.oh.us

/s/ Michael D. Dortch
Michael D. Dortch

Summary: Reply electronically filed by Mr. Michael D. Dortch on behalf of Noble Americas Energy Solutions LLC