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

APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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May 2, 2016

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APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC") files this Application for Rehearing to oppose AEP Ohio's claim for customers to pay hundreds of millions of dollars (potentially billions) to subsidize affiliate-owned power plants ("PPA Units") that are no longer regulated by the government.[1] In its Opinion and Order of March 31, 2016 ("Opinion and Order"), the Public Utilities Commission of Ohio ("PUCO") approved the Joint Stipulation and Recommendation ("Stipulation") filed in this case that includes customer charges under a power purchase agreement ("PPA") rider ("PPA Rider"). Thereafter, the Federal Energy Regulatory Commission ("FERC") rescinded the waiver

[1] See R.C. 4903.10 and O.A.C. 4901-1-35.

under which AEP Ohio claimed it could proceed with the PPA without FERC review. FERC explained that "no sales may be made with respect to the Affiliate PPA unless and until [FERC] approves the [PPA.]"[2] Accordingly, the PPA Rider is effectively dead. The Opinion and Order is unreasonable and unlawful under Ohio law.[3]

The Opinion and Order approved the Stipulation with modifications. Under the modified Stipulation, AEP Ohio will collect increased rates from customers for the period June 1, 2016 through May 31, 2024. The Opinion and Order is unreasonable and unlawful in the following respects:

ASSIGNMENT OF ERROR 1: The PUCO's Opinion and Order is unreasonable and unlawful because under OAC 4901-1-15(F) and governing law, the PUCO should have reversed certain evidentiary rulings of the Attorney Examiners that prejudiced OCC (and all intervenors) and deprived the PUCO of a full, complete, accurate record.

A. The settlement discussion confidentiality privilege was applied in a blanket fashion contrary to Ohio Rule of Evidence 408, OAC 4901-1-26(E), and Ohio Supreme Court precedent.

B. Subpoenas for witnesses to attend and give testimony at the evidentiary hearing were quashed contrary to O.A.C. 4901-1-25(A) and (C) and the rules and precedent governing discovery.

C. Purported expert testimony was not excluded as required by governing law where the witness admitted that he was neither an expert nor qualified to render the opinions given. Further, the "expert" admitted that he did not materially participate in the economic analysis to which he testified.

ASSIGNMENT OF ERROR 2: The PUCO's Opinion and Order is unreasonable and unlawful because the PUCO ruled on OCC's motion to stay without considering OCC's reply in support. As a result, the PUCO's ruling did not address the merits of the motion, departed from its previous precedent, and will harm consumers.

[2] See *Electric Power Supply Association, et al. v. AEP Generation Resources, Inc., et. al,* Docket No. EL16-33-000 Order Granting Complaint at 19, n. 85 (April 27, 2016).

[3] OCC has maintained, and still maintains, that the PPA Rider should be rejected in its entirety, notwithstanding anything herein that could be improperly construed to the contrary.

ASSIGNMENT OF ERROR 3: The PUCO's Opinion and Order is unreasonable because it relied on the settlement test historically applied to stipulations. To protect consumers, that test should not be applied here.

A. There should be a nexus between an application and settlement terms. Otherwise, parties, potential parties, and the public are not provided notice of the matters that will be addressed by the PUCO as a result of an application.

B. Because so many parties did not support material provisions of the Stipulation, there is no package to apply the settlement test to.

C. The settlement test historically applied to stipulations is no longer workable or fair because the electric security plan statute, R.C. 4928.143, vests electric utilities with superior bargaining power. Under the statute (R.C. 4928.143(C)(2)(a), they can reject any modifications to an ESP.

ASSIGNMENT OF ERROR 4: The PUCO's Opinion and Order is unreasonable and unlawful because the Stipulation was not the product of serious bargaining among knowledgeable parties. The Stipulation is so vague, ambiguous, and uncertain that it could not have been the product of serious bargaining among knowledgeable parties.

ASSIGNMENT OF ERROR 5: The PUCO's Opinion and Order is unreasonable and unlawful because the Stipulation is inconsistent with important regulatory principles and practices. The Stipulation, as a contract like any other, must be sufficiently clear and certain so that it can be enforced as a matter of important regulatory principles and practice.

A. The Stipulation is full of provisions setting standards by which signatory parties' conduct will be judged for compliance. The standards are so vague, ambiguous, and uncertain that they cannot be enforced.

B. So many parties opted-out of so many provisions that what the Stipulation is cannot even be determined.

C. The Stipulation's vagueness, ambiguity, and uncertainty cannot be cleared up by extrinsic evidence given the breadth with which the settlement discussion confidentiality privilege is applied.

ASSIGNMENT OF ERROR 6: The PUCO's Opinion and Order is unreasonable and unlawful in that the PUCO found OCC Witness Wilson's PPA Rider cost forecast flawed without considering record evidence regarding its reliability.

A. The record evidence shows that futures prices represent economic principles of demand, supply, and the resulting price.

B. The record evidence shows that there is sufficient liquidity in electric energy forwards.

C. Parties to futures transactions are concerned with the actual future price of energy and do account for factors such as future carbon emission regulations.

D. OCC Witness Wilson did not concede a lack of liquidity after October 2020. Instead, for the time after October 2020, he accepted the pattern reflected in AEP Ohio's energy price forecast and then scaled AEP Ohio's energy prices to match, on average, forward prices.

E. The record evidence shows that OCC Witness Wilson's forecasts were subject to the most rigorous "sanity check" available – the "consensus of market participants."

ASSIGNMENT OF ERROR 7: The PUCO's Opinion and Order regarding the PPA Rider Rate Impact Mechanism was unreasonable. To protect consumers, the PUCO should modify its Opinion and Order to confirm that the customer rate increases through May 31, 2018 are capped at five percent of the generation component of the June 1, 2015 SSO rate plan bill. Also to protect consumers, the PUCO should modify its Opinion and Order to confirm that any lost revenue due to the PPA Rider Rate Impact Mechanism sought to be recovered in a subsequent quarter is subject to the five percent cap. The PUCO should also modify its Opinion and Order to unambiguously confirm, in consumers' interest, that AEP Ohio cannot charge customers for any revenue reduction resulting from the implementation of the PPA Rider Rate Impact Mechanism after May 31, 2018.

ASSIGNMENT OF ERROR 8: The PUCO's Opinion and Order is unreasonable and unlawful because the PUCO misapplied the settlement test (if it could be applied at all, which it cannot). It did not determine if the Stipulation, as a package (if it can be considered one, which it cannot), benefits ratepayers and the public interest. **Error! Bookmark not defined.**

A. The Stipulation is not necessary, its purported benefits are contingent and may not come to fruition, and their costs are unknown.

B. Reducing the return on equity and shortening the PPA's length are "benefits" only to the degree that the stipulation is compared to AEP Ohio's Amended Application. That is not the standard. The standard is whether the Stipulation, standing on its own, benefits customers and the public interest.

ASSIGNMENT OF ERROR 9: The PUCO evaluated whether the Stipulation benefits customers and the public interest based on the factors discussed in the Opinion and Order in AEP Ohio's ESP III case. That was unlawful because the ESP III Opinion and Order was not a final appealable order and treating it as such deprives parties of their due process and appeal rights.

ASSIGNMENT OF ERROR 10: The PUCO's decision that AEP Ohio met its burden under the factors discussed in the ESP III Opinion and Order is unreasonable as against the manifest weight of the evidence.

ASSIGNMENT OF ERROR 11: The PUCO's Opinion and Order is unreasonable and should be modified so that charges under the PPA Rider are subject to refund.

A. In light of the pending FERC case and potential rule changes, the public interest and fundamental fairness necessitate that the PPA Rider be subject to refund.

B. Questions surrounding the PUCO's jurisdiction mean that the PPA Rider should be subject to refund.

ASSIGNMENT OF ERROR 12: The PUCO's Opinion and Order is unreasonable and unlawful regarding PUCO oversight of bilateral contracts. The PUCO has no jurisdiction to review bilateral contracts between it and its affiliates. Further, the PUCO should modify its Opinion and Order so that any bilateral contract (not just bilateral contracts between AEP Ohio and its affiliates, if the PUCO attempts to assert jurisdiction over such contracts) involving the PPA Units are subject to stringent PUCO review. Such modification is necessary to protect consumers.

ASSIGNMENT OF ERROR 13: The PUCO's Opinion and Order is unreasonable because it deprives consumers of the benefits of capacity performance bonuses. The PUCO should modify its Opinion and Order so that customers get the benefit of capacity performance bonuses.

ASSIGNMENT OF ERROR 14: The PUCO's Opinion and Order is unreasonable, unlawful, and contrary to important regulatory principles and practices because the ESP statute, R.C. 4928.143, does not authorize the PPA Rider. The PPA Rider will not stabilize or provide certainty regarding retail electric service.

A. R.C. 4928.143 does not authorize the PPA Rider.

B. The PPA Rider does not have the effect of stabilizing or providing certainty regarding retail electric service.

ASSIGNMENT OF ERROR 15: The PUCO's Opinion and Order is unlawful because, contrary to R.C. 4928.38 and important regulatory principles and practice, the PPA Rider allows AEP Ohio to collect untimely transition costs. That harms consumers.

ASSIGNMENT OF ERROR 16: The PUCO's Opinion and Order is unlawful because, contrary to R.C. 4928.143 and important regulatory principles and practice, the PUCO found that AEP Ohio's ESP passes the MRO v. ESP test. The ESP is not more favorable in the aggregate than the MRO.

A. OCC Witness Wilson's cost projections should be considered in the MRO v. ESP analysis.

B. The PUCO considered qualitative and quantitative benefits in applying the MRO v. ESP test. It should only consider quantitative benefits.

C. A substantial number of the proposals in the Stipulation are subject to future filings. Their costs are unknown. The PUCO cannot conclude that the MRO v. ESP test is passed when the costs of proposals are unknown.

ASSIGNMENT OF ERROR 17: The PUCO's Opinion and Order is unreasonable and unlawful because it found that AEP Ohio's customers after implementation of the PPA Rider are not captive.

ASSIGNMENT OF ERROR 18: The PUCO's Opinion and Order is unreasonable and unlawful because the Stipulation's provision for 900 MW of wind and solar renewable generation resources is contrary to the public interest and governing law.

ASSIGNMENT OF ERROR 19: The PUCO's Opinion and Order is unreasonable and unlawful because it approves the "Competition Incentive Rider," which facilitates an anticompetitive price increase of the SSO and marketer's rates in violation of R.C. 4928.02(A).

ASSIGNMENT OF ERROR 20: The PUCO's Opinion and Order is unreasonable and unlawful because it approves the "Competition Incentive Rider," which facilitates an anticompetitive price increase of the SSO and marketer's rates in violation of R.C. 4928.02(A).

ASSIGNMENT OF ERROR 21: The PUCO's Opinion and Order is unreasonable and unlawful because it approves the Stipulation's "Grid Modernization" proposal. It contains virtually no details or obligations that could conceivably be in the public interest or consistent with important regulatory principles and practices.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

FERC recently held that AEP Ohio's waiver from filing affiliate contracts with FERC for prior approval is rescinded.[4] FERC recognized that the PPA Rider "present[s] the potential for the inappropriate transfer of benefits from [captive] customers to the shareholders of [AEP Ohio], and, thus, could undermine the goal of [FERC's] affiliate restrictions."[5] FERC explained that "no sales may be made with respect to the [PPA] unless and until [FERC] approves the [PPA]" under governing law.[6] Without a FERC-approved PPA, there can be no charges to consumers through the PPA Rider.[7]

The PUCO also has an opportunity to stand between the public interest and AEP Ohio charging consumers billions of dollars to subsidize, via government regulation, old, inefficient, affiliate-owned, coal-fired power plants that cannot compete in a market

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[4] See *EPSA, et al.*, EL16-33-000 at 19.

[5] Id. at 20.

[6] Id. at 19, n. 85.

[7] Accordingly, the PUCO should dismiss this case.

deregulated by the Ohio General Assembly over sixteen years ago. It should ensure that its Opinion and Order is reasonable and lawful. Unfortunately for consumers, it is not. BY OCC's count, twenty-one times the PUCO made decisions that were unreasonable and unlawful. To protect consumers and the public interest, it should reconsider those decisions. Upon reconsideration of any one of those decisions, the PUCO should find that the Stipulation should be rejected.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." OCC filed a motion to intervene in this proceeding on October 29, 2014, which was granted by Entry dated September 15, 2015. OCC also filed testimony regarding AEP Ohio's Application/Amended Application and the Stipulation. It participated in the evidentiary hearings on both.

R.C. 4903.10 requires that an application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." Additionally, Ohio Adm. Code 4901-1-35(A) states: "An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing."

In considering an application for rehearing, R.C. 4903.10 provides that "the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear." The statute also provides: "[i]f, after such rehearing, the commission is of the opinion that the

original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed."

The statutory standard for abrogating some portions of the Opinion and Order and modifying other portions are met here. The PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Opinion and Order of March 31, 2016.

III. RECOMMENDATIONS

ASSIGNMENT OF ERROR 1: The PUCO's Opinion and Order is unreasonable and unlawful because under OAC 4901-1-15(F) and governing law, the PUCO should have reversed certain evidentiary rulings of the Attorney Examiners that prejudiced OCC (and all intervenors) and deprived the PUCO of a full, complete, accurate record.

Broad discovery is permitted under the governing rules and law.[8] The importance of this case and the corresponding need for a robust record has been acknowledged.[9] Unfortunately for consumers and the public interest, relevant, material evidence was kept out of the record during the evidentiary hearing on the Stipulation. The settlement discussion confidentiality privilege was applied well beyond legal bounds. OCC's subpoenas on signatory parties[10] to appear and testify during the evidentiary hearing were improperly quashed. And testimony was admitted that should not have been. Such rulings prejudiced OCC (and all intervenors) and should be reversed by the PUCO.

[8] See generally Memorandum Contra by The Office of the Ohio Consumers' Counsel (Expedited Treatment Requested) filed in this docket on January 4, 2016, pp. 3-4; see also R.C. 4903.082 and OAC 4901-1-16; Civ. R. 26.

[9] See, e.g., Hearing Transcript at Vol. XVIII, pp. 4431-4433.

[10] Specifically, Sierra Club, IGS Energy, and Direct Energy.

The PUCO should reconsider and reverse its rulings on these evidentiary matters.

A. The settlement discussion confidentiality privilege was applied in a blanket fashion contrary to Ohio Rule of Evidence 408, OAC 4901-1-26(E), and Ohio Supreme Court precedent.

OCC pointed out that the Attorney Examiners' application of the settlement discussion confidentiality privilege extended well beyond the bounds of governing rules and Ohio Supreme Court precedent.[11] The PUCO did *not* disagree with OCC that the rules governing the settlement discussion confidentiality privilege permit discovery when the evidence is offered for another valid purpose.[12] And the PUCO did *not* disagree that OCC was seeking information for another valid purpose; namely, information relevant to the three-part test used by the PUCO to evaluate stipulations.[13] Instead, the PUCO initially determined that the Attorney Examiners' rulings regarding the settlement discussion confidentiality privilege should be affirmed because non-signatory parties were permitted to ask certain questions on limited topics.[14]

So long as information sought is relevant and admissible, it should be heard by the PUCO.[15] Because the PUCO did not take issue with OCC's demonstration of the settlement discussion confidentiality privilege's limits or the relevance of the information OCC sought, it erred in affirming the Attorney Examiners' rulings simply because OCC

[11] See OCC's Initial Post-Hearing Brief at 164-67.

[12] See id.

[13] See id.

[14] See Opinion and Order at 17.

[15] See generally Memorandum Contra by The Office of the Ohio Consumers' Counsel (Expedited Treatment Requested) filed in this docket on January 4, 2016, pp. 3-4; see also R.C. 4903.082 and OAC 4901-1-16; Civ. R. 26.

(and other intervenors) were able to ask, and get answered, *other* questions. The rules governing discovery permit no such limitation.[16]

Further, the Ohio Supreme Court has held that there is no blanket "settlement privilege[,]" and that the potential for "backroom deals" excluding parties are of "grave concern[]" to it.[17] The Attorney Examiners' blanket application of the settlement discussion confidentiality privilege goes against the first principle established by the Supreme Court. It renders the second principle meaningless, as parties are prevented from probing if the Supreme Court's "grave concern" is warranted in the case at hand.

The PUCO's initial decision on the Attorney Examiners' application of the settlement discussion confidentiality privilege will have far-reaching, prejudicial effects on non-signatory parties and the PUCO's ability to decide the important matters before it based on a full, accurate, complete record. As happened here, signatory parties will use the three-prong test and associated, purported settlement discussion confidentiality privilege as a sword and a shield.

The PUCO's evaluation of a stipulation is limited to whatever "evidence" signatory parties choose to submit in direct testimony. There was serious bargaining among knowledgeable parties, a signatory party would assert, but non-signatory parties could not fully explore the assertion. The stipulation, as a package, does not violate any regulatory principle or practice, a signatory party would assert, but non-signatory parties could not fully explore the assertion. The stipulation, as a package, is in the public

[16] See note 8, supra.

[17] See *Ohio Consumers' Counsel v. PUC*; 111 Ohio St. 3d 300 (2006); *Time Warner v. PUC*, 75 Ohio St. 3d 229, n. 2 (1996).

interest, a signatory party would assert, but non-signatory parties could not fully explore the assertion. But "one cannot assert a privilege as both a shield and a sword."[18]

B. Subpoenas for witnesses to attend and give testimony at the evidentiary hearing were quashed contrary to O.A.C. 4901-1-25(A) and (C) and the rules and precedent governing discovery.

As demonstrated in OCC's Initial Post-Hearing Brief, the Attorney Examiners' decision to quash OCC's subpoenas for signatory party witnesses (Sierra Club, IGS, and Direct Energy) to attend and give testimony at the hearing guts the very purpose of subpoenas. It allows signatory parties to evade questioning even where they are not similarly situated, and cuts off non-signatory parties from conducting *any* meaningful discovery.[19] The PUCO initially determined that the Attorney Examiners' decision should be affirmed out of concern with the "chilling effect" that subpoenas such as OCC's would have on settlement negotiations and O.A.C. 4901-1-30(D)'s requirement that only at least one signatory party must file or provide supporting testimony.[20]

As in all interpretive matters, "[c]ontext matters" here.[21] In interpreting and evaluating parties' subpoena power, this case is sufficiently different than others such that any purported "chilling effect" can be avoided in other contexts. As has been

[18] See *Mota v. Gruszczynski*, 2011 Ohio Misc. Lexis 830, *14-15 (Cuyahoga Comm. Pls. 2011), citing *SS&D v. Givaudan Flavors Corp.*, 127 Ohio St. 3d 161 (holding, in part, that "a client may not rely on attorney-client communications to establish a claim against the attorney while asserting the attorney-client privilege to prevent the attorney from rebutting that claim"); *Vandenhaute v. Filer*, 2002 Ohio App. Lexis 3709, para. 9 (Cuyahoga 2002) ("Like all privileges, the physician-patient privilege is intended to be used as a shield of privacy, not a sward to escape liability or to otherwise gain an advantage."); *Haydocy Pontiac, Inc. v. Lee*, 19 Ohio App. 2d 217, 219 (Franklin 1969) (allowing an infant to rescind a contract without requiring return of the property received would permit him to use his privilege as a sword rather than a shield).

[19] See OCC's Initial Post-Hearing Brief at 168-170.

[20] See Opinion and Order at 18.

[21] See *In re Application of Ohio Power Co.*, 140 Ohio St. 3d 509 (2014).

acknowledged, this is a very large, very important, multi-party case.[22] The only witness offered in support of the Stipulation conceded that "individual parties can speak for themselves as to why they support or do not oppose particular provisions or the Stipulation as a whole and the Company can only speak for itself."[23] Further, the signatory parties subpoenaed are not participating in, not opposing, or both, certain material provisions in the Stipulation.[24] Thus they have identified themselves as being different from other signatory parties – including AEP Ohio. Accordingly, non-signatory parties could not possibly have obtained the information to which they (and the public) are entitled from the only testifying witness. This is based on signatory parties' own admission that the testifying witness *could not* speak to matters involving other parties and such other parties, *themselves*, materially differentiating themselves from all other signatory parties (including the party, AEP Ohio, offering the only testifying witness). Under such circumstances, this case can be easily distinguished from other cases and therefore nullify any concern with a purported "chilling effect."

For the same reasons, the PUCO's reliance on O.A.C. sec. 4901-1-30(D) is misplaced. It states: "Unless otherwise ordered, parties who file a full or partial written stipulation or make an oral stipulation must file or provide the testimony of at least one signatory party that supports the stipulation." By its plain terms, it establishes a floor, not a ceiling, on signatory parties' testimony at a hearing on a stipulation. It does not prevent non-signatory parties from subpoenaing signatory parties that do not file or provide the testimony required. Applying it in a way that it does makes no sense here. The signatory

[22] See, e.g., Hearing Transcript at Vol. XVIII, pp. 4431-4433.

[23] See INT-S1-034, INT-S1-035 (OCC Ex. 25, admitted at Hearing Transcript Vol. XX, p. 5015).

[24] See footnotes in Stipulation (Joint Ex. 1, admitted at Hearing Transcript Vol. XX, p. 5011).

parties admitted that the testifying witness *could not* speak to matters involving other parties. Such other parties, *themselves*, materially differentiated themselves from all other signatory parties (including the party, AEP Ohio, offering the only testifying witness). The PUCO's application of O.A.C. sec. 4901-1-30(D) is contrary to the broad discovery rights to which parties are entitled.[25]

Last, the PUCO did not consider in its Opinion and Order the effect that affirming the Attorney Examiners' rulings will have on *all* discovery.[26] In addition to prohibiting hearing testimony from signatory parties that do not file written testimony, the ruling will practically prevent responses to written discovery from being entered into the record. Here, non-signatory parties received important responses to written discovery from the subpoenaed signatory parties. Without the testimony from the subpoenaed signatory parties, non-signatory parties cannot be assured of having the responses to written discovery in the record.[27] The PUCO is thus deprived of a record that includes what such responses were, and how they may inform the PUCO's analysis under the three-prong test.

C. Purported expert testimony was not excluded as required by governing law where the witness admitted that he was neither an expert nor qualified to render the opinions given. Further, the "expert" admitted that he did not materially participate in the economic analysis to which he testified.

OCC documented the record evidence that AEP Ohio Witness Allen was neither qualified nor materially participated in the economic analysis that was attached to his

[25] See generally Memorandum Contra by The Office of the Ohio Consumers' Counsel (Expedited Treatment Requested) filed in this docket on January 4, 2016, pp. 3-4; see also R.C. 4903.082 and OAC 4901-1-16; Civ. R. 26.

[26] See generally OCC's Initial Post-Hearing Brief at 169.

[27] See, e.g., Ohio Rs. Ev. 401, 402, 403, 801, 802, 803, 804, and 901.

testimony.[28] Nonetheless, the PUCO initially decided that the Attorney Examiners' ruling denying the motions to strike AEP Ohio Witness Allen's testimony should be affirmed. The PUCO decided that AEP Ohio Witness Allen "directed" an economist to run the economic model, gathered data, and discussed how to account for various factors.[29] He is familiar with regulatory filings and was "sufficiently knowledgeable" to sponsor the results of the economic analysis.

But AEP Ohio Witness Allen did *not* direct what model to use.[30] Although other models could have been used to test the economic base model's accuracy, AEP Ohio Witness Allen did *not* direct that models other than the economic base model be used.[31] He did *not* direct that 100 percent of an industry be considered as basic, nor that 100 percent of an industry be considered non-basic.[32] He did *not* direct what counties to include in the OVEC Region, [33]the Cardinal Region,[34] the Conesville Region,[35] or the Stuart-Zimmer Region.[36] He gave *no* direction regarding which PPA Units shut down, when, or on any other matter related to the forecasted shutdown of the PPA Units.[37]

AEP Ohio Witness Allen does *not* know what industries were used in the analysis attached to his testimony. He does *not* know how specific/non-specific the industries

[28] See OCC's Initial Post-Hearing Brief at 84-85; 170.

[29] See Opinion and Order at 18.

[30] See Hearing Transcript at Vol. VII, p. 1933:16-19; 1781:7-10.

[31] See id. at p. 1933:20-23.

[32] See id. at p. 1933:24-1934:6.

[33] See id. at p. 1934:12-16.

[34] See id. at p. 1934:17-20.

[35] See id. at p. 1934:21-24.

[36] See id. at p. 1934:25-1935:3.

[37] See id. at p. 1935:12-15.

were classified, or how much of an industry considered in the analysis was assigned to the basic sector.[38] He does *not* know what industries were included in either the basic or non-basic sector.[39] Nor does he know that economic base theory focuses on the demand side of the economy and ignores the supply side.[40] AEP Ohio Witness Allen does *not* know if the basic sector is equivalent to the export sector or if the non-basic sector is equal to the service sector.[41] He knows *neither* which location quotients were utilized in the model employed by someone else to create the documents attached to his direct testimony *nor* any other specific elements included in the model.[42]

Simply put, the PUCO cannot conclude, based on the record evidence, that AEP Ohio Witness Allen directed *anything meaningful* related to the economic analysis attached to his testimony. That he gathered data and had discussions about various factors cannot substitute, and does not substitute, for meaningful direction of the economic analysis.[43] And given these admissions, that AEP Ohio Witness Allen may be familiar with *regulatory filings* cannot substitute, and does not substitute, for meaningful direction of the *economic analysis or the required economic expertise*.

The PUCO should grant rehearing on Assignment of Error No. 1.

[38] See id. at p. 1788:5-25.

[39] See id. at p. 1787:13-21.

[40] See id. at p. 1806:13-19.

[41] See id. at p. 1792:23-1793:4.

[42] See id. at p. 1789:5-12.

[43] And of course, AEP Ohio Witness Allen himself admits that he is neither an economist nor an expert in the economic base model. See Hearing Transcript at Vol. VII, pp. 1739-64; 2054-2060; 1787:8-11.

ASSIGNMENT OF ERROR 2: The PUCO's Opinion and Order is unreasonable and unlawful because the PUCO ruled on OCC's motion to stay without considering OCC's reply in support. As a result, the PUCO's ruling did not address the merits of the motion, departed from its previous precedent, and will harm consumers.

OCC, Appalachian Peace and Justice Network, and the Ohio Manufacturers' Association Energy Group moved the PUCO to stay these proceedings pending rulings by FERC that would inform the decision on the issues now before the PUCO.[44] As explained in the Reply in Support of the Motion to Stay, the stay requested was based on the PUCO's inherent authority to manage its docket.[45] Based on that authority, the PUCO has stayed proceedings pending rulings by FERC.[46]

The PUCO did not consider the Reply in Support, as its Opinion and Order was issued the day after it was filed.[47] Because the PUCO did not consider the Reply in Support, it erroneously departed from its previous precedent[48] staying proceedings before it pending FERC rulings in denying the Motion to Stay.

The PUCO should reconsider its ruling on the Motion to Stay. Granting the Motion to Stay would be in keeping with the PUCO's duty to safeguard the public

[44] See Motion to Stay (filed March 21, 2016) and Reply in Support (filed Marcy 30, 2016). FERC has been asked to rescind the waiver on affiliate power sales restrictions previously granted to AEP Ohio and review AEP Ohio's PPA with its affiliated generator to ensure that its rates, terms, and conditions are just and reasonable, and free from affiliate abuse. *EPSA, et al. v. AEP Generation Resources and Ohio Power Company*, FERC Case No. EL-16-33-000. If the PPA, which serves as the predicate for the PPA Rider, is unlawful, the PPA Rider is illusory. As noted herein, FERC *has* rescinded AEP Ohio's waiver and *will* review the PPA. There is no lawful PPA, a condition precedent to a PPA Rider.

[45] See Reply in Support.

[46] See Reply in Support at 2.

[47] This is confirmed by the PUCO's statement in the Opinion and Order that the Reply in Support "reiterated the arguments raised in the motion." Opinion and Order at 19. In fact, the Reply in Support cited the PUCO's own precedent staying proceedings pending a FERC ruling and emphasized the PUCO's inherent authority to manage its docket (and that it should use such authority here to protect the public interest). The Opinion and Order addressed neither. Instead, it addressed only the four-factor test that has been used to stay an order pending appeal. See Opinion and Order at 20.

[48] See Reply in Support at 2.

interest against paying unjust and unreasonable rates.[49] It would be in keeping with its previous precedent. The Motion to Stay should be granted.

The PUCO should grant rehearing on Assignment of Error No. 2.

ASSIGNMENT OF ERROR 3: The PUCO's Opinion and Order is unreasonable because it relied on the settlement test historically applied to stipulations. To protect consumers, that test should not be applied here.

In its Initial Post-Hearing Brief, OCC (and others in their initial briefs) described why the three-part test historically applied to settlements should not be applied here.[50] The PUCO initially determined that the three-part test should be applied because it "always carefully reviews all terms and conditions of the proposed stipulation, in order to determine whether the stipulation is in the public interest."[51]

That initial determination should be reconsidered. The hodgepodge nature of the Stipulation should disqualify it from being considered as a "package" under the PUCO's three-prong settlement test. For treatment as a package, a settlement should have terms that, in the context of an application, have a sufficient nexus between each other and can be lawfully and reasonably considered in the case as filed. In a case allegedly about "hedging" electric generation, there is no nexus to the various terms and issues that have shown up for the first time at case-end in a settlement. Further, because so many parties did not support material provisions of the Stipulation, there is no "package" to which the settlement test historically applied to stipulations can be applied. And in light of the

[49] See R.C. 4905.22.

[50] See OCC's Initial Post-Hearing Brief at 13-16; Post-Hearing Brief of Environmental Law & Policy Center/Environmental Defense Fund/Ohio Environmental Council at 52-54.

[51] Opinion and Order at 49. The PUCO's reliance on *Monongahela Power Co. v. PUC*, 104 Ohio St. 3d 571 (2004) is misplaced. That case dealt with evidentiary matters. It did not deal with the test under which stipulations are evaluated.

parties' asymmetrical bargaining positions in ESP cases, applying the three-part test, in this case, harms customers and is not in the public interest. It should not be used here.

A. There should be a nexus between an application and settlement terms. Otherwise, parties, potential parties, and the public are not provided notice of the matters that will be addressed by the PUCO as a result of an application.

The PUCO should not apply the settlement test to the Stipulation. The settlement is a hodgepodge (not a package) of unrelated terms, including "gimmes" to induce certain signatories to sign. These terms are tailored to the individual parties to be induced to sign, and should not be confused with benefits to customers generally or in the public interest.[52] The terms that are inducements to sign lack a reasonable nexus to the subject of the case, the PPA, and are therefore not a package.[53] They cannot be independently evaluated on their own merits. To give the Stipulation deference as a "package" would allow for terms that are unreasonable or even outrageous for consumers to be accepted by the PUCO, in the name of considering the package, without items having to individually withstand PUCO scrutiny. It should not be done. As ELPC Witness Rabago explained,

[52] See, e.g., Joint Initial Brief of Interstate Gas Supply, Inc., Direct Energy Services, LLC, and Direct Business, LLC (not even attempting to defend the Stipulation or the record, instead discussing only provisions benefitting them); Post-Hearing Brief of the Mid-Atlantic Renewable Energy Coalition (not citing the record or evaluating the Stipulation, instead discussing only provision benefiting it); Post-Hearing Brief of the Ohio Energy Group (little record support, instead clearly focusing on the Stipulation's provisions benefiting its members); Buckeye Power, Inc.'s Post-Hearing Brief (not supporting – removing itself from – those provisions of the Joint Stipulation impacting it).

[53] ELPC Witness Rabago testified that "[t]he Stipulation appears to be a deal to allow the Company to recover costs for the proposed PPA in return for the many elements of the deal unrelated to the core PPA." Direct Testimony of Karl R. Rabago (ELPC Ex. 19) filed December 28, 2015 at 4:7-8. See also *In re Duke SmartGrid Case*, Case No. 14-1051-GE-RDR (The PUCO ruled that issues that are "not contained within the intended subject matter" of the utility's application, are the subject matter of other ongoing PUCO proceedings, and contemplate programs which are, thus far, not in existence or in operation are not relevant to considering the utility's application and should not be considered under the three-part test); *In the Matter of the Application of Duke Energy Ohio to Adjust Rider DR-IM and Rider AEU for 2012 Smart Grid Costs*, Case No. 13-1141-GE-RDR, Opinion and Order at 16-17 (April 9, 2014) (same).

"the Stipulation cannot be found to be in the public interest absent a careful review of each of its terms – individually, in addition to as an interactive whole."[54]

Further, there was no notice that this case was about consumers funding renewable energy, a mass roll-out of the smart grid, subsidies for members of an association of weatherization providers, and so on. Therefore, whether the PUCO carefully reviews all of the Stipulation's provisions to see if they are in the public interest does not address the problem. The *public*, and other potential parties, are *deprived of notice* of the "handouts" and, therefore, the opportunity to intervene or otherwise participate meaningfully in the process. The PUCO is therefore deprived of their input.[55]

B. Because so many parties did not support material provisions of the Stipulation, there is no package to apply the settlement test to.

Various signatory parties opted-out of material provisions of the Stipulation.[56] The Stipulation thus does not present the PUCO with a "package" to which it can apply the three-part test. The settlement terms that are not endorsed by signatory parties must be excluded from the package analyzed. Or the PUCO must sift through the Stipulation to identify the multiple packages presented (and it did not do that here). In either case, the three-part test in this case cannot adequately safeguard the public interest. It should not be applied here.

[54] See Direct Testimony of Karl R. Rabago (ELPC Ex. 19) filed December 28, 2015 at 4.

[55] See R.C. 4928.141(B) and O.A.C. 4901:1-35-04.

[56] See OCC's Initial Post-Hearing Brief at 37-42.

C. The settlement test historically applied to stipulations is no longer workable or fair because the electric security plan statute, R.C. 4928.143, vests electric utilities with superior bargaining power. Under the statute (R.C. 4928.143(C)(2)(a), they can reject any modifications to an ESP.

In evaluating settlements in ESP cases, the PUCO should recognize the parties' asymmetrical bargaining positions, where the utility possesses superior bargaining power. As Commissioner Roberto noted in FirstEnergy's initial ESP case filed in 2008:

> When parties are capable, knowledgeable and stand equal before the Commission, a stipulation is a valuable indicator of the parties' general satisfaction that the jointly recommended result will meet private or collective needs. It is not a substitute, however, for the Commission's judgment as to the public interest. The Commission is obligated to exercise independent judgment based on the statutes that it has been entrusted to implement, the record before it, and its specialized expertise and discretion.
>
> In the case of an ESP, the balance of power created by an electric distribution utility's authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore. I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission. The Commission must consider whether an agreed-upon stipulation arising under an ESP represents what the parties truly view to be in their best interest – or simply the best that they can hope to achieve when one party has the singular authority to reject not only any and all modifications proffered by the other parties but the Commission's independent judgment as to what is just and reasonable. In light of the Commission's fundamental lack of authority in the context of an ESP application to serve as the binding arbiter of what is reasonable, a party's willingness to agree with an electric distribution utility application cannot be afforded the same weight due as when an agreement arises within the context of other regulatory frameworks. As such, the Commission must review carefully all terms and conditions of this stipulation.[57]

[57] *In re FirstEnergy's 2008 ESP Case*, Case No. 08-935-EL-SSO, Second Opinion and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part (Mar. 25, 2009) at 1-2 (citations omitted).

Commissioners Centolella and Lemmie expressed similar concerns.[58] As reflected in Commissioner Roberto's opinion, the bargaining position of an electric distribution utility relative to other parties in an ESP proceeding is strengthened by the ability of the electric distribution utility to reject the results from a fully litigated ESP proceeding. The utility's advantage is further increased by the utility's ability to offer inducements, including inducements funded by other people's money, to gain signatures.

Utilities' superior bargaining position strikes at the heart of the three-prong test. It renders the test meaningless. It should not be applied in ESP proceedings.

The PUCO should grant rehearing on Assignment of Error No. 3.

ASSIGNMENT OF ERROR 4: The PUCO's Opinion and Order is unreasonable and unlawful because the Stipulation was not the product of serious bargaining among knowledgeable parties. The Stipulation is so vague, ambiguous, and uncertain that it could not have been the product of serious bargaining among knowledgeable parties.

The PUCO should reconsider its conclusion that the Stipulation was the product of serious bargaining among knowledgeable parties because it is so vague and ambiguous. The Stipulation is full of provisions without any information about their costs or rate impacts. OCC argued in its briefs that the Stipulation fails the first prong of the settlement test (serious bargaining among knowledgeable parties) because it includes numerous provisions for which there is no information regarding costs or rate impacts.[59] The PUCO said that the lack of such information is unimportant, explaining that, "it is

[58] See id., Opinion of Commissioners Paul A. Centolella and Valerie A. Lemmie, Concurring (Mar. 25, 2009) at 2 (the ability of an electric distribution utility to withdraw (and its prior withdrawal)" need to be taken into account when considering the weight to be given to this stipulation" and "The Commission must evaluate whether the stipulation represents a balanced and appropriate resolution of issues.").

[59] OCC's Initial Post-Hearing Brief at 53-54.

not necessary that specific details of compliance, costs, and rate impacts for every commitment AEP Ohio agreed to undertake in the stipulation be known, at this time, for the stipulation to comply with the first prong of the test."[60]

The PUCO misunderstood OCC's argument and, therefore, should reconsider. The OCC did not argue that AEP Ohio needs to show "specific details of compliance, costs, and rate impacts for every commitment" in the Stipulation. OCC's argument was that AEP Ohio provided *no* details regarding its proposals. Whatever the appropriate standard, AEP Ohio does not meet it. For example, OCC Witness Dormady's testimony listed at least 17 substantive Stipulation provisions that had varying degrees of uncertainty.[61] This uncertainty comes from the fact that, for most commitments, AEP Ohio performed "no analyses, [either] preliminary or technical" to help determine costs or rate impacts, did not show that some commitments would even be "technically feasible", and did zero "economic or cost-benefit analyses" for others.[62] The PUCO cannot approve a stipulation where, as here, there is absolutely no information about its provisions.

The PUCO should grant rehearing on Assignment of Error No. 4.

[60] Opinion and Order at 52.

[61] See Direct Testimony of OCC Witness Noah C. Dormady (OCC Ex. 36) filed December 28, 2015 at 17-20.

[62] OCC's Initial Post-Hearing Brief at 53.

ASSIGNMENT OF ERROR 5: The PUCO's Opinion and Order is unreasonable and unlawful because the Stipulation is inconsistent with important regulatory principles and practices. The Stipulation, as a contract like any other, must be sufficiently clear and certain so that it can be enforced as a matter of important regulatory principles and practice.

Usually, extrinsic evidence can be used to help interpret an ambiguous contract's meaning.[63] But the Stipulation is so vague, ambiguous, and uncertain that it cannot be enforced.[64] Further, the PUCO's blanket application of the settlement discussion confidentiality privilege means that there is no extrinsic evidence that will be available to help interpret the Stipulation. The Stipulation will invite endless litigation and is, ultimately, unenforceable. More is required of a Stipulation as a matter of important regulatory principles and practice.

A. The Stipulation is full of provisions setting standards by which signatory parties' conduct will be judged for compliance. The standards are so vague, ambiguous, and uncertain that they cannot be enforced.

The Stipulation's uncertainty is compounded because it lays out impractical standards for evaluating the actions required of AEP Ohio.[65] For example, AEP Ohio

[63] *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 129 Ohio St. 3d 397, 409 (2011) (noting that "[w]hen circumstances surrounding the agreement invest the language of the contract with a special meaning, extrinsic evidence can be considered in an effort to give effect to the parties' intention); *In the Matter of the Complaints of ICG Telecom Group, Inc., MCImetro Access Transmission Services, Inc., and Time Warner Telecom of Ohio, L.P., Complainants, v. Ameritech Ohio, Respondent; Regarding the Payment of Reciprocal Compensation*, Case No. 97-1557-TP-CSS Opinion, 1999 Ohio PUC LEXIS 69, *16 -20 (May 5, 1999) (rejecting an argument that the PUCO was "foreclosed from considering extrinsic evidence outside of the four corners of the agreements" in order to interpret the terms of the agreement). The Stipulation, as a settlement agreement, is a contract like any other. See, e.g., In re All Kelley & Ferraro Asbestos Cases, 104 Ohio St. 3d 605, 613 (2004).

[64] See *Patton v. Alessi*, 42 Ohio App. 91, 93(Muskingum 1932) (holding that a "contract was so vague and indefinite that it could not be enforced"); *7 Med Sys., LLC v. Open Mri of Steubenville*, 2012 Ohio 2009, P39 (Jefferson 2012) ("A contract is illusory and unenforceable where one party's obligations are so vague and indefinite that the other party is left to guess at his obligation."); *Militiev v. McGee*, 2010 Ohio 6481, P33 (Cuyahoga 2010) (summary judgment appropriate where provision was ambiguous and indefinite, thereby rendering the contract unenforceable).

[65] OCC's Initial Post-Hearing Brief at 41-42.

must advocate before PJM "in good faith"[66] and must "work with" the Ohio Hospital Association on an annual energy efficiency program.[67] Each of the Stipulation's amorphous standards invites future disputes over what they actually require. Such an invitation can neither be the product of serious bargaining among knowledgeable parties nor consistent with regulatory principles and practice.[68]

B. So many parties opted-out of so many provisions that what the Stipulation is cannot even be determined.

OCC argued that the PUCO could not adopt the Stipulation because it is littered with footnotes that carved out numerous parties from various portions of the Stipulation's terms.[69] These carve outs make it impossible to determine the four-corners of the Stipulation, rendering unidentifiable the "package" of "benefits" that the PUCO was asked to approve. The PUCO did not address this argument in its Opinion and Order. It was required to do so.[70] OCC requests that the PUCO reconsider and address this argument on rehearing. Upon doing so, it can come to but one conclusion: the Stipulation should be rejected.

C. The Stipulation's vagueness, ambiguity, and uncertainty cannot be cleared up by extrinsic evidence given the breadth with which the settlement discussion confidentiality privilege is applied.

As described above, the Stipulation is vague and ambiguous. Under such circumstances, it would not be unusual to look to extrinsic evidence to help interpret its

[66] See Joint Ex. 1 at p. 9, para. B1.

[67] See id. at p. 13, para. D2; *see also id.* at p. 14, para. D2b ("work together" to develop and automate Energy Star benchmarking); *id.* at para. D2d ("prioritize" circuits with OHA members for Volt-Var Optimization deployments).

[68] See note 64, supra.

[69] OCC's Initial Post-Hearing Brief at 37-42.

[70] See, e.g., *In re: Comm. Rev. of Capacity Charges of Ohio Power Co.*, Slip Opinion No. 2016-Ohio-1607, ¶55 (finding that the PUCO erred because its order contained no record citations relevant to the pertinent issue, despite claims that it had reviewed all of the testimony and the PUCO failed to address arguments raised by the appellant).

meaning.[71] But given the breadth with which the PUCO is applying the settlement confidentiality privilege, extrinsic evidence is unavailable. The Stipulation is a riddle, wrapped in a mystery, inside of an enigma. The PUCO's blanket application of the settlement discussion confidentiality privilege essentially throws away the key for any hope to unlocking its meaning. No extrinsic evidence about its meaning can be discovered or admitted. Given its vagueness and ambiguity, it can therefore never be adequately enforced. The Stipulation could not conceivably have been the product of serious bargaining among knowledgeable parties or be consistent with regulatory principles and practice.

The PUCO should grant rehearing on Assignment of Error No. 5.

ASSIGNMENT OF ERROR 6: The PUCO's Opinion and Order is unreasonable and unlawful in that the PUCO found OCC Witness Wilson's PPA Rider cost forecast flawed without considering record evidence regarding its reliability.

The PUCO found in its Opinion and Order that OCC Witness Wilson's cost projections for the PPA Rider are "fundamentally flawed for a number of reasons."[72] It did so, and could only have done so, by ignoring the record evidence demonstrating the projections' reliability. But the PUCO must make findings of fact based on the evidence in the record before it.[73] Upon consideration of the full record, the PUCO should reconsider its finding and conclude that OCC Witness Wilson's cost projections are

[71] *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 129 Ohio St. 3d 397, 409 (2011) (noting that "[w]hen circumstances surrounding the agreement invest the language of the contract with a special meaning, extrinsic evidence can be considered in an effort to give effect to the parties' intention); *In the Matter of the Complaints of ICG Telecom Group, Inc., MCImetro Access Transmission Services, Inc., and Time Warner Telecom of Ohio, L.P., Complainants, v. Ameritech Ohio, Respondent; Regarding the Payment of Reciprocal Compensation*, Case No. 97-1557-TP-CSS Opinion, 1999 Ohio PUC LEXIS 69, *16 -20 (May 5, 1999) (rejecting an argument that the PUCO was "foreclosed from considering extrinsic evidence outside of the four corners of the agreements" in order to interpret the terms of the agreement).

[72] See Opinion and Order at 79.

[73] R.C. 4903.09.

sound. Based on that conclusion, the PUCO should adopt OCC Witness Wilson's cost projections.

A. The record evidence shows that futures prices represent economic principles of demand, supply, and the resulting price.

Without citation to recorded evidence, the PUCO asserted that futures prices are not forecasts of future spot market prices.[74] The assertion is wrong based on the record evidence. Futures prices represent economic principles of demand, supply, and the resulting price. OCC Witness Wilson explained that futures prices "reflect a consensus of market participants' expectations of future prices, reflecting their expectations and forecasts of supply, demand and price."[75] Although market participants pursue a range of objectives through futures transactions, "their hedging actions will reflect and represent their expectations and forecasts of prices in the coming months and years, *because the futures contract is simply an alternative to paying those prices.*"[76]

B. The record evidence shows that there is sufficient liquidity in electric energy forwards.

OCC Witness Wilson decided to use the AEP-Dayton Hub day-ahead prices – "AEP-Dayton Hub day-ahead were the right prices to use for [his] analysis."[77] There has been no challenge to the propriety of OCC Witness Wilson's choice. The PUCO's questioning the level of liquidity is belied by the fact that there are multiple exchanges on which futures are traded, additional contracts for the real-time market with large volume and similar prices to those used by OCC Witness Wilson, and other hubs geographically

[74] Opinion and Order at 79.

[75] Supplemental Testimony of James F. Wilson (OCC Ex. 34) filed December 28, 2015 at 11:14-16.

[76] Id. at 11:117-12:2 (italics added).

[77] See Hearing Transcript at Vol. XV, p. 3815:6-10.

close and well interconnected to the electricity grid.[78] So in concluding that futures markets lack liquidity, the PUCO inappropriately looked at "only a small part of a much larger picture."[79] The PUCO erred in this regard.

C. Parties to futures transactions are concerned with the actual future price of energy and do account for factors such as future carbon emission regulations.

OCC Witness Wilson explained that "[b]oth parties to a futures transaction have engaged in the transaction precisely because they are concerned about future price levels."[80] This is reflected in the fact that "[t]he transaction allows them to protect themselves from undesirable price movements, at least for the portion of their sales or purchases covered by the transaction."[81] Parties who engage in future transactions "likely evaluated future market conditions very carefully before entering into the transaction."[82] Even so-called "financial participants" in a futures transaction are focused on the actual future price of energy. OCC Witness Wilson pointed out that financial participants engage in future transaction because they believe that prices will move in one direction or the other. "[T]hey too are taking a position based on their evaluation of future market conditions."[83]

Regarding whether futures prices account for factors such as future carbon emissions, it must first be recognized that it is not possible for AEP Ohio to conclude

[78] See id. at p. 3814:4-17.

[79] See id. at 3814:2-19. Importantly, OCC Witness Wilson checked the prices from these other sources in connection with his analysis. See id. at 3815:6-10. He found them to be "very close." See id.

[80] Supplemental Testimony of James F. Wilson (OCC Ex. 34) filed December 28, 2015 at 12:9-12 (emphasis in original).

[81] Id.

[82] Id. at 12:12-14.

[83] Id. at 12:16-18.

whether future prices do or do not reflect a particular anticipated policy change, like the Clean Power Plan.[84] Such information is personal to each participant in a futures transaction. That is why there was no evidence, just AEP Ohio's baseless claim, that futures market participants would ignore the potential impact of the Clean Power Plan or other CO2 policy in their decisions to engage in transactions at certain prices.[85] On the other hand, OCC Witness Wilson explained that futures prices reflect market participants' expectations of future prices based on all relevant supply and demand factors, including CO2 policy, if they consider it relevant.[86] Accordingly, it would be completely irrational, and potentially disastrous, for futures market participants to ignore such concerns.

D. OCC Witness Wilson did not concede a lack of liquidity after October 2020. Instead, for the time after October 2020, he accepted the pattern reflected in AEP Ohio's energy price forecast and then scaled AEP Ohio's energy prices to match, on average, forward prices.

OCC Witness Wilson did not concede a lack of liquidity in futures markets after October 2020. Instead, he "accepted the pattern reflected in AEP Ohio's energy price forecast[.]"[87] He then *scaled* AEP Ohio's energy prices to match, on average, forward prices.[88] So for the years 2020-2024 OCC Witness Wilson *still used* AEP Ohio's forecasted energy prices, but adjusted them for his analysis based on the ratio,[89] or relationship,[90] between 2019-2020 forward prices and AEP Ohio's 2019-2020 prices –

[84] Id. at 13:9-11.

[85] Id. at 13:14-16.

[86] Id. at 13:17-20.

[87] See Direct Testimony of James F. Wilson (OCC Ex. 15) filed September 11, 2015 at 54:4-12.

[88] See id. at 51:4-52:5.

[89] See Hearing Transcript at Vol. XV, p. 3817:23-3818:3.

[90] See id. at p. 3819:10-19.

the best evidence available.[91]

E. The record evidence shows that OCC Witness Wilson's forecasts were subject to the most rigorous "sanity check" available – the "consensus of market participants."

The foregoing demonstrates the reliability of OCC Witness Wilson's use of futures prices. The PUCO's finding that OCC Witness Wilson's projections are "fundamentally flawed" simply cannot stand-up in light of the record evidence.

Were there any doubt remaining about the reliability of OCC Witness Wilson's use of futures prices, it is put to rest by the "sanity check" to which OCC Witness Wilson's use of futures prices was subject. That sanity check is the best one possible – the "consensus of market participants."[92]

The PUCO should grant rehearing on Assignment of Error No. 6.

ASSIGNMENT OF ERROR 7: The PUCO's Opinion and Order regarding the PPA Rider Rate Impact Mechanism was unreasonable. To protect consumers, the PUCO should modify its Opinion and Order to confirm that the customer rate increases through May 31, 2018 are capped at five percent of the generation component of the June 1, 2015 SSO rate plan bill. Also to protect consumers, the PUCO should modify its Opinion and Order to confirm that any lost revenue due to the PPA Rider Rate Impact Mechanism sought to be recovered in a subsequent quarter is subject to the five percent cap. The PUCO should also modify its Opinion and Order to unambiguously confirm, in consumers' interest, that AEP Ohio cannot charge customers for any revenue reduction resulting from the implementation of the PPA Rider Rate Impact Mechanism after May 31, 2018.

The PUCO's Opinion and Order creates a "rate impact mechanism" that limits customer rate increases to five percent of an individual customer's bill for the remainder

[91] See id. at p. 3819:4-9.

[92] See Redacted Public Version of Hearing Transcript at Vol. XXII, p. 5521:12-19.

of the ESP period, June 1, 2016 through May 31, 2018.[93] But the PUCO's Order is unclear in a number of respects regarding this mechanism, and so OCC seeks rehearing.

Though the Opinion and Order specifies that the rate impact mechanism's five percent cap is on an individual customer-by-customer basis,[94] it is not clear whether the five percent cap applies to five percent of the *total* monthly bill or the *total generation* piece of the bill. Because AEP Ohio's PPA Rider is part of its ESP under R.C. 4928.143, the PPA Rider costs should be capped at five percent of the generation costs. The PPA Rider is associated with the generation services portion of the customer's bill. The PUCO should modify its Opinion and Order accordingly.

The Opinion and Order goes on to state that "[a]ny revenue reduction resulting from the implementation of the customer rate impact mechanism shall be reflected in the calculation of the PPA rider's over/under-recovery balance for recovery in AEP Ohio's next quarterly update filing."[95] This provision could be read to say that any revenue reduction that AEP Ohio does not recover in the first two years of the PPA Rider due to the rate impact mechanism can simply be recovered after May 31, 2018. Such a result was obviously not the PUCO's intent, otherwise it would not have described the customer rate impact mechanism as a "limit" on rate increases but as a temporary limit on the timing of rate increases. If AEP Ohio can collect lost revenue from June 1, 2016 through May 31, 2018 beginning June 1, 2018, the customer rate impact mechanism would be no limit at all. Accordingly, the PUCO should modify its Opinion and Order so that AEP

[93] Opinion and Order at 81.

[94] Id.

[95] Id. at 82.

Ohio cannot collect any revenue reduction due to the rate impact mechanism after May 31, 2018.

Further, the Opinion and Order is unclear regarding whether reduced revenue reflected in the next calculation of the PPA Rider's over/under-recovery is also subject to the rate impact mechanism's five percent cap. The Opinion and Order could be read to permit, for example, collection of reduced revenue from a given quarter (and, potentially, accumulation of reduced revenue from multiple quarters) in subsequent quarters without being subject to the five percent cap. Once again, such a result was obviously not the PUCO's intent, otherwise it would not have described the rate impact mechanism as a five percent limit on rate impacts. Were AEP Ohio permitted to charge customers for reduced revenue in a given quarter (and accumulate reduced revenue over multiple quarters) without being subject to the five percent limit, there would be no five percent limit at all. Accordingly, the PUCO should modify its Opinion and Order so that reduced revenue sought to be included in the calculation of the PPA Rider's over/under-recovery balance for recovery in AEP Ohio's next quarterly update filing is subject to the rate impact mechanism's five percent cap.

The PUCO should grant rehearing on Assignment of Error No. 7.

ASSIGNMENT OF ERROR 8: The PUCO's Opinion and Order is unreasonable and unlawful because the PUCO misapplied the settlement test (if it could be applied at all, which it cannot). It did not determine if the Stipulation, as a package (if it can be considered one, which it cannot), benefits ratepayers and the public interest.

The PUCO misapplied the settlement test. The Stipulation's purported benefits do not benefit customers or the public interest. The Stipulation is not necessary to achieve the purported benefits (facilitating fuel diversity, as the

market is diversifying itself), the purported benefits are contingent and may not come to fruition (future applications may not be approved), and their costs are unknown (renewable energy provisions). Reducing the return on equity and shortening the PPA's length (two purported benefits found by the PUCO) are "benefits" only to the degree that the Stipulation is compared to AEP Ohio's application. That is not the standard. Public interest is.

A. The Stipulation is not necessary, its purported benefits are contingent and may not come to fruition, and their costs are unknown.

The purported benefits that the PUCO included in its analysis are not really "benefits" at all. The Stipulation, and the PPA Units it subsidizes, is not necessary to facilitate fuel diversity. Approving the PPAs would, at best, maintain the status quo that is currently dominated by coal-fired generation.[96] The most efficient mechanism to facilitate fuel diversity is a well-functioning market – forces that were working well before this Opinion and Order. Indeed, Carrol County Energy, the Middletown Energy Center, and the Oregon Clean Energy Center, facilities currently being constructed, are prime examples of efficient market forces at work.[97] The PUCO's approval of the Stipulation, and the PPA Rider it authorizes, harms the public interest by negatively impacting such market forces that provide fuel diversity in Ohio and PJM.[98] And in doing so the PUCO fails to carry out its duty under R.C. 4928.02(I) to protect customers from market deficiencies and market power.

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[96] OCC's Initial Post-Hearing Brief at 78-79.

[97] See Hearing Transcript at Vol. VIII, p. 2096:6-14 (Carrol County Energy); p. 2099:12-20 and 2100:21-25 (Middletown Energy Center); p. 2103:7-18 (Oregon Clean Energy Center). Proposed new generation arose even during the hearing in this matter. See id. at 2145:8-19.

[98] See id. at p. 2122:18-21. Conveniently, AEP Ohio did not consider this new generation for purposes of this proceeding. See id. at p. 2139:5-12. Nor, conveniently, did AEP Ohio consider the effects of increased natural gas production in Ohio on bringing new generation to Ohio. See id. at 2136:6-11 and 2137:22-2138:1.

Further, the public interest and customers do not benefit from the various and sundry applications that AEP Ohio has committed to file in the future. The PUCO found "value for customers in AEP Ohio's commitment to bring these proposals before the [PUCO] for further consideration."[99] Unfortunately for Ohioans, no such value exists. There are scant details on what exactly AEP Ohio will include in these future applications. And the PUCO stated explicitly that its "recognition of the benefits of the proposals should not be construed as a predetermination of the outcome of those future proceedings, which will be decided based upon the record in each case."[100] So a real possibility exists that these future applications will either result in (1) increased rates for consumers if approved or (2) a waste of substantial public, company, and third-party resources on analyzing and litigating these filings if the PUCO ultimately rejects them. Customers and the public interest are harmed under both outcomes.

The Stipulation "provides for a commitment to procure 500 MW of wind capacity and 400 MW of solar capacity."[101] No analysis or estimate of costs was done to support this portion of the Stipulation. The PUCO has essentially given AEP Ohio a blank check that will be drawn from Ohioans' pockets with no benefit to them.

B. Reducing the return on equity and shortening the PPA's length are "benefits" only to the degree that the stipulation is compared to AEP Ohio's Amended Application. That is not the standard. The standard is whether the Stipulation, standing on its own, benefits customers and the public interest.

The PUCO's Opinion and Order identifies certain purported benefits by erroneously comparing the Stipulation to AEP Ohio's Amended Application.

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[99] Opinion and Order at 84.

[100] Id.

[101] Id. at 83.

Specifically, the PUCO noted that, compared to AEP Ohio's Amended Application, "the stipulation reduces the ROE for the affiliate PPA from an initial variable rate of 11.24 percent (with a range up to 15.9 percent) to a fixed 10.38 percent, resulting in savings of $86 million, and shortens the term of the PPA to approximately 8 years."[102] That the Stipulation is more "beneficial" than the Amended Application is not the standard. This is wrong. The standard is whether the Stipulation is, itself, beneficial to customers and the public interest.[103]

The PUCO should grant rehearing on Assignment of Error No. 8.

ASSIGNMENT OF ERROR 9: The PUCO evaluated whether the Stipulation benefits customers and the public interest based on the factors discussed in the Opinion and Order in AEP Ohio's ESP III case. That was unlawful because the ESP III Opinion and Order was not a final appealable order and treating it as such deprives parties of their due process and appeal rights.

In its Opinion and Order here, the PUCO relied on its Opinion and Order from AEP Ohio's recent electric security plan case[104] for authority to establish the PPA Rider and the factors under which the rider will be evaluated.[105] Such reliance is unlawful. The Ohio Supreme Court has previously stated its great concern with administrative agencies wielding power in the absence of procedural integrity that satisfies due process

[102] Id. at 84.

[103] If the PUCO considers "benefits" that arise from comparing the Stipulation to the Amended Application, then it must also consider the flip-side of the same coin – harm that would result from the same comparison. OCC showed at hearing and in its briefs that the Stipulation harms consumers. See, e.g., Initial Post-Hearing Brief at 59-69. The PUCO needs to look no further than the testimony of AEP Ohio Witness Allen for confirmation. See Direct Testimony of William A. Allen (AEP Ohio Ex. 52) (filed December 14, 2015 at 14 (cost to typical residential customer using 1,000 kWh per month will be a $.62 charge). The PUCO did not make this analysis.

[104] Case No. 13-2385-EL-SSO ("ESP III").

[105] See generally Opinion and Order.

requirements.[106] The PUCO's prior orders do not support its actions included in the Order in this proceeding.

There is no final order in ESP III. Parties, including OCC, have filed applications for rehearing and those applications have not been substantively ruled upon. The PUCO should therefore reconsider its reliance on the ESP III Opinion and Order. It cannot rely on the ESP III Opinion and Order until it is a final appealable order and represents something more than an "interim" order that does not reflect the "ultimate" opinion of the PUCO.[107]

The PUCO itself has acknowledged that there is no final appealable order in ESP III and that the matter is still pending at the PUCO.[108] The ESP III order is not legal precedent. Relying on it deprives parties of their appeal rights and due process.[109]

In fact, the PUCO has skirted Supreme Court review of its Opinion and Order in ESP III by continually delaying issuing a final rehearing entry. OCC and other parties in ESP III filed applications for rehearing, pointing out errors and asking the PUCO to grant rehearing on many issues relating to the PPA Rider.[110] The PUCO granted OCC's (and others') applications for rehearing to allow more time to consider the issues raised in the

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[106] See *State ex rel. Ormet Corp. v. Industrial Com. of Ohio*, 54 Ohio St. 3d 102, 103 (1990) (quotations and citation omitted).

[107] See PUCO's Motion to Dismiss in Supreme Court Case No. 2015-1225 at 4, 6

[108] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code in the Form of an Electric Security Plan*, Sup. Ct. 2015-1225, Motion to Dismiss at 3.

[109] See *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St. 3d 80, syllabus para. 1 (1988) ("The right to file an appeal, as it is defined in the Appellate Rules, is a property interest and a litigant may not be deprived of that interest without due process of law.").

[110] ESP III, OCC Application for Rehearing (March 27, 2015); IEU, OPAE, APJM, IGS, OMAEG, Constellation, Environmental Advocates, and RESA Applications for Rehearing (March 27, 2015).

applications.[111] Later, the PUCO issued a Second Entry on Rehearing and stated that it "will defer ruling on the assignments of error related to the PPA at this time."[112] It further stated:

> Given that R.C. 4903.10 and 4903.11 permit any party to file an application for rehearing of any order and appeal the order of the Commission within 60 days, no party's right to appeal will be adversely affected by our decision to defer ruling on these assignments of error.[113]

OCC and other parties then applied for rehearing of the PUCO's Second Entry on Rehearing and the PUCO, again, in its Third Entry on Rehearing, granted rehearing to allow further consideration on the matter raised in the applications for rehearing.[114]

IEU Ohio, OCC, and ELPC (jointly with OEC and EDF) filed appeals at the Ohio Supreme Court.[115] In response, the PUCO filed a motion to dismiss the appeals. It asserted: "[N]o order has been issued on those applications [for rehearing]. Thus, the matter is still pending at the Commission."[116] The Ohio Supreme Court dismissed all three appeals.

Since the Third Entry on Rehearing, no subsequent entry has been issued to resolve the pending issues on rehearing. The PUCO has done exactly what it said that it would not do – adversely affect, by it decision (to defer ruling), parties' rights to appeal.[117] It is improper to rely on the ESP III Opinion and Order as legal precedent. The

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[111] Id. at Entry on Rehearing (April 22, 2015).

[112] Id. at Second Entry on Rehearing at ¶ 10 (May 28, 2015).

[113] Id.

[114] Id. Third Entry on Rehearing (July 22, 2015).

[115] Id. at IEU-Ohio, OCC, and ELPC Notices of Appeal (Sept. 27, 2016).

[116] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code in the Form of an Electric Security Plan,* Sup. Ct. 2015-1225, Motion to Dismiss at 4 (Sept. 4, 2015).

[117] ESP III, Second Entry on Rehearing at ¶ 10 (May 28, 2015).

PUCO cannot simply treat its prior orders as precedent where, as here, it knows that adverse parties have been denied their due process rights to challenge them.

The PUCO should grant rehearing on Assignment of Error No. 9.

ASSIGNMENT OF ERROR 10: The PUCO's decision that AEP Ohio met its burden under the factors discussed in the ESP III Opinion and Order is unreasonable as against the manifest weight of the evidence.

The PUCO's analysis of the four factors established in ESP III is scant. It consists almost entirely of what AEP Ohio's testimony "reflects" or "addressed."[118] It does not evaluate, let alone meaningfully evaluate, the evidentiary record. As but one example, the PUCO says that AEP Ohio's testimony "reflects" a financial need.[119] In arriving at that statement, it did not evaluate the fact that AEP's assets increased in value by $3 billion from 2014 through 2015[120] or that AEP has consistently represented that its generation fleet, including the PPA Units, is cost-competitive and well-positioned to compete in the competitive market.[121] Further, although the PUCO in its ESP III Opinion and Order invited parties to suggest other factors that it should consider,[122] it did not consider *any* of the factors necessary for consumer protection suggested by OCC here.[123]

The Opinion and Order is unreasonable as against the manifest weight of the evidence, violating R.C. 4903.09. Rehearing should be granted on Assignment of Error No. 10.

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[118] Opinion and Order at 86-87.

[119] See id. at 86.

[120] See, e.g., Hearing Transcript at Vol. I, p. 195:1-4.

[121] See OCC Exs. 3, 5-7 (admitted at Hearing Transcript Vol. II, p. 365).

[122] See ESP III Opinion and Order at 25.

[123] See Opinion and Order.

ASSIGNMENT OF ERROR 11: The PUCO's Opinion and Order is unreasonable and should be modified so that charges under the PPA Rider are subject to refund.

A. In light of the pending FERC case and potential rule changes, the public interest and fundamental fairness necessitate that the PPA Rider be subject to refund.

The PUCO is well aware that FERC will review the lawfulness of the PPA underlying the PPA Rider.[124] It is also well aware that PJM and FERC may address the threat posed by the PPA Rider through market rule changes.[125] Regarding the former, FERC made clear that "no sales may be made with respect to the Affiliate PPA unless and until [FERC] approves the [PPA.]"[126] Accordingly, no charges can be passed onto consumers through the PPA Rider.[127] Regarding the latter, a change in the market rules could, in the words of Stipulation-signer Ohio Energy Group, "dramatically raise the level of costs collected [from customers] through the PPA Rider."[128] That is why the PUCO expressly reserved the right to reevaluate the PPA Rider if the market rules change.[129]

With notice of potentially fundamental change to the environment in which AEP Ohio would charge customers under the PPA Rider, and because it has passed on

[124] See, e.g., Opinion and Order at 18-20; *Electric Power Supply Association, et al. v. AEP Generation Resources, Inc., et. al*, Docket No. EL16-33-000 Order Granting Complaint (April 27, 2016).

[125] See Opinion and Order at 60; 90.

[126] See *Electric Power Supply Association, et al. v. AEP Generation Resources, Inc., et. al*, Docket No. EL16-33-000 Order Granting Complaint at 19, n. 85 (April 27, 2016).

[127] Because a lawful PPA is a condition precedent to AEP Ohio's PPA Rider proposal, and there is no lawful PPA, this case should be dismissed.

[128] Ohio Energy Group Post-Hearing Brief at 20.

[129] See Opinion and Order at 90.

opportunities to wait and see if (and how) such changes play out,[130] the PUCO should make the PPA Rider subject to refund in the public interest and fundamental fairness.

The PUCO has, in the past, ordered utility rates to be subject to refund, and the Ohio Supreme Court has approved such measures. In 1983, for example, the PUCO determined that a portion of the allowance related to Columbus & Southern Ohio Electric Company's construction work in progress for the Zimmer plant would be collected subject to refund to customers.[131] After the PUCO's action was upheld on appeal,[132] the PUCO ordered the utility to refund approximately $4.5 million to its customers.[133] The PUCO ordered the collection to be subject to refund in order to protect customers in the event of a later decision that the utility was collecting more from customers than warranted by law, rule, or reason.

A more recent example of the PUCO collecting rates subject to refund was in the proceeding concerning the Ohio Supreme Court's remand of AEP Ohio's first electric security plan ("AEP ESP I"). In the AEP ESP I Appeal, the Court determined that the provider of last resort ("POLR") rates approved in the AEP ESP I Order were not supported by record evidence, and remanded that issue to the PUCO for further consideration.[134] After the Court remanded the POLR issue (and the environmental carrying charges) to the PUCO, OCC and others requested that the PUCO either stay the

[130] See, e.g., Motion to Stay of OCC, Ohio Manufacturers' Association Energy Group, and Appalachian Peace and Justice Network.

[131] *In re Columbus & Southern Ohio Electric Co.*, Case No. 81-1058-EL-AIR, Entry (November 17, 1982).

[132] *Columbus & Southern Ohio Electric Co. v. Pub. Util. Comm.*, 10 Ohio St.3d 12 (1984).

[133] *In the Matter of the Application of Columbus & Southern Ohio Electric Company for Authority to Amend and Increase Certain of Its Rates and Charges for Electric Service, Amend Certain Terms and Conditions of Service and Revise its Depreciation Accrual Rates and Reserves*, Case No. 81-1058-EL-AIR, Order on Rehearing (May 1, 1984).

[134] *In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d 512, 518 (2011).

collections of the POLR charge or collect the charge subject to refund.[135] Though the PUCO first directed AEP Ohio to remove the rates from tariffs,[136] it subsequently ordered the charges collected subject to refund.[137]

The PUCO should protect consumers in this proceeding and require that any collections under the PPA Rider be collected subject to refund.

B. Questions surrounding the PUCO's jurisdiction mean that the PPA Rider should be subject to refund.

The PUCO is well-aware that its jurisdiction regarding the PPA Rider has been repeatedly called into question.[138] It has refused to decide the jurisdictional question.[139] If a court of competent jurisdiction finds that the PUCO had no jurisdiction to authorize the PPA Rider, customers should be refunded any money that they were charged under the PPA Rider.[140] The public interest should not be sacrificed by allowing AEP Ohio to charge customers under a rider that the PUCO did not have jurisdiction to authorize in the first place. This is particularly so because the PUCO has declined to address the jurisdictional issue.

The PUCO should grant rehearing on Assignment of Error No. 11.

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[135] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Asset*, Case No. 08-917-EL-SSO, Motion (April 26, 2012).

[136] Id., Entry (May 4, 2012).

[137] Id., Entry (May 25, 2012).

[138] See, e.g., Opinion and Order at 102-03.

[139] See, e.g., id.

[140] The United States Supreme Court's decision in *Hughes v. Talen Energy Marketing*, Case No. 14-614 Slip Op., finding similar state programs preempted, and FERC's decision in *Electric Power Supply Association*, in which FERC expressed grave concern with AEP Ohio's proposal's effect on wholesale markets, makes it nearly certain that AEP Ohio's proposal will not pass muster under federal law.

ASSIGNMENT OF ERROR 12: The PUCO's Opinion and Order is unreasonable and unlawful regarding PUCO oversight of bilateral contracts. The PUCO has no jurisdiction to review bilateral contracts between it and its affiliates. Further, the PUCO should modify its Opinion and Order so that any bilateral contract (not just bilateral contracts between AEP Ohio and its affiliates, if the PUCO attempts to assert jurisdiction over such contracts) involving the PPA Units are subject to stringent PUCO review. Such modification is necessary to protect consumers.

R.C. 4928.02(H) provides that Ohio's state policy is 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. . . ." R.C. 4928.02(I) establishes that, as a matter of state policy, the PUCO must ensure customers are protected from market deficiencies and market power.

The PPA Rider incents AEP Ohio to breach these statutes by entering into bilateral contracts with an affiliate to give the affiliate a competitive advantage.[141] For example, if capacity does not clear in any PJM auction, AEP Ohio could seek to sell it at below-market prices to an affiliate through a bilateral contract. Such a transaction would violate Ohio's prohibition on anticompetitive subsidies identified in R.C. 4928.02(H). And it would likely create market deficiencies.

The PUCO unreasonably and unlawfully found that it has imposed safeguards in the annual prudency review process to protect against anticompetitive subsidies.[142] (The PUCO did not address its duties to protect against market deficiencies and market power.) The PUCO stated that any bilateral contracts between AEP Ohio and an affiliate

[141] See, e.g., Opinion and Order at 89.

[142] See id.

will be stringently reviewed, and no presumption of management prudence will be assumed in a bilateral sale to an affiliate.[143]

The PUCO's decision is unreasonable and unlawful because it does not have authority to review bilateral contracts between AEP Ohio and its affiliates. The PUCO only has authority to review bilateral contracts between a utility and an end-user. Under the Federal Power Act, FERC has exclusive authority to regulate "the sale of electric energy at wholesale in interstate commerce."[144] A wholesale sale is defined as a "sale of electric energy to any person for resale."[145] The Federal Power Act assigns to FERC responsibility for ensuring that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission…shall be just and reasonable."[146] States have sole jurisdiction to regulate "any other sale—most notable, any retail sale—of electricity."[147] That is, Ohio has the authority to review a contract between a utility and an end-user (i.e., retail sale), but it does not have authority to review a contract between a utility and a non-end-user (e.g., an AEP Ohio affiliate). Therefore, the PUCO unreasonably and unlawfully determined that it could safeguard against anticompetitive bilateral contracts between AEP Ohio and an affiliate by reviewing the bilateral contracts. And the PUCO did not address how it could safeguard customers from market deficiencies and market power.

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[143] See id.

[144] 16 U.S.C. § 824(b)(1).

[145] 16 U.S.C. § 824(d).

[146] 16 U.S.C. § 824d(a).

[147] 16 U.S.C. § 824(b).

The concern that AEP Ohio may cut sweetheart deals to consumers' detriment extends not only to deals with its affiliates (over which the PUCO has no jurisdiction). The concern also applies to deals between AEP Ohio and end-users. Accordingly, the PUCO should modify its Opinion and Order to make explicit that any deal between AEP Ohio and end-users involving the PPA Units will be subject to stringent PUCO review.

The PUCO should grant rehearing on Assignment of Error No. 12.

ASSIGNMENT OF ERROR 13: The PUCO's Opinion and Order is unreasonable because it deprives consumers of the benefits of capacity performance bonuses. The PUCO should modify its Opinion and Order so that customers get the benefit of capacity performance bonuses.

The PUCO modified the Stipulation to "ensure that AEP Ohio, rather than ratepayers, will bear the burden of any Capacity Performance penalties" and instructed AEP Ohio "not to seek to recover, through the PPA rider, any costs associated with Capacity Performance penalties."[148] The PUCO then went a step further and modified the Stipulation so that "all Capacity Performance bonuses will be retained by AEP Ohio."[149] Although OCC agrees that AEP Ohio should bear the penalties under PJM's Capacity Performance rules, it seeks rehearing on AEP Ohio retaining any bonuses.

[148] Opinion and Order at 87-88.

[149] Opinion and Order at 88.

PJM revised the rules for its forward capacity market after the polar vortex in January of 2014. The new Capacity Performance rules included a "pay for performance" requirement that provides an opportunity to earn "bonus" capacity payments in return for investment in modernizing a generating unit's equipment or adapting it to a different fuel type. Such bonuses would be paid by generating units that were "penalized" for under or nonperformance when called upon.

The PUCO was correct in requiring AEP Ohio to bear any capacity performance penalties. AEP Ohio is best situated to avoid such penalties by investing its capacity performance revenues to maintain and upgrade its generation and operate it reliably. This same logic shows that the PUCO has erred in allowing AEP Ohio to keep any capacity performance bonuses. PJM instituted the bonus payments as a reward to generation that exceeds its performance commitments because the unit owner managed the risk of nonperformance through investments in the generation.

Here, however, AEP Ohio bears absolutely no risk from making investments in the PPA Units. Risk is placed squarely on the shoulders of consumers. By passing these costs through to consumers via the PPA Rider, AEP Ohio is guaranteed full recovery of the costs of such investments *and* a return on equity. Consumers should be entitled to any bonus payments because they are footing the bill for and bearing the risk of all generation investments that would result in over-performance under PJM's capacity performance rules.

Additionally, under the PUCO's current capacity bonus/penalty requirements for PPA Units, AEP Ohio could be incented not to clear all PPA Units to hedge against the possibility of being charged capacity penalties for other old and potentially unreliable

PPA Units that clear the base residual auction. Under this scenario, the non-clearing PPA Units would produce less revenue to offset costs to customers. But AEP Ohio would be able to retain any additional revenues for capacity bonuses paid during shortage periods for these same non-clearing units. This potential scenario is unfair and will harm consumers. To protect consumers by maximizing PPA revenues, the PPA Units should be required to clear as a price-taker in PJM's annual BRA capacity auctions. If a rule is adopted by FERC that prohibits any of the PPA Units from clearing, the PUCO should remove such units from the PPA Rider. The PUCO should grant rehearing on Assignment of Error No. 13.

ASSIGNMENT OF ERROR 14: The PUCO's Opinion and Order is unreasonable, unlawful, and contrary to important regulatory principles and practices because the ESP statute, R.C. 4928.143, does not authorize the PPA Rider. The PPA Rider will not stabilize or provide certainty regarding retail electric service.

The PUCO found in its Opinion and Order that it has authority under state law to approve the PPA Rider because, allegedly, it is a financial limitation on customer shopping and has the effect of stabilizing or providing certainty regarding retail electric service.[150] The PUCO should reconsider this finding because R.C. 4928.143(B)(2)(d)'s plain text does not allow for a "financial hedge." Further, the PPA Rider will not have the effect of stabilizing or providing certainty regarding retail electric service.

A. R.C. 4928.143 does not authorize the PPA Rider.

R.C. 4928.143(B)(2)(d) allows for an ESP to include terms, conditions, or charges relating to "limitations on customer shopping[.]" The statute does not permit a "financial" limitation on customer shopping.

[150] Opinion and Order at 94.

The Ohio Revised Code, PUCO precedent, and Ohio Supreme Court precedent are replete with references that use the term "shopping" synonymously with the word "switching."[151] Common usage dictates that the term "customer shopping" refers to customers who physically "switch" to marketers.[152] The PUCO's initial determination that the PPA Rider is a limitation on customer shopping requires it to read the word "financially" into the statute.

Recently addressing the rules of statutory construction in PUCO proceedings, the Ohio Supreme Court said that it must rely on the specific language in the statute and must give effect to those words:

> When interpreting a statute, a court must first examine the plain language of the statute to determine legislative intent. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 12. The court must give effect to the words used, ***making neither additions nor deletions from the words chosen by the General Assembly***. *Id. See, also, Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 19. Certainly, had the General Assembly intended to require that electric distribution utilities prove that carrying costs were "necessary" before they could be recovered, it would have chosen words to that effect.[153]

The PUCO's addition of the word "financial" to the statute contravenes the statute's text and plain meaning. The proper interpretation of the phrase "limitation on customer shopping" is that an ESP may include a provision relating to limitations on customers switching to a marketer. And since a "financial limitation on customer

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[151] See, e.g., R.C. 4928.40(A)(1); *In Re Ohio Consumers' Counsel*, 109 Ohio St.3d 328 (2006); *In Re Elyria Foundry*, 114 Ohio St.3d 305 (2007).

[152] See R.C. 1.42 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage.")

[153] *In Re Columbus S. Power*, 138 Ohio St.3d 448, 454 (2014) (italics added).

shopping" is not a term expressly included in the items listed in R.C. 4928.143(B)(2)(d), it cannot be included in an electric security plan.[154]

B. The PPA Rider does not have the effect of stabilizing or providing certainty regarding retail electric service.

The PPA Rider will not have the effect of stabilizing or providing certainty regarding retail electric service. As OCC explained in its Initial Post-Hearing Brief, the PPA Rider is subject to numerous adjustments and true-ups.[155] AEP Ohio did no quantitative analysis to determine the monetary value of the alleged benefits of smoothing the volatility (assuming the PPAs actually could smooth out and not exacerbate volatility).[156] AEP Ohio cannot even point to any information in the record showing that AEP Ohio's SSO customers have experienced retail rate volatility.[157] In fact, given all the forecasts, true-ups, over and under collection adjustments and yearly/quarterly reconciliations, it is more likely that AEP Ohio's PPA Rider proposal will *increase* rate volatility.[158]

Rehearing should be granted on Assignment of Error No. 14.

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[154] See, e.g., *In re Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011).

[155] OCC Initial Post-Hearing Brief at 21.

[156] See Hearing Transcript at Vol. I, p. 103:11-15.

[157] See id at Vol. VII, p. 1957:24-1958:21. And the PUCO itself has found that staggering and laddering in the SSO already provide a significant hedge against volatility. *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, Opinion and Order at 25 (February 25, 2015).

[158] OCC Initial Post-Hearing Brief at 21.

ASSIGNMENT OF ERROR 15: The PUCO's Opinion and Order is unlawful because, contrary to R.C. 4928.38 and important regulatory principles and practice, the PPA Rider allows AEP Ohio to collect untimely transition costs. That harms consumers.

The PUCO determined in its Opinion and Order that the PPA Rider does not allow AEP Ohio to collect untimely transition revenues.[159] Based on recent Ohio Supreme Court precedent, the PUCO should reconsider that determination and find that the PPA Rider does, in fact, allow AEP Ohio to collect untimely transition revenues.

The Ohio Supreme Court explained just recently that "R.C. 4928.38 bars the commission from authorizing the 'receipt of transition revenues or any equivalent revenues' after December 31, 2010"[160] It therefore found that the PUCO erred in approving AEP Ohio's Retail Rate Stability Rider.[161] That unlawful rider is indistinguishable from the PPA Rider. As the record evidence here shows, the PPA Rider allows AEP Ohio to collect untimely transition revenues.[162]

The PUCO's ESP III Opinion and Order, and the Opinion and Order here, confirm this. One of the four factors established in the ESP III Opinion and Order under which AEP Ohio's PPA Rider proposal would be evaluated is the PPA Units' financial need.[163] AEP Ohio, including its President, acknowledged that it needed to charge customers under the PPA Rider because the PPA Units could otherwise close their doors

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[159] Opinion and Order at 102.

[160] *In re Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Under R.C. 4928.143 in the Form of an Electric Security Plan*, Oh. S. Ct. 2016-1608, Slip Opinion at ¶ 18 (April 21, 2016).

[161] Id.

[162] See generally Direct Testimony of Kenneth R. Rose (OCC Ex. 11) filed September 11, 2015. That the PUCO ignored Dr. Rose's testimony demonstrates the unreasonableness of its Opinion and Order. Such record evidence from a drafter of S.B. 3surely would have informed the PUCO's consideration of the degree to which the PPA Rider allows AEP Ohio to collect untimely transition revenues.

[163] ESP III Opinion and Order at 25.

"prematurely."[164] In the Opinion and Order here, the PUCO explicitly found "that near-term capacity market revenues are not sufficient to support necessary capital investment, even with the revenue uplift from recent Capacity Performance auctions, and have increased the risk of premature retirement of the PPA units."[165] The PPA Units cannot compete in the market and the PPA Rider is needed to keep them afloat. That is the very essence of transition revenues.

The PPA Rider allows AEP Ohio to collect transition revenues. R.C. 4928.38 "bars the 'receipt of transition revenues *or any equivalent revenues* by an electric utility'"[166] The PUCO should reconsider its holding that the PPA Rider constitutes a rate stability charge and recognize it for what it is, which is an unlawful transition charge that is not permitted under Ohio law.

Rehearing should be granted on Assignment of Error No. 15.

ASSIGNMENT OF ERROR 16: The PUCO's Opinion and Order is unlawful because, contrary to R.C. 4928.143 and important regulatory principles and practice, the PUCO found that AEP Ohio's ESP passes the MRO v. ESP test. The ESP is not more favorable in the aggregate than the MRO.

The PUCO concluded in its Opinion and Order that the MRO v. ESP test is passed here.[167] It did so unreasonably and unlawfully because it did not adequately consider OCC Witness Wilson's cost projections. It considered qualitative benefits, not just quantitative benefits. And it did not account for the substantial number of proposals

[164] See, e.g., Direct Testimony of Pablo Vegas (AEP Ohio Ex. 1) filed May 15, 2015 at 13-14; Direct Testimony of Toby Thomas (AEP Ohio Ex. 5) filed May 15, 2015 at 11.

[165] Opinion and Order at 86.

[166] *In re Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Under R.C. 4928.143 in the Form of an Electric Security Plan*, Oh. S. Ct. 2016-1608, Slip Opinion at ¶ 25 (April 21, 2016) (italics in original).

[167] Opinion and Order at 105.

subject to future filings, the costs of which are unknown. The PUCO should reconsider its conclusion and find that the MRO v. ESP test is failed here.

A. OCC Witness Wilson's cost projections should be considered in the MRO v. ESP analysis.

The PUCO considered only AEP Ohio's PPA Rider cost projections.[168] As described above, OCC Witness Wilson's cost projections are reliable and should be considered.[169] At a cost of $1.9 billion over the PPA Rider term, and $580 million over the current ESP term, AEP Ohio's proposal clearly fails the MRO v. ESP test.[170] It should therefore be rejected.

B. The PUCO considered qualitative and quantitative benefits in applying the MRO v. ESP test. It should only consider quantitative benefits.

In finding that the MRO v. ESP test is passed, the PUCO considered purported qualitative benefits.[171] It should not have done so. Instead, it should only have considered quantitative benefits.

If an electric utility chooses to provide a standard offer through an ESP, the PUCO may approve the ESP only if it finds that it is more favorable in the aggregate for customers than a market-rate offer.[172] The expected price of the SSO generation under an ESP is compared to the expected price under a market-rate offer. This requires a comparison to determine which is better for customers.

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[168] Id.; see also id. at 80 ("the Commission finds that AEP Ohio's PPA rider analysis is reliable and should be used to determine an estimate of the rider's net impact.")

[169] See Assignment of Error 6, supra.

[170] See OCC's Initial Post-Hearing Brief at 67-68; 160-63.

[171] Opinion and Order at 105.

[172] R.C. 4928.143(C)(1).

R.C. 4928.143(C)(1) requires the comparison to be made on an "aggregate" basis. That means that the comparison must consider "all other terms and conditions" of the ESP plan. The PUCO has determined that such provisions may include quantifiable non-price benefits and qualitative benefits. Parties have challenged the PUCO's authority to apply the ESP vs. MRO test using qualitative factors.

The outcome of the MRO v. ESP test should be determined using quantitative factors, not qualitative factors. Qualitative factors are manipulated to reduce or cancel out a more objective quantitative analysis. The Ohio Supreme Court has limited the items that can be included in an ESP to those expressly listed in R.C. 4928.143(B), and the Court subsequently found that each of those items were "categories of cost recovery." The categories of cost recovery do not include qualitative factors.[173]

C. A substantial number of the proposals in the Stipulation are subject to future filings. Their costs are unknown. The PUCO cannot conclude that the MRO v. ESP test is passed when the costs of proposals are unknown.

The PUCO initially concluded that the ESP v. MRO is passed when the Stipulation's quantitative and qualitative benefits are considered and because, "as a matter of basic addition," there is a net benefit "when the net positive benefit of the PPA rider proposal is combined with the existing net positive results of the EPS/MRO test conducted by the Commission on the ESP 3 Case[.]"[174] The PUCO should reconsider this conclusion because it did not consider, and due to AEP Ohio's lack of evidence, could not have considered, the cost of the myriad proposals subject to future filings

[173] See S. Ct. 2013-513.

[174] Opinion and Order at 105.

whose costs are unknown.[175] The PUCO should not find the ESP v. MRO test passed under such circumstances.

Rehearing should be granted on Assignment of Error No. 16.

ASSIGNMENT OF ERROR 17: The PUCO's Opinion and Order is unreasonable and unlawful because it found that AEP Ohio's customers after implementation of the PPA Rider are not captive.

To protect against affiliate abuse, FERC's regulations expressly provide that "no wholesale sale of electric energy or capacity may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization for the transaction under section 205 of the Federal Power Act."[176] For purposes of these restrictions, "captive customers mean any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation."[177] FERC has held that a franchised public utility does not have captive retail customers if all of the utilities' retail customers have retail choice, and by virtue of that choice, can purchase their power at market-based rates from competitive electric retail suppliers.[178] FERC has long recognized that, absent such choice, a "power marketer could sell power to its affiliated franchised public utility at an above market price, and that affiliated utility could then pass those costs through to its captive customers."[179]

[175] See OCC's Initial Post-Hearing Brief at 32-36; OCC's Reply Brief at 35-37.

[176] 18 C.F.R. § 35.39(b) (2015).

[177] 18 C.F.R. § 35.36(a)(6) (2015).

[178] See *Amendments to Market-Based Rate Tariffs Waiving Affiliate Restrictions in Ohio*, Docket Nos. ER09-134-000, et al. (filed Oct. 24, 2008), accepted, *FirstEnergy Solutions Corp*., 125 FERC ¶ 61,356 (2008), on reh'g, 128 FERC ¶ 61,119 (2009).

[179] *Illinova Power Mktg., Inc.*, 88 FERC ¶ 31,268 at n.280 (1999).

The PUCO unreasonably and unlawfully found that AEP Ohio's shopping and SSO customers are not captive.[180] FERC has recently found that AEP Ohio's customers *are* captive.[181]

The PPA Rider and associated PPA would eliminate retail choice in relation to AEP Ohio's purchases of energy from its affiliate AEPGR. Customers will have no ability to choose not to bear the costs that AEP Ohio will incur under the PPA. All customers, regardless of whether they take electric service from AEP Ohio or have opted to take service from a competitive retail electric supplier, will be subject to the non-bypassable PPA Rider charges. Therefore, the customers are captive because Ohio's retail choice landscape does not allow them to avoid the PPA Rider charges.

Additionally, the PPA Rider and associated PPA are a return to cost-based regulation, which is squarely within the definition of captive customers. PPA Rider charges will be cost-based in that they will represent the net cost of the affiliate purchases – the difference between what AEP Ohio pays its affiliate, AEPGR, and what AEP Ohio receives in the PJM markets. The PPA will also provide AEPGR a set rate of return that is guaranteed by AEP Ohio's customers regardless of how uneconomic the power plants may become. Consequently, AEP Ohio's customers are captive because, where costs of the PPA are concerned, they will be "served by a franchised public utility under cost-based regulation"[182] just as they were before retail choice.

[180] See Opinion and Order at 95.

[181] See *Electric Power Supply Association*, Docket No. EL16-33-000 Order Granting Complaint at 20.

[182] 18 C.F.R. 36.36(a)(6) (2015).

It is unreasonable and unlawful for the PUCO to determine that AEP Ohio customers are not captive for purposed of the PPA Rider. Rehearing should be granted on Assignment of Error No. 17.

ASSIGNMENT OF ERROR 18: The PUCO's Opinion and Order is unreasonable and unlawful because the Stipulation's provision for 900 MW of wind and solar renewable generation resources is contrary to the public interest and governing law.

The Stipulation calls for developing at least 900 MW of wind and solar renewable generation capacity – at customers' expense.[183] The PUCO found that the renewable provision benefits the public interest.[184]

But the General Assembly determined long ago that the public will benefit from market pricing for their electric generation service.[185] Further, the General Assembly determined that the public will benefit from freezing the renewable mandate.[186] The Stipulation runs counter to each of these decisions made by the General Assembly. The PUCO's decision approving it is therefore unreasonable and unlawful.

Additionally, the only information known about building these plants is that AEP Ohio will file future applications with the PUCO to pass the costs on to customers through the PPA Rider.[187] The public benefit claimed by constructing these renewable units is that they allegedly will create permanent manufacturing jobs in Appalachian Ohio.[188] But OCC Witness Dormady pointed out that once solar installations are put in

[183] See Stipulation at 30-32.

[184] See, e.g., Opinion and Order at 82.

[185] See S.B. 3.

[186] See S.B. 310.

[187] See Direct Testimony of Dr. Noah Dormady (OCC Ex. 36) filed December 28, 2015 at 17.

[188] See id. at 17.

place, only operational and maintenance staff will be needed – not permanent manufacturing jobs.[189] Further, there is no guarantee that the solar equipment will be purchased from Ohio manufacturers because there is international pressure, particularly from China, in developing the solar panel market.[190] The purported public benefits of these plants are counter to the record evidence.

AEP Ohio's efforts here – attempting to bring renewable energy that others would pay for to Ohioans through an ESP application – have failed in the past. In AEP Ohio's ESP II case, it proposed the $20,000,000 Turning Point solar project.[191] In a subsequent proceeding, the PUCO rejected a stipulation between AEP Ohio and Staff, stating: "[T]here is no basis upon which we can find that the Turning Point provision of the stipulation benefits AEP Ohio's ratepayers."[192] The PUCO should once again reject AEP Ohio's wind and solar proposal in this proceeding.

The PUCO should grant rehearing.

ASSIGNMENT OF ERROR 19: The PUCO's Opinion and Order is unreasonable and unlawful because it approves the "Competition Incentive Rider," which facilitates an anticompetitive price increase of the SSO and marketer's rates in violation of R.C. 4928.02(A).

The PUCO approved a "Competition Incentive Rider" ("CIR") that was added at the eleventh hour. The CIR is "an addition to the SSO non-shopping rate above the auction price with the purpose of incenting shopping and recognizing that there may be

[189] See id.

[190] See id.

[191] See *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plain*, Case No. 11-346-EL-SS) Opinion and Order at pp. 38-40 (December 14, 2011).

[192] *In the Matter of the Long-Term Forecast Report of the Ohio Power Company and Related Matters*, Case No. 10-501-EL-FOR Opinion and Order at p. 26.

costs associated with providing retail electric services that are not reflected in the SSO bypassable rates."[193] Unfortunately for consumers, the CIR will do no such thing.

OCC argued that the CIR is "an artificial increase to the SSO."[194] The PUCO will allow AEP Ohio and numerous private parties (including the marketers who compete with the SSO) to set this artificial increase at whatever level they desire. Customers are faced with an unenviable choice to: either stay with AEP Ohio's SSO rate and pay the inflated CIR or shop with a marketer and pay its rate, which will most likely be inflated by the same amount.[195] This lose-lose for customers is nothing more than a PUCO-approved mechanism for competitors to reach an agreement to increase prices.[196] This is the antithesis of competition.

The CIR is in clear violation of R.C. 4928.02(A) because it is discriminates against AEP Ohio's standard offer customers and it does not produce reasonably priced service. The PUCO should grant rehearing on Assignment of Error No. 19

ASSIGNMENT OF ERROR 20: The PUCO's Opinion and Order is unreasonable and unlawful because it approves the "Competition Incentive Rider," which facilitates an anticompetitive price increase of the SSO and marketer's rates in violation of R.C. 4928.02(A).

The PUCO approved a "Competition Incentive Rider" ("CIR") that was added at the eleventh hour. The CIR is "an addition to the SSO non-shopping rate above the auction price with the purpose of incenting shopping and recognizing that there may be

[193] Opinion and Order at 29.

[194] See OCC's Initial Post-Hearing Brief at 48-50.

[195] See id.

[196] Direct Testimony of Dr. Noah Dormady (OCC Ex. 36) filed December 28, 2015 at 12.

costs associated with providing retail electric services that are not reflected in the SSO bypassable rates."[197] Unfortunately, the CIR will do no such thing.

OCC argued that the CIR is "an artificial increase to the SSO."[198] The PUCO will allow AEP Ohio and numerous private parties (including the marketers who compete with the SSO) to set this artificial increase at whatever level they desire. Customers are faced with an inevitable Sophie's choice: either stay with AEP Ohio's SSO rate and pay the inflated CIR or shop with a marketer and pay its rate, which will most likely be inflated by the same amount.[199] This lose-lose for customers is nothing more than a PUCO-approved mechanism for competitors to reach an agreement to increase prices.[200] This is the antithesis of competition.

The CIR is in clear violation of R.C. 4928.02(A) because it is discriminates against AEP Ohio's standard offer customers and it does not produce reasonably priced service. The PUCO should grant rehearing on Assignment of Error No. 20.

ASSIGNMENT OF ERROR 21: The PUCO's Opinion and Order is unreasonable and unlawful because it approves the Stipulation's "Grid Modernization" proposal. It contains virtually no details or obligations that could conceivably be in the public interest or consistent with important regulatory principles and practices.

AEP Ohio asserts that it will "explore" grid modernization initiatives and "highlight" future initiatives as part of its June 1, 2016 grid modernization business

[197] Opinion and Order at 29.

[198] See OCC's Initial Post-Hearing Brief at 48-50.

[199] See id.

[200] Direct Testimony of Dr. Noah Dormady (OCC Ex. 36) filed December 28, 2015 at 12.

plan.[201] The PUCO found that such "exploring" and "highlighting" is in the public interest. It is not. Nor is it consistent with important regulatory principles and practices.

First, AEP Ohio is required to do nothing – other than "explore" and "highlight." Neither has any proven public benefit or any real binding effect on AEP Ohio.

Second, any future initiatives "highlighted" are contingent on a future PUCO decision in a different proceeding. They may not come to fruition. They are wholly outside the scope of this proceeding and no notice was provided about them. Contingencies outside the scope of this proceeding that may not come to fruition are not in the public interest. They are not consistent with important regulatory principles and practices – more certainty for consumers is required.

Third, because AEP Ohio says what it will do in a *future* proceeding, there is virtually no detail about its proposal in *this* proceeding. It asserts, for example, that it will "highlight" removing obstacles for distributed generation.[202] But AEP Ohio does not identify any purported obstacles. It asserts that it will "highlight" pursuing Volt-VAR optimization.[203] But AEP Ohio has not provided associated costs/benefits.[204] The further Grid Modernization in AEP Ohio's service territory should not have been approved by the PUCO without first using traditional ratemaking standards (including used and useful under R.C. 4909.15) and requiring AEP Ohio to file a business case at the PUCO.

Rehearing should be granted because AEP Ohio's proposal is neither in the public interest nor consistent with important regulatory principles and practices.

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[201] See Stipulation at 29-30.

[202] See id.

[203] See id.

[204] See Hearing Transcript at Vol. XIX, p. 4807:11-18.

The PUCO should grant rehearing.

IV. CONCLUSION

The PUCO should grant rehearing on OCC's claims of error and modify or abrogate its March 31, 2016 Opinion and Order because it will harm customers. Granting rehearing as requested by OCC is necessary to ensure that AEP Ohio customers are not subject to unreasonable and unjust charges. Without rehearing, Ohio consumers will end up paying for a whole host of unreasonable and unlawful charges, including a government ordered subsidy of power plants by customers that under the law should be competing in a competitive market.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was served on the persons stated below via electronic transmission, this 2nd day of May 2016.

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Summary: Application Application for Rehearing by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Michael, William Mr.