BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

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# OHIO POWER COMPANY'S MEMORANDUM CONTRA APPLICATIONS FOR REHEARING

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Ohio Power Company ("AEP Ohio" or the "Company") submits this Memorandum Contra the Applications for Rehearing ("AFR") submitted in this proceeding by Dynegy, Inc. ("Dynegy"); the Environmental Law & Policy Center ("ELPC"), the Ohio Environmental Council ("OEC"), and the Environmental Defense Fund ("EDF," and collectively with ELPC and OEC, "ELPC/OEC/EDF"); the Mid-Atlantic Renewable Energy Coalition ("MAREC"); the Office of Ohio Consumers' Counsel ("OCC"); the Ohio Manufacturers' Association Energy Group ("OMAEG"); the PJM Power Providers Group ("P3") and the Electric Power Supply Association ("EPSA"); and the Retail Energy Supply Association ("RESA," and collectively with P3 and EPSA, "P3/EPSA/RESA").[1] This Memorandum will refer to these parties collectively as "Opposing Intervenors."

## OVERVIEW OF AEP OHIO'S REHEARING POSITION

As indicated in AEP Ohio's application for rehearing, the Company is productively attempting to salvage rather than terminate the commitments made as part of the beneficial package of the Joint Stipulation and Recommendation ("Stipulation") in a reasonable and modest way – even though the central feature of the original Affiliate PPA between AEP Ohio and AEP Generation Resources ("AEPGR") is no longer included. However, to effectuate this result in a manner that is fair and acceptable to AEP Ohio, it is imperative that the Commission recalibrate the provisions of the Stipulation and PPA Rider in light of the intervening FERC decision. Otherwise, the Company indicated (at 14) that it will have no reasonable choice but to exercise its right to withdraw under Section IV.G of the Stipulation – an option that remains fully available to the Company under the terms of the Stipulation. In addition to reserving the right to

[1] The Application for Rehearing filed by P3 and EPSA and the Application for Rehearing filed by RESA contain the same assignments of error. For brevity, this Memorandum will refer to the two Applications for Rehearing jointly as the "P3/EPSA/RESA AFR." Page number references are to the RESA AFR.

terminate the Stipulation, the Company also reserved (footnote 1) the right to pursue – before the Commission or the General Assembly – any other remedy or solution relating to the affiliate PPA Units. Moreover, the Company invoked (footnote 2) Section IV.D of the Stipulation and reserved the right to pursue a replacement provision of equivalent in value to the original inclusion in the PPA Rider of the Affiliate PPA. Thus, while the Company offered an OVEC-only PPA Rider on rehearing as an option for the Commission, it by no means agreed that such a result by itself would be an acceptable outcome or comprehensive solution. Consistent with Section IV.G of the Stipulation, therefore, the Company will await the outcome of rehearing prior to electing whether to terminate the Stipulation.

What is clear is that, as a result of recent decisions at FERC, the Commission is at a crossroads and is making a policy decision as the regulator responsible for utility regulation in the state of Ohio. The Commission has embraced the PPA Rider's rate stability benefits as a significant benefit advancing the public interest, and it need not abandon those outcomes – lawful and reasonable under Ohio law and based on the record in this proceeding – just because of the intervening FERC decision. Rather, the Commission can formulate a new approach on rehearing in response to an intervening federal agency decision.[2] If the Commission decides on a policy path that allows the state to enjoy the significant benefits associated with the PPA Rider without running afoul of the federal issues, then the Commission should apply that policy consistently to Ohio EDUs. As AEP Ohio stated in its rehearing application (footnote 4), the FERC decision does not itself prevent continuation of the PPA Rider based on the Stipulation's PPA Proposal even without the Affiliate PPA.

[2] *CSP v. Pub. Util. Comm.*, 10 Ohio St. 3d 12, 13-15 (1984) (it was reasonable for the Commission to modify an order on rehearing after a Nuclear Regulatory Commission intervening order changed factors impacted in the Commission's order).

The Commission has the rehearing process available to it as a vehicle to reconsider matters in relation to the new information resulting from the FERC decision. In the current case, even opposing intervenors complain on rehearing that the Commission did not undertake an additional analysis of alternative hedging options. That can still be done under the additional guidance of the Commission or as a grant of rehearing and request for options to take advantage of the substantial record already provided. If the Commission wants to explore additional hedging options for rate stability beyond the OVEC-only version of the PPA Rider suggested by the Company on rehearing, it can first approve the OVEC-only PPA Rider on rehearing and then direct AEP Ohio to develop an additional hedging proposal for further consideration. The Company can then formulate an appropriate option that it could support (either along the lines of the proposal pending in Case No. 14-1297-EL-SSO case or based on another feasible alternative) and present it through testimony to effectuate any state policy guidance the Commission may be seeking to implement to realize the significant PPA Rider benefits.[3] The Commission could then establish an additional procedural schedule to further consider the Company's supplemental proposal on rehearing.

As will be further explained below, the legal basis for the rider and its hedging mechanism, which the Commission established in its *ESP III* Opinion and Order, at 20-23, and which it confirmed in its Opinion and Order in this proceeding, at 93-95, remains completely intact under Ohio law. In particular, with regard to its legal basis, the PPA mechanism, as proposed in the Amended Application and the Stipulation and modified and approved by the

[3] AEP Ohio is permitted to raise issues both in its rehearing request and in response to other parties' rehearing requests – and those matters are properly within the scope of rehearing for the Commission. *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 92 Ohio St. 3d 177, 180-81 (2001) (both the applications for rehearing by all parties and the memorandum in response to rehearing requests define the jurisdictional scope of rehearing).

Opinion and Order, continues to meet the three requirements set forth in R.C. 4928.143(B)(2)(d). The Commission has the authority and discretion to manage its docket efficiently and to the extent it seeks to implement a policy to capture significant expected benefits interrupted by FERC rulings it can do so within the existing process by a grant of rehearing and direction on how further proceedings should advance.[4] Opposing Intervenors' challenges on rehearing lack merit.

**The Commission correctly applied its traditional three-part test for contested stipulations, and Opposing Intervenors' critiques of the Stipulation process are meritless.**

Opposing Intervenors claim that the Commission should not have applied its traditional three-part test for contested stipulations. But that test is well-established, having been used by this Commission in countless proceedings and having been expressly endorsed by the Ohio Supreme Court. There are no grounds to deviate from that precedent here.

Opposing Intervenors also raise a number of arguments about the Stipulation and the process that led to it, but each argument is meritless. Opposing Intervenors complain that certain terms of the Stipulation were unrelated to the PPA Rider, but this Commission has full discretion to manage its docket, and the Commission properly encourages parties to resolve multiple issues as part of a settlement package, as the Signatory Parties did here. Opposing Intervenors further argue that AEP Ohio's right to withdraw from an ESP, *see* R.C. 4928.143(C)(2)(a), undermined the settlement process, but the ESP withdrawal provision had no bearing on the settlement process here, and Opposing Intervenors' claim, if true, would lead to the absurd result that ESP proceedings could never be resolved by stipulations.

[4] The Supreme Court of Ohio has held that, under R.C. 4903.10, the Commission has the authority on rehearing to abrogate or modify its orders and has the discretion to decide whether a subsequent hearing is needed to take additional evidence. *Ohio Consumers Counsel v. Pub. Utils. Comm'n of Ohio*, 111 Ohio St. 3d 300, 304 (2006); *Senior Citizens Coalition v. Pub. Utils. Comm'n of Ohio*, 40 Ohio St. 3d 329, 333 (1988).

Opposing Intervenors' criticisms of the terms and other aspects of the Stipulation also fail. Opposing Intervenors believe that some Stipulation terms are ambiguous, but the Commission had no trouble understanding those terms in approving the Stipulation. Opposing Intervenors also attack Stipulation terms relating to so-called "future benefits," but as the Opinion and Order made clear, these provisions reflect a commitment by Signatory Parties – including AEP Ohio – to *propose* certain measures in the future. These are meaningful commitments, since the Signatory Parties were under no obligation to make such proposals until they signed the Stipulation. And the Commission will evaluate each so-called "future benefit" in a future proceeding, at which point Opposing Intervenors will be able to raise all of their arguments and objections for the Commission's consideration.

**The Commission correctly found that the Stipulation is the product of serious bargaining among capable, knowledgeable parties.**

Opposing Intervenors argue that the Commission erred in finding that the Stipulation was the product of serious bargaining among capable, knowledgeable parties under the first prong of the three-part test. But there was no such error. As the Commission correctly concluded, the Stipulation was signed by numerous parties, representing diverse interests, including representatives from industrial customers, commercial customers, residential customers, generators, and CRES providers – plus, critically, the Commission's Staff. Moreover, the Stipulation process was the result of lengthy negotiations involving experienced representatives of many stakeholder groups, and all parties – including all Opposing Intervenors – played active roles in the settlement process and were afforded every opportunity to provide input.

Opposing Intervenors also claim that the IEU Global Settlement Agreement and the Agreement between AEPGR and Sierra Club somehow undermine the Stipulation, but these assertions are baseless. In stark contrast to the only case Opposing Intervenors cite to support

this argument (*OCC v. Public Utilities Commission of Ohio*, 2006-Ohio-5789), here, the two agreements were disclosed to all parties and were the subject of extensive cross-examination in the hearing on the Stipulation. Thus, the Commission was fully aware of the agreements and all parties' arguments concerning the agreements, and it was proper for the Commission to determine that the agreements in no way affected the merits of the Stipulation and the significant customer benefits it will provide.

**The Commission correctly found that the Stipulation, as a package, benefits ratepayers and the public interest.**

On the second prong of the three-part test for stipulations, the Commission correctly concluded that the Stipulation, as a package, will benefit ratepayers and the public interest.

***Inclusion of OVEC in the PPA Rider, as a package with the other Stipulation provisions, will benefit ratepayers and the public interest.***

As described in AEP Ohio's application for rehearing, the Commission, *at a minimum*, should uphold the inclusion of AEP Ohio's OVEC entitlement in the PPA Rider – and potentially convert the Rider to a *bypassable* credit or charge. As the record evidence shows, the OVEC PPA will provide retail stability for customers by providing a cost-based hedge against fluctuating market generation prices. Although the price-stabilizing effect of an OVEC-only PPA Rider is not as substantial as a PPA Rider with the Affiliate PPA, an OVEC-only PPA Rider still provides customers an important hedge against market prices, as the record evidence demonstrated.[5] As noted above, AEP Ohio is open to exploring additional rate stabilization mechanisms, as the Commission may direct on rehearing.

[5] References herein to the OVEC-only PPA Rider are intended to address the "step one" rehearing approval that would approve the OVEC-only PPA Rider now and subsequently entertaining a supplemental rate stability proposal to be further developed and considered for approval as part of a "step two" of rehearing.

Opposing Intervenors' criticisms of the OVEC portion of the PPA Rider, moreover, lack merit. Opposing Intervenors claim that AEP Ohio failed to address the Commission's ESP III factors for OVEC specifically, but that is untrue: As discussed in detail below, AEP Ohio's presentation of PPA Rider benefits, and its evidence concerning the ESP III factors, all included the substantial benefits provided by the OVEC PPA. Nor did the Commission foreclose an OVEC-only PPA Rider in the ESP III case, as Opposing Intervenors claim; the Commission expressly stated that the ESP III decision did "not preclude the Company from seeking recovery of its OVEC costs in a future filing." *ESP III*, Opinion and Order at 26.

***The Commission correctly found that the PPA Rider will promote retail rate stability and will benefit ratepayers.***

The Commission's finding that the PPA Rider will promote retail rate stability was manifestly correct and based on sound and ample record evidence – and that includes both the aspect of the finding relating to the Affiliate PPA and the aspect of the finding relating to the OVEC PPA. Opposing Intervenors raise no new arguments regarding this finding in their Applications for Rehearing, and their arguments are as meritless now as they were when the Commission first rejected them in the Opinion and Order.

Opposing Intervenors claim that customers already have sufficient means to achieve retail rate stability, such as staggering and laddering of SSO auctions. But as AEP Ohio's witnesses explained (in testimony the Commission properly credited in the Opinion and Order), staggering and laddering only *masks* market volatility, it does not *hedge* against it, as the PPA Rider does.

Opposing Intervenors further criticize the Commission for crediting the PPA Rider revenue and cost projections of AEP Ohio's witnesses and discounting the "projections" of Opposing Intervenors' witnesses. But the Commission was right to credit AEP Ohio's evidence.

The Commission correctly noted that AEP Ohio was the only party that presented a comprehensive forecast of long-term energy prices and PPA Rider net revenues, and the Commission correctly discounted the "projections" of Opposing Intervenor witnesses as based on unreliable and non-rigorous sources such as futures.

***The Commission correctly concluded that the ESP III factors and requirements support the Stipulation.***

As an initial matter, the Commission properly cautioned that its approval of the Stipulation "d[id] not turn on" many of the factors and requirements laid out in the ESP III decision. Opinion and Order at 86.[6] Nonetheless, ample record evidence demonstrated that the Stipulation fulfilled each of the four factors and four requirements in the ESP III decision, and the Commission's findings in that regard were correct. Opposing Intervenors' criticisms of those findings, moreover, are not new and do not provide grounds for rehearing.

- First factor – financial need. To the extent the Commission relied on this factor, the Commission properly found, based on AEP Ohio's record evidence, that near-term capacity revenues are not sufficient to support necessary capital investments at the PPA Units, including the OVEC Units.
- Second factor – supply diversity. To the extent the Commission relied on this factor, the Commission properly found that the PPA Rider would promote supply diversity by discouraging the premature retirement of the Affiliate PPA and OVEC Units.

[6] Citations to "Opinion and Order" are to the March 31, 2016 Opinion and Order issued by the Commission in this proceeding (Case Nos. 14-1693-EL-RDR et seq.).

- Third factor – environmental compliance costs. The Commission correctly found that AEP Ohio's witnesses "thoroughly addressed" the Affiliate PPA and OVEC Units' environmental compliance.
- Fourth factor – economic benefits. To the extent the Commission relied on this factor, the Commission properly found, based on ample record evidence, that the Affiliate PPA and OVEC Units are powerful economic forces in their regions, including, specifically, over $40 million of economic benefit in Meigs, Vinton, Gallia, Jackson, Scioto, and Pike Counties and $100 million of economic benefit in Ohio annually attributable specifically to OVEC. (AEP Ohio Ex. 10 at 11.)
- First and second requirements – oversight and information sharing. The Commission correctly found that the Stipulation reflects a thorough review process, including quarterly reconciliations and annual prudence audits (akin to AEP Ohio's current FAC audit process), as well as a commitment by AEP Ohio to full information sharing. That oversight and information-sharing process applies equally to the inclusion of OVEC in the PPA Rider.
- Third requirement – sharing of financial risk. The Commission expressly modified the Stipulation in order to adjust the proposed sharing of financial risk between AEP Ohio and its customers. AEP Ohio's Application for Rehearing requested that the Commission further modify the sharing of financial risk as appropriate for an OVEC-only PPA Rider, including scaling back AEP Ohio's $100 million commitment, allowing AEP Ohio to include capacity performance penalties in the PPA Rider (subject to prudence review, as with all PPA Rider costs), and reversing the 5% customer bill cap. *See* AEP Ohio AFR at 3-14. For

the same reasons, Opposing Intervenors' requested modifications are inappropriate and should be rejected.

- Fourth requirement – severability provisions. The Commission properly approved a severability provision in the Stipulation.

In sum, the Commission's findings on the four ESP III factors and four ESP III requirements were correct and support inclusion of the OVEC entitlement in the PPA Rider. Indeed, the Commissions' findings on the ESP III factors and requirements also support consideration of additional rate stability proposals on rehearing.

***The Commission's treatment of the ESP versus MRO test was reasonable and lawful.***

As the Commission correctly concluded, this is not an ESP test, and thus the ESP/MRO test does not apply. Nonetheless, the Commission, in the alternative, concluded that the ESP/MRO test was satisfied, and that finding was correct. Opposing Intervenors criticize the Commission's ESP/MRO finding on the ground that their witnesses project that the PPA Rider will result in a net charge to customers over the ESP term. But as described above, the Commission properly discredited Opposing Intervenors' "projections" and credited the only thorough forecast in the record – namely, AEP Ohio's forecast, which showed that the PPA Rider will result in a net *credit* to customers over the term of the ESP.

***Opposing Intervenors' additional arguments against – and requested modifications to – the PPA Rider and Stipulation are meritless.***

Opposing Intervenors raise a number of additional arguments against – or proposed modifications to – the PPA Rider and Stipulation, but these should be rejected.

Opposing Intervenors claim that the PPA Rider should be subject to refund, but established precedent holds that Commission orders are effective when issued and should be

presumed valid and enforceable. It would upend that precedent and well-established Commission practice to make this Rider subject to refund.

Opposing Intervenors further criticize the Commission for permitting AEP Ohio to retain capacity performance (CP) bonuses. But if the Commission requires AEP Ohio to retain CP penalties (it should not, as AEP Ohio explained in its AFR), it is only fair to allow AEP Ohio to retain CP bonuses.

Opposing Intervenors make various arguments about the 5% bill cap ordered by the Commission. Again, AEP Ohio opposes this cap as inappropriate for an OVEC-only PPA Rider. *See* AEP Ohio AFR at 13.

Opposing Intervenors criticize various details of the PPA Rider and suggest certain changes, including an "annual and aggregate limit" on Rider charges and a different implementation date. As described in detail below, however, the Commission's treatment of these details was reasonable and Opposing Intervenors' arguments in this regard are merely repackaged versions of their overall objections to the PPA Rider – objections this Commission has repeatedly and correctly overruled.

Opposing Intervenors also object to the Commission's treatment of Stipulation provisions related to renewable resources. As described in AEP Ohio's Application for Rehearing, the Commission should modify its treatment of these provisions to confirm that the renewable wind projects contemplated by the Stipulation can be pursued expeditiously to take advantage of time-sensitive tax advantages, and that AEP Ohio affiliates have a right under the Stipulation to own up to 50 percent of such renewable projects. *See* AEP Ohio AFR at 9-12. Apart from those modifications, the Commission's treatment of the renewable project provisions was reasonable. Opposing Intervenors question the customer benefits from these projects, but all such arguments

can be aired in the future proceedings that the Commission will hold in determining whether to approve the projects.

Opposing Intervenors further object to the provisions of the Stipulation relating to grid modernization, but once again, these grid modernization proposals reflect an important commitment by AEP Ohio to propose various projects with potentially substantial customer benefits, but there will be future proceeding in which Opposing Intervenors can raise all relevant objections to the projects for the Commission's consideration.

Finally, the Stipulation does not violate R.C. 4928.6613 relating to energy efficiency opt-outs, as Opposing Intervenors again wrongly assert.

**The Commission correctly found that the Stipulation package does not violate any important regulatory principle or practice.**

Under the third prong of the three-part test for stipulations, the Commission correctly found that the Stipulation here does not violate any important regulatory principle or practice.

***The PPA Rider is authorized by and consistent with Ohio Law.***

Opposing Intervenors raise numerous arguments asserting that the PPA Rider violates various provisions of Ohio law. But each of these claims is meritless and has already been properly rejected by the Commission.

First, Opposing Intervenors again assert that the PPA Rider is not authorized by R.C. 4928.143(B)(2)(d), but as the Commission has held on at least two previous occasions, the Rider is unquestionably a "charge"; it is a financial "limitation on shopping"; and as a countercyclical hedge on market prices, it will have the effect of stabilizing retail pricing. Opposing Intervenors offer no new grounds to reconsider this holding.

Second, Opposing Intervenors claim that the PPA Rider is an anticompetitive subsidy under R.C. 4928.02(H). But these claims are built on the flawed premise that the PPA Rider as a

distribution charge. The PPA Rider is a generation rider, not a distribution rider. Thus, as the Commission has correctly concluded, the PPA Rider does not permit the recovery of generation-related costs through distribution rates.

Third, Opposing Intervenors argue that the Competition Incentive Rider ("CIR") and the PPA Rider violate R.C. 4928.02(A). As to the CIR, Opposing Intervenors' argument is premature because the Stipulation only reflects a commitment by AEP Ohio to propose the CIR in a future proceeding; Opposing Intervenors can raise their objections to the CIR in that future proceeding. In any event, the Commission has long employed shopping incentives like the CIR, and the Commission, as the ultimate arbiter of state policy, has concluded that the CIR is beneficial. The same point applies to the PPA Rider – the Commission has concluded that the PPA Rider will encourage competition and is consistent with state policy, and Opposing Intervenors offer no grounds to second guess that judgment.

Fourth, Opposing Intervenors claim that the PPA Rider violates R.C. 4928.01(I), but once again, the Commission has determined that the PPA Rider is reasonable and does not reflect any alleged market deficiencies or market power. Merely invoking R.C. 4928.01(I) does not alter that conclusion.

Fifth, Opposing Intervenors assert that the PPA Rider violates R.C. 4928.03 and 4928.17, and the separation of service and corporate separation rules. Insofar as the Commission approves an OVEC-only PPA Rider at this stage of rehearing, this argument is moot. In any event, the Commission correctly rejected code of conduct arguments in the Opinion and Order, and Opposing Intervenors offer no new arguments in this regard on rehearing.

Sixth, Opposing Intervenors claim that the PPA Rider is an unreasonable charge under R.C. 4905.22, but obviously the Commission found the PPA Rider reasonable, and this claim adds nothing new that the Commission has not already considered in reaching that finding.

Seventh, Opposing Intervenors argue that the Opinion and Order authorizes the recovery of transition revenues in violation of R.C. 4928.38. But the Ohio Supreme Court's recent decision regarding AEP Ohio's ESP II (*In re Columbus S. Power Co.*, 2016-Ohio-1608) is easily distinguishable. The costs of the PPA Units are not transition costs because they are costs that are projected to be recoverable through market-based rates. Moreover, the nature of the PPA Rider and the costs, if any, that would be recovered through it are fundamentally different from the non-deferral portion of the RSR. As the Court recently noted, that component of the RSR was intended, among other things, to "provide AEP [Ohio] with sufficient revenue to maintain its financial integrity and ability to attract capital during the ESP [II]." 2016-Ohio-1608, ¶ 8. The PPA Rider is not designed for that purpose. Rather, as the Commission has twice confirmed, it is a financial hedging mechanism that "has substantial value" as a rate stability mechanism and will provide significant benefits to retail customers. Opinion and Order at 80-81. Finally, AEP Ohio does not even own the generation assets whose costs Intervenors contend are stranded.

***Opposing Intervenors' procedural arguments fail.***

In addition to their substantive critiques, Opposing Intervenors also raise a number of procedural arguments, claiming that the hearing process denied them due process. This proceeding involved 22 days of hearings, with 43 witnesses, 231 admitted exhibits, and over 5,600 pages of hearing transcripts. The parties filed over 870 pages of post-hearing briefs, and filed hundreds more pages of applications for rehearing. There was more than ample process for Opposing Intervenors here, and they had every opportunity to raise arguments and objections to

the Commission concerning the Stipulation and PPA Rider. There were no procedural errors meriting reconsideration.

***Opposing Intervenors' remaining contentions are meritless.***

Opposing Intervenors final arguments are equally unavailing. Opposing Intervenors claim that the PPA Rider will stifle competition. That claim rings hollow when applied to an OVEC-only PPA Rider, and in any event, as AEP Ohio explained in its post-hearing briefs, the type of cost-based compensation for generation embodied by Affiliate PPA and OVEC PPA are commonplace in PJM and do not stifle competition.

Opposing Intervenors again attempt to analogize the PPA Rider to recent state programs that were struck down in New Jersey and Maryland, but the recent U.S. Supreme Court decision in that proceeding expressly distinguished those programs from "traditional bilateral contracts" other "long-term financial hedging contracts based on the auction clearing price," and, most importantly, left the door open for "other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, *direct subsidies*, construction of state-owned generation facilities, *or re-regulation of the energy sector*." Slip Op. 15 (emphasis added).

Opposing Intervenors also contend that the Commission erred in its treatment of AEP Ohio's right to withdraw from ESP III, but that right is statutory and was properly treated by the Commission here. And no matter what standards may apply at the federal level, Opposing Intervenors' continued complaints about alleged "captive customers" are irrelevant as applied to a bypassable OVEC-only PPA Rider and, in any event, meritless for purposes of this Commission's *retail* rate regulation, given that the Commission properly found that AEP Ohio's customers are *not* captive. Opposing Intervenors' Applications for Rehearing should be denied.

## ARGUMENT

### I. The Commission correctly applied its traditional three-part test for contested stipulations, and Opposing Intervenors' critiques of the Stipulation process are meritless.

#### A. The Commission correctly applied its traditional three-part test for contested stipulations. (OCC AOE 3; P3/EPSA/RESA AOE 1, 13-14)[7]

OCC and P3/EPSA/RESA attack the Commission's Order as unlawful and unreasonable based on its application of the three-part test. OCC AFR at 12-16 (AOE 3); P3/EPSA/RESA AFR at 33-36 (AOE 13-14). OCC reargues prior points disagreeing with the Commission's application of the facts organized in three subparts: 1) the nexus between the application and final settlement terms, 2) the asserted lack of a package due to the number of opposing parties, and 3) a request to abandon the test to judge stipulations based on a concern with bargaining power. OCC AFR at 12-16 (AOE 3). P3/EPSA/RESA make similar arguments, including an argument that the Commission's interpretation of the three-part test is improper, an assertion that the Stipulation cannot be reviewed due to the nature of the deals included in the document, and a claim that the ability for the utility to reject modifications under R.C. 4928.143 makes the three-part test inapplicable. P3/EPSA/RESA AFR at 33-36 (AOE 13-14).

OCC's argument that there was a lack of any nexus between certain settlement terms and the application filed in this case fails to recognize the nature of this proceeding and the Commission discretion over its dockets.[8] It is well-settled that the Commission has discretion over how best to handle its dockets and that it is vested with broad discretion in their management. *See, e.g.*, *In re Application of Duke Energy Ohio, Inc. for Approval of an Advanced Meter Opt-Out Service Tariff*, Case Nos. 14-1160-EL-UNC et seq., Entry at 2-3 (Sept.

[7] AEP Ohio has attempted to group similar Opposing Intervenor assignments of error ("AOE") for brevity and ease of reference.

[8] See also AEP Ohio Reply Brief at 15 for a further discussion on this point.

16, 2015); *In re Application of Ohio Power Company for a Limited Waiver of Ohio Adm. Code 4901:1-35-10,* Case No. 15-386-EL-WVR, Entry at 4 (Apr. 22, 2015). The Commission's Order also makes clear that each of these matters reserved for a future filing will be reliant on the development of the necessary details to be considered by the Commission in each of those proceedings. Opinion and Order at 52.

The terms approved were available for discussion by all interested parties in the context of negotiation. The Commission pointed out that it has repeatedly found value in resolving matters through stipulation packages, as an efficient and cost-effective means of bringing the issues before the Commission and avoiding considerable time and expense of litigating in fully contested cases. Opinion and Order at 77-78. There are numerous parties in this case covering a variety of topics. All of those parties were involved in the negotiations with equal chance to raise issues for consideration and to participate in the discussion of the ones that were raised. The Commission found that OCC was involved in the negotiation process and, even though OCC did not ultimately sign the Stipulation, that the interests of residential customers were represented in the negotiations. Opinion and Order at 52. OCC's ground for rehearing 3(A) thus should be denied.

Similarly, OCC's and P3/EPSA/RESA's arguments that the Stipulation lacked an adequate number of Signatory Parties should be denied. OCC at 14-15 (AOE 3(B)); P3/EPSA/RESA at 8-9 (AOE 1).[9] Intervenors argue that the Stipulation does not present a package due to an alleged lack of parties supporting the Stipulation and lack of definition in the terms of the agreement. *Id.* However, the Commission found that the Signatory Parties represent a wide variety of diverse interests. Opinion and Order at 52. This finding is even

[9] OCC also makes a nearly identical argument under AOE 5(B) at 19.

supported by the table in P3/EPSA/RESA's application for rehearing which shows that the Stipulation included a variety of interests, including environmental, low-income residential, competitive suppliers, large customers, Staff, and public interest organizations. P3/EPSA/RESA AFR at 8. The Commission also found that it did not have trouble reviewing the terms of the Stipulation, stating that it always carefully reviews all terms and conditions of a proposed stipulation in order to determine whether the stipulation is in the public interest. Opinion and Order at 49. Opposing Intervenors' accusation that the Commission is unable to adequately review the agreement is an unfounded attack on the Commission's ability to review stipulations and should be rejected. Opposing Intervenors' disagreement about certain of the issues does not invalidate the broad support included in the Stipulation.

Finally, OCC and P3/EPSA/RESA seek rehearing attacking the very nature of the Stipulation and appear to seek complete abandonment of the three-part test in cases involving an element of an electric security plan due to the utility's ability to withdraw from the plan if modified by the Commission. OCC AFR at 15-16 (AOE at 3(C)); P3/EPSA/RESA at 33-36 (AOE 13-14). P3/EPSA/RESA attack the Commission Order dealing with serious bargaining based on alleged favor trading and the level of review performed for the different elements in a large agreement. P3/EPSA/RESA AFR at 33-36. OCC is focused on its concern with the ability of the utility to withdraw from the plan based on R.C. 4928.143(C)(2)(a). OCC AFR at 15-16.

P3/EPSA/RESA focuses their arguments on a general attack on the application of the three-part test as a whole. P3/EPSA/RESA AFR at 8-10 (AOE 1); *id.* at 34-35 (AOE 13-14). Those Intervenors question the status of the Stipulation as a true document entitled to review. *Id.* at 8, 34. They also argue that the test used by the Commission lacks fairness in a judicial sense because it does not indicate that the bargaining is fair to everyone. *Id.* at 9, 34. They attempt to

compare the Commission review to a judicial review of a stipulation in a civil proceeding and suggest a standard more akin to a summary judgment. *Id.* at 9. They argue that it is an error of law to use the three-part test because of their concerns with agreements reached between parties. *Id.* at 34-35.

Opposing Intervenors' arguments, taken individually or together, unconvincingly attack the use of the three-part test previously recognized by the Supreme Court of Ohio and used extensively in Commission proceedings. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559 (1994) (citing *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123 (1992)); *see also* Opinion and Order at 48 (citing case law). The Commission did not err in this proceeding by applying its three-part test. Opposing Intervenors simply no longer want the test to apply. Their disagreement with the standard is not an error, it is a group of Intervenors attempting to stand in the Commission's shoes and change the standard.

Despite attempts to expand the first prong of the test beyond its intent, the requirement for serious bargaining among knowledgeable parties is intended to address the process of negotiation and ensure a seat at the table and the knowledge level of the parties to discuss the regulatory matters. The Commission found that all parties were invited to attend multiple meetings to discuss proposals and offered to discuss terms to be included in the agreement. Opinion and Order at 52. This finding was based on the evidence of record, including OCC witness Haugh's admission that there were numerous meetings among the parties to discuss settlement and that there was numerous settlement drafts circulated, including a redline version provided by OCC to AEP Ohio. Tr. XXII at 5419, 5423. The process was appropriate and Intervenors' request for rehearing should be denied.

The other P3/EPSA/RESA arguments circle back to concerns with agreements made among parties to the case and the appropriateness of the three-part stipulation test in reviewing those actions. A fuller discussion on these points can be found in below, *see supra* Part II. In short, the Commission found these arguments had no merit. Opinion and Order at 51. Opposing Intervenors' disagreement on rehearing does not warrant reversal of the Commission's reasoned findings in the Order. Opposing Intervenors' requests for rehearing should be denied.

OCC and P3/EPSA/RESA also raise an argument related to the concerns with the process based on the ability of AEP Ohio to withdraw from ESP plans under R.C. 4928.143(C)(2)(a). OCC AFR at 15-16; P3/EPSA/RESA AFR at 36. OCC relies on the partial concurrence and partial dissent of a former Commissioner in a 2009 FirstEnergy proceeding. OCC AFR at 15. The language from the dissent is not an accepted amendment to the Commission's three-part test. In fact, the three part test was applied to the next FirstEnergy ESP plan Stipulation in 2012[10] and to other ESP stipulations, including AEP Ohio's, since the 2009 FirstEnergy Order. OCC's and P3/EPSA/RESA's arguments with the elements of the statute are with the General Assembly and not the Commission. The right to withdraw an electric security plan is embedded within the statute due to the scope of ESP plans. The ability to withdraw is a safety mechanism provided in case modifications run afoul of the ability or willing intent of the utility to carry out the plan. This is not a question of bargaining position; the statute is presumed in the public interest. The Commission does not need an addition to the three-part test based on a right provided by the General Assembly. Intervenors' attempt to create a new test to review Stipulations reached under R.C. 4928.143 is without merit and should be rejected.

[10] *In re Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order, July 2012, at 27 ("2012 FE Order").

### B. The Commission correctly evaluated the Stipulation "as a package." (P3/EPSA/RESA AOE 18; OCC AOE 5, 8(B))

P3/EPSA/RESA argue that the Commission erred in finding the Stipulation satisfied the second prong of the three-part test because the Commission allegedly glossed over a proper analysis, failing to sever provisions the Opposing Intervenors did not consider in the public interest. P3/EPSA/RESA AFR at 42-43 (AOE 18). OCC argues that the Commission erred in the benefits it considered as part of the package for review. OCC AFR at 28-29 (AOE 8(B)). OCC also argues that the structure of the package makes it impossible for the Commission to consider it as a package. OCC AFR at 18-20 (AOE 5). These Intervenors ignore the Commission's review of the record in the Opinion and Order and the Commission's ability to determine what is and is not in the public interest.

The Commission favors settlements and understands that any number of elements may be of importance to any number of parties. But that does not mean that the Commission is bound by the entire agreement without consideration. The Commission recognized that the Supreme Court endorsed the three-part test, and that although the Commission may place substantial weight on the terms of a stipulation, it is not bound by the terms of the agreement. Opinion and Order at 49. The Commission discussed this very matter in the Opinion and Order, finding:

> The Commission always carefully reviews all terms and conditions of the proposed stipulation in order to determine whether the stipulation is in the public interest. In making this determination, we exercise our independent judgment, based upon our statutory authority, the evidentiary record, and Commission's specialized expertise and discretion.

*Id.* (citing *Monongahela Power Co. v. Pub. Comm.*, 2004-Ohio-6896, ¶ 29).

A settlement by nature typically involves parties to a case compromising litigation positions to find another way to reach an accord. As discussed above, the Commission recognized the value in resolving issues in a package and avoiding the time and expense of

litigation. *Id.* at 77-78. The argument that the Commission blindly accepted a package without review is without a basis. The decision contains a number of issues the Commission weighed and modified. *Id.* at 81-91. The fact that the Commission did not agree with the P3/EPSA/RESA's arguments and view on public interest rooted in their economic private interest is not a valid basis for rehearing. These arguments amount to an attack on the Commission's expertise and analysis of the record and should be denied.

OCC also raised an argument concerning the items the Commission considered as benefits under the three-part test. OCC AFR at 28-29 (AOE 8(B)). OCC argues that the Commission considered changes to the length of the PPA term and reduced return on equity should not be considered public benefits within the standard for review. OCC AFR at 29. A closer review of the Opinion and Order shows that it discussed many more benefits than the items highlighted by OCC. The Commission looked at the whole package and found that the PPA Rider will benefit customers simply as a hedging mechanism and supplement the staggering and laddering of the SSO auctions. Opinion and Order at 83. The Commission pointed out the enhancements to the PPA proposal and the numerous commitments by AEP Ohio to offer proposals in the future proceedings that are intended to promote economic development and retail competition, facilitate energy efficiency measures, reduce carbon emissions, expand the development of renewable resources, and pursue grid modernization. *Id.* at 82-86. Taken in combination, it is appropriate for the Commission to consider the movement and compromise of AEP Ohio in the changes to return on equity and term. The willingness of a party to compromise its filed position is appropriate to weigh in the overall package of a Stipulation under review by the Commission.

Finally, OCC argued that the Commission's review of the three-part test was inconsistent with regulatory principles. OCC AFR at 18-20 (AOE 5). Specifically, OCC argues that there are terms so confusing that it will be unable to understand how to apply the agreement. *Id.* at 18-19. OCC also repackages its argument that the Commission cannot adopt the agreement because it is unsure of what is in the overall package due to the footnotes that carve out different positions. *Id.* at 19. Finally, OCC argues that approval of the Stipulation is an error because it is a riddle that can only be solved by reviewing extrinsic information that should be obtained by delving into confidential settlement discussions. *Id.* at 19-20.

OCC's arguments are red herrings and are not proper arguments for rehearing. The Commission was not confused by the Stipulation terms. It reviewed and provided an Opinion and Order modifying and approving a result. OCC raises a concern with language that has AEP Ohio and the Ohio Hospital Association working together. OCC AFR at 19. Neither AEP Ohio nor OHA has expressed any concerns about how it will accomplish this commitment. To the extent there is any confusion in the future the Commission has the authority to interpret what its Order approving the modified Stipulation means. OCC's accusation that the agreement is confusing or that footnotes make it impossible to understand belies the plain words of the document and the expertise of the Commission. Likewise, the argument that there is some unsolvable riddle in the Stipulation that requires extrinsic evidence to determine the answer is also not supported by the record. OCC may want to know why a certain party or parties made the confidential decision to support or not support the Stipulation, but that desire does not entitle OCC to discover those facts. O.A.C. 4901-1-26 specifically prohibits the disclosure of evidence of conduct or statements made in compromise negotiations not otherwise discoverable from use as evidence. There may be a myriad of reasons why a party enters into a settlement, and

negotiations are confidential so that parties are not negatively impacted when they do decide to compromise or negotiate a settled result. OCC's argument amounts to a procedural complaint about a hearing room decision and not a ground for rehearing attacking the Commission's approval of the actual Stipulation. OCC's ground for rehearing should be denied.

### C. There is no merit to Opposing Intervenors' arguments attacking the Commission's order based on the uncertainty of "future commitments." (OCC AOE 4, 8; OMAEG AOE 3(j); P3/EPSA/RESA AOE 19)

Opposing Intervenors raise a number of arguments rooted in the fact that there are elements of the Stipulation that require future filings and Commission review. Opposing Intervenors argue that the fact that there are commitments to take action in the future means that the Commission cannot properly evaluate the Stipulation as serious bargaining when there are unknown future variables. OCC AFR at 16 (AOE 4). They also argue that the Commission should not consider any potential benefits associated with those terms because they are speculative. OMAEG AFR at 27-28 (AOE 3(j)); P3/EPSA/RESA AFR at 43-44 (AOE 19). Opposing Intervenors also argue that the Stipulation is not needed to achieve the benefits associated with the "future commitments" and therefore they should not be considered as benefits. OCC AFR at 27 (AOE 8)

OCC takes issue with certain Commission language in an effort to show that the Commission has no basis to claim a benefit from future filings. Specifically, OCC takes issue with the finding that the Commission does not need to know specific details of compliance, costs, and rate impacts for every commitment to find the Stipulation complies with the first prong of the test. OCC AFR at 16-17 (AOE 4) (citing Opinion and Order at 52). OCC argues that the Commission did not have any information to support those items in the Stipulation and the finding that it does need to know specific details fails to address its concern. OCC AFR at 17. OCC also reiterates the testimony of its witness Noah Dormady concerning a list of

provisions that have varying degrees of uncertainty. *Id.* However, OCC's argument fails to account for the entirety of the Commission's analysis in the Order. [11]

OCC's claim of Commission error ignores the full Commission decision. More specifically, OCC ignores the Commission's discussion in the rest of the paragraph it cites as Commission error. A complete review of the Order shows that the Commission goes on to state that the value in the various provisions of the agreement exists in the fact that AEP Ohio, or another party, is making the commitment to make a future filing that it is under no prior obligation to make. Opinion and Order at 52. The Commission also points out that these future filings will include the necessary details and be considered by the Commission at that time. *Id.* The Commission will have options on programs and comments provided that would not otherwise have been required and perhaps never offered but for the Stipulation.

The Commission's finding concerning the value of the future commitments and the expectation of detailed filings for future review also addresses the rehearing requests concerning future unknown benefits. OMAEG AFR at 27-28 (AOE 3(j)); P3/EPSA/RESA AFR at 43-44 (AOE 19); OCC AFR at 27 (AOE 8). The Commission approved a Stipulation that provides a series of future filings and opportunities for the Commission to consider issues in a variety of areas. Although it is true that these opportunities may have been available absent the Stipulation, there is no guarantee that AEP Ohio or others would have made such future filings. As the Commission found, it is the commitment made in the Stipulation that provides the future benefit. Ultimately, the Commission will decide if the issues are approved or further action taken based on the facts involved at that time. Any impact on customers and costs can be considered at that

[11] See AEP Ohio Reply Brief at 24-25 for a further analysis of this argument and the admitted lack of credibility of OCC witness Dormady on regulatory matters.

time when the matter is directly under review. The Commission as the regulator has the authority to express the level of benefit associated with this commitment and optionality.

The argument the Commission may have predetermined the outcome of those future proceedings is also without merit. OMAEG AFR at 28 (AOE 3(j)); OCC AFR at 28 (AOE 8). The Commission required AEP Ohio to provide a future filing with necessary details at the time for Commission consideration. Opinion and Order at 52. Any future decision will be subject to Commission review and appeal as allowed by statute.

## II. The Commission correctly found that the Stipulation is the product of serious bargaining among capable, knowledgeable parties. (OCC AOE 4; OMAEG AOE 2; 3(k); P3/EPSA/RESA 15-17)

P3/EPSA/RESA, OCC, and OMAEG argue that the Commission erred in finding that the Stipulation satisfied the first prong of the three-part test. Specifically, OCC argues that the Commission misunderstood its argument and that it sought a negative finding because, in OCC's view, the Commission approved elements of the Stipulation without any supporting information detailing the impact for many of the items included in the settlement. OCC AFR at 16-17 (OCC AOE 4). OMAEG and P3/EPSA/RESA argue that the disclosed agreement between Sierra Club and AEPGR and the agreement with IEU, a non-opposing party, should result in a negative finding on the first prong of the three-part test. OMAEG AFR at 8-9 (AOE 2); P3/EPSA/RESA AFR at 40-41 (AOE 16-17). Intervenors ignore the Commission's oversight and also misapply the prior ruling concerning "side deals" to support their arguments.

P3/EPSA/RESA and OMAEG attack the Commission's Order arguing that the existence of the AEPGR/Sierra Club and IEU Global Agreement should result in a denial of the first prong of the test to review the Stipulation. OMAEG AFR at 8-9 (AOE 2); P3/EPSA/RESA AFR at 40-41 (AOE 16-17). OMAEG argues that the Commission failed to find that the agreements discussed in the case taint the bargaining process. OMAEG AFR at 8. OMAEG argues that if it

had known about the AEPGR/Sierra Club agreement, which was referenced in the Stipulation, it might have influenced OMAEG to adopt a different litigation position. *Id.* P3/EPSA/RESA argue that there cannot be serious bargaining with the existence of these agreements and due to the timing of the release of the agreements.

Given the scope of AEP Ohio's rehearing application, and the issue presented for decision in this stage of rehearing, much of this argument is moot or irrelevant. In the absence of a PPA contract between AEP Ohio and AEPGR, the AEPGR units are no longer part of the proceeding and any agreement between AEPGR and Sierra Club should have no bearing on these matters.

In any event, as applied to the former Affiliate PPA or any other rate stability mechanism AEP Ohio may seek or the Commission may request, the argument is meritless. The Commission properly discussed and addressed the arguments of Opposing Intervenors on this ground for rehearing. Opinion and Order at 51. OMAEG's argument that disclosure of the Sierra Club/AEPGR Agreement could have affected parties' litigation position is without merit because the document was disclosed in the Stipulation and provided in discovery. As the Commission stated, the existence of the Sierra Club/AEPGR Agreement should have been obvious to all parties. Opinion and Order at 51.

Likewise, the IEU Global Settlement Agreement does not impact the Commission's finding that the Stipulation satisfied the first prong of the three-part test. [12] The Commission distinguished the facts in this case from the facts in the *OCC v. Public Utilities Commission of Ohio*, 2006-Ohio-5789, which was cited by Opposing Intervenors. The Commission pointed out that the side agreement in that case was between *signatory parties* and the side agreement was

[12] See also AEP Ohio Reply Brief at 20-23 for a further discussion supporting the Commission's finding that the agreements did not impact the serious bargaining among knowledgeable parties in this case.

requested in discovery but not provided. Opinion and Order at 51 (citing *OCC*, 2006-Ohio-5789, ¶ 86). Conversely, in the present case, the Commission found that IEU was not a signatory party and the agreement was disclosed by IEU in the docket on December 22, 2015 and provided to all parties in discovery. Opinion and Order at 51. Therefore, there is no indication that IEU's agreement to not take a position influenced any party. *Id.* Opposing Intervenors misapplied the prior case law in this area and their request should be denied.

OMAEG's argument also fails to explain how the lack of another party's participation in a proceeding to consider a Stipulation impacts its ability to negotiate or litigate. For support, OMAEG cites a portion of the AEP Ohio *ESP III Order* discussing IEU's staunch opposition to the PPA Rider in that case. OMAEG AFR at 9. But the Staff and others also opposed the PPA concept prior to the Stipulation. OMAEG and the P3/EPSA/RESA conglomerate are responsible for their own positions and should not be waiting or relying on IEU or others to make their points in cases. That is why the parties seek intervention on an individual basis, not based upon the hope that others will make their arguments for them at hearing.

As discussed in depth in AEP Ohio's Post Hearing Reply Brief in this docket (at 20-23), the IEU Global Settlement involved a number of cases before the Supreme Court of Ohio and at the Commission. Opposing Intervenors' oversimplification of the agreement and attempt to assert some nefarious intent is not supported by the face of the agreement, the transparency with which it was provided, or the precedent dealing with agreements among signatory parties.

P3/EPSA/RESA also attempt to apply the case law on concerns with side deals to the enumerated terms included in the Stipulation. P3/EPSA/RESA AFR at 336-40 (AOE 15). As discussed above, the *OCC v. Public Utilities Commission of Ohio* case dealt with side agreements among signatory parties that were not in the Stipulation for Commission approval

and not provided to the other parties in discovery. Yet, Opposing Intervenors argue that the elements included in the Stipulation qualify as creating an unfair advantage distorting settlement negotiations under *OCC v. Public Utilities Commission*. This argument improperly applies the Court's decision. As distinguished in the Order by the Commission, and above in this filing, the side deals under consideration in that case dealt with deals outside the record that were not disclosed in discovery. Opinion and Order at 51. The Commission denied a similar claim in a 2012 FirstEnergy ESP decision. [13] Specifically, the Commission found that agreements disclosed in the stipulation before the Commission are not considered side-deals. 2012 FE Order at 27. In that same Order, the Commission also held that many parties received benefits under the stipulation, but the Commission would not conclude that the benefits were the sole motivation of any party signing the agreement without any evidentiary support. *Id.* The Commission held that it expects parties to bargain in support of their own interests in deciding whether to support an agreement. *Id.* Opposing Intervenors' argument in this case improperly applies Court precedent and ignores Commission precedent on the basic nature of negotiations.

Opposing Intervenors also take issue with the Commission's explanation that the certain terms included in the Stipulation are not simply monetary inducements in exchange for support. P3/EPSA/RESA AFR at 38; OMAEG AFR at 29. OMAEG argues that inclusion of these terms runs afoul of the Commission's decision in the IGCC decision. OMAEG AFR at 29. However, the Commission specifically referred to the type of payments directly to parties contemplated in that case in the Opinion and Order and distinguished them from the terms of this agreement. Opinion and Order at 91. The Commission also required greater reporting in this case dealing

[13] *In re Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order, July 2012, at 27 ("2012 FE Order").

with the outcome of the approved terms under attack by Intervenors. P3/EPSA/RESA argue that the Commission misunderstands their argument and that the Commission should not be evaluating the reasonableness of the terms but instead rejecting the terms. P3/EPSA/RESA AFR at 38. Again they improperly use the *OCC v. Public Utilities Commission of Ohio* decision asserting the enumerated terms are improper side deals providing an unfair advantage. P3/EPSA/RESA AFR at 39. The argument again ignores the Commission guidance in the 2012 FE Order concerning an expectation that parties bargain for their interests and disclose those in the Stipulation. 2012 FE Order at 27. The Intervenor argument leads to an absurd result where there is no ability for parties to clearly and publicly compromise by incorporating issues that benefit their interests into settlement agreements. Opposing Intervenors propose a narrow, inefficient process that runs counter to the development and efficient management of dockets enjoyed by the Commission. Opposing Intervenors' attempts to further limit the Commission's ability to manage its dockets should be denied.

Opposing Intervenors' grounds for rehearing asserting that the Commission erred in finding satisfaction of the first prong of the three-part test due to the existence of any agreements should be denied.

## III. The Commission correctly found that the Stipulation, as a package, benefits ratepayers and the public interest.

### A. Inclusion of OVEC in the PPA Rider, as a package with the other Stipulation provisions, will benefit ratepayers and the public interest, and those benefits could be supplemented by additional rate stability proposals on rehearing.

#### 1. The Commission correctly found that the inclusion of the OVEC entitlement in the PPA Rider will bring substantial benefits to customers. (P3/EPSA/RESA AOE 45; OMAEG AOE 1)

After reviewing all of the substantial evidence of record presented in this proceeding, the Commission correctly found that the PPA Rider, including the OVEC PPA, will substantially

benefit customers. Opinion and Order at 80-81. As AEP Ohio explained in its application for rehearing, the reasonableness of using AEP Ohio's OVEC entitlement as the basis for a financial hedging mechanism that would benefit retail customers through the PPA Rider mechanism the Commission approved in *ESP III* is fully supported by both the existing record in this proceeding and Ohio law. AEP Ohio AFR at 3-8. Intervenors advance several repetitive arguments in opposition to the inclusion of the OVEC entitlement in the PPA Rider; however, none of them have merit. The Commission should confirm that inclusion of the OVEC PPA in the PPA Rider will benefit ratepayers and the public interest.

P3/EPSA/RESA argue that the Commission erred in allowing AEP Ohio to include the OVEC PPA in the PPA Rider because, Opposing Intervenors contend in an unsupported and conclusory fashion, AEP Ohio failed to address the Commission-required factors for the OVEC Units, and the Commission failed to address and consider that evidence when finding that the PPA Rider, including the OVEC PPA, has substantial value as a financial hedge and rate stability mechanism. P3/EPSA/RESA AFR at 77 (AOE 45). Opposing Intervenors also argue that the inclusion of OVEC in the PPA Rider is inappropriate because the Commission was not persuaded in the *ESP III* case, based on the record in that proceeding, that an OVEC-only PPA Rider would provide sufficient benefits to customers relative to the rider's potential cost. P3/EPSA/RESA AFR at 77 (AOE 45); OMAEG AFR at 7 (AOE 1). Intervenors made both of these arguments in their post-hearing briefs (*see* RESA Br. at 13-14, 35-36, 41-42, 44; P3/EPSA Br. at 30-35, 47), and the Commission already considered and rejected them. Opinion and Order at 61, 70, 80-81. Intervenors have raised no new support for either argument; thus, the Commission should disregard Intervenors' repeated arguments on rehearing.

Intervenors' arguments also fail on their merits. P3/EPSA/RESA's contention that AEP Ohio failed to address the Commission-required factors for the OVEC Units in this proceeding is flatly incorrect as a factual matter. As AEP Ohio explained in its post-hearing briefs, AEP Ohio presented ample information regarding, *inter alia*: the OVEC units' financial need (AEP Ohio Ex. 1 at 16-19; AEP Ohio Ex. 3 at 31 & tbl. 1; AEP Ohio Ex. 9 at 14-15; AEP Ohio Br. at 33-38); the need for the coal-fired OVEC Units in light of future reliability concerns, including supply diversity (*see* AEP Ohio Br. at 38-43); the OVEC Units' environmental compliance and the budgeted cost of their future compliance through 2024 (*id.* at 43-53; Tr. IV at 1029, 1033-35); and the impact that the OVEC Units' closure would have on electric prices and economic development within Ohio (AEP Ohio Br. at 53-58; AEP Ohio Ex. 10). The record thus fully supports inclusion of AEP Ohio's OVEC entitlement in the PPA Rider.

Moreover, Intervenors' position that the Commission foreclosed an OVEC-only PPA Rider in the *ESP III* case is simply incorrect. In its *ESP III* Order, the Commission declined *without prejudice* to adopt AEP Ohio's OVEC-only proposal *based on the record in that proceeding. ESP III*, Opinion and Order at 24. The Commission made explicit that it was open to a further-developed PPA proposal that included additional information responsive to each of the factors that Order identified. *Id.* at 25. Indeed, the Commission expressly stated that its *ESP III* decision did "not preclude the Company from seeking recovery of its OVEC costs in a future filing." *Id.* at 26. As set forth above and in AEP Ohio's post-hearing briefs in this case, and as the Commission correctly found, the record in this case supports inclusion of the OVEC PPA in the PPA Rider. *See* Opinion and Order at 80-81. Further, if additional proposals are entertained on rehearing, there would be additional rate stability.

### 2. Co-owned units, including the OVEC Units, were properly included in the PPA Rider. (Dynegy AOE 1)

As it did in its post-hearing brief, Dynegy again argues that the Commission erred in approving the PPA Rider because the rider allegedly shields AEPGR from market forces affecting the units that Dynegy co-owns with AEPGR and the Dayton Power and Light Company, which Dynegy argues will lead to inefficient operation of those units. Dynegy AFR at 4-7 (AOE 1). Dynegy already made these arguments (Dynegy Br. at 19-21), and the Commission already considered and rejected them. *See* Opinion and Order at 60, 87-90. Thus, Dynegy's request for rehearing should be denied on that basis alone. Moreover, given the scope of AEP Ohio's rehearing application, and the issue presented for decision in this stage of rehearing, this argument is largely moot. Dynegy does not own any portion of the OVEC Units (*see* Opinion and Order at 22; Dynegy AFR at 3); thus, its concerns about operation of the plants in which it has an ownership interest is no longer relevant.

In any event, as applied to the former Affiliate PPA or any other rate stability mechanism AEP Ohio may seek or the Commission may request, Dynegy's argument about co-owned units is meritless.[14] As AEP Ohio previously explained in response to this argument, Dynegy's position gives no regard for the Commission's ability to review the level of the PPA Rider costs incurred by AEP Ohio in the Commission's annual PPA Rider audits. AEP Ohio Reply Br. at 89. As the Stipulation, AEP Ohio's post-hearing briefs, and the Commission's Opinion and Order discussed at length, the Commission will conduct annual managerial audits of the costs of all units included in the PPA Rider, evaluating whether AEP Ohio has prudently exercised its

[14] As set forth in AEP Ohio's application for rehearing, AEP Ohio agrees with Dynegy that the Commission erred in precluding AEP Ohio from including costs of Capacity Performance penalties in the PPA Rider (*see* AEP Ohio AFR at 12-13 (AOE II.B)); however, Dynegy's concerns about the effect of that decision are misplaced, as discussed in this section and AEP Ohio's post-hearing briefs.

contractual "buyer's prudence" rights under the Affiliate PPA to review and approve certain costs, including operational and management budgets and capital expenditures. *Id.* at 50-53; AEP Ohio Br. at 61-68; *see also* Opinion and Order at 87-90. Thus, to the extent the manner in which the PPA Units are being operated has increased costs to AEP Ohio's retail customers under the PPA Rider, the Commission will have full visibility into these issues and, through its annual prudence review of AEP Ohio's actions in exercising its contractual "buyer's prudence" rights, the Commission can take steps to address the issues – including disallowing AEP Ohio's cost recovery, if appropriate.

As an independent power producer, Dynegy lacks experience with this kind of Commission prudence review of power plant expenditures. But the Commission, Staff, and AEP Ohio know from long experience prior to 1999 that Commission prudence review is an effective method to ensure that retail customers do not bear the burden of increased costs that result from generation facilities that have been inefficiently operated. That includes, in particular, prudence review of the costs incurred in connection with the operation of the very PPA Units at issue here, which for years were included in AEP Ohio's cost-based rates. Thus, Dynegy's concerns about AEP Ohio's incentives are misplaced.

### B. The Commission correctly found that the PPA Rider will promote retail rate stability and will benefit ratepayers.

#### 1. The PPA Rider promotes retail rate stability. (Dynegy AOE 8; OCC AOE 14(B); OMAEG AOE 3(g); P3/EPSA/RESA AOE 24, 31-34)

The Commission found that the Stipulation, as modified, will protect consumers against rate volatility and price fluctuations by promoting retail rate stability for all ratepayers. It found that customers will benefit from the PPA Rider as a financial hedging mechanism that would supplement the benefits derived from staggering and laddering of the SSO auctions and protect retail customers from price volatility in the market. Opinion and Order at 77, 83. Several

Intervenors contend that the Commission's finding that the PPA Rider, as modified by the Stipulation and the Commission's order, was in error. P3/EPSA/RESA and OMAEG contend that laddering and staggering of SSO auction procurements for non-shopping customers, along with fixed-price contracts that are available to shopping customers, adequately insulate customers from rate volatility and instability and, so, make the PPA Rider unnecessary. P3/EPSA/RESA AFR at 60 (AOE 31-34); OMAEG AFR at 24 (AOE 7). P3/EPSA/RESA, OMAEG, and OCC all contend that the PPA Rider's quarterly reconciliation process either will be out of step with or will not necessarily be countercyclical to wholesale market price changes. P3/EPSA/RESA AFR at 61-62; OMAEG AFR at 24-25; and OCC AFR at 27 (AOE 8).[15]

These criticisms are meritless. They are the same arguments that these Intervenors have made repeatedly during the evidentiary and post-hearing briefing phases of this proceeding and which the Commission already has considered and declined to accept. Company witness Allen explained that while staggering and laddering the SSO procurements contracts may provide a benefit of smoothing out changes in the market prices in the short term, they are not capable of nor designed to address longer term changes in market prices in the same way as the AEP Ohio PPA Rider mechanism can. (AEP Ohio Ex. 10 at 7-8; AEP Ohio Ex. 51 at 2-3.) Mr. Allen provided an exhibit to his direct testimony showing the laddering and staggering of standard service offerings for the FirstEnergy Companies had limited the annual change in customer rates to less than $6/MWh or less for the five years ending with the 2015/16 PJM planning year. (AEP Ohio Ex. 10 at 8; AEP Ohio Ex. 10, Ex. WAA-2.) Mr. Allen explained that the laddering

[15] P3/EPSA/RESA also recommend in their AFR at 62 (AOE 31-34) that the Commission should impose an aggregate or annual limit on the PPA Rider's charges in order to provide incremental rate stability. This argument by P3/EPSA/RESA is a request that the Commission revise the two-year five percent bill cap it already has established. It also is the same argument that P3/EPSA/RESA make in their AOE 26. P3/EPSA/RESA's argument should be rejected. Instead, as explained in AEP Ohio's AFR at 13, , the two-year five percent bill cap should be reversed.

and staggering may mask the impact on customers of rising market prices but it cannot offset those impacts like a PPA rider mechanism can. (*Id*. at 8.) The PPA rider mechanism provides a hedge against changes in market prices over a longer period than staggering and laddering of SSO procurements can accomplish. (AEP Ohio Ex. 51 at 3.) Mr. Allen also showed that the argument that shopping customers can manage rate volatility and self-provide rate stability through fixed-price contracts is illusory. (AEP Ohio Ex. 51 at 5-7; AEP Ohio Initial Br. at 96-98.)

Opposing Intervenors' arguments on rehearing that the PPA Rider's quarterly reconciliation process either will not necessarily be countercyclical to, or will be out of step with, wholesale market price changes still lack merit and continue to miss the point. The contention that the rider will not act in a countercyclical manner to wholesale market price changes simply ignores that the design of the rider ensures that result. When wholesale prices exceed the cost-based price of any PPA whose costs are included in the rider, the rider will produce a credit. Conversely, when wholesale market prices are lower than the cost-based price of a PPA whose costs are included in the rider, the rider produces a charge. Thus, the rider will provide credits and charges in a manner that is countercyclical to price changes in the wholesale market providing a stabilizing effect. (*See* Tr. XX at 4978.) Opposing Intervenors' other criticism that the quarterly reconciliation process will result in those credits and charges being applied in manner that lags the wholesale market fluctuations also miss the point of the rider, which is to dampen, over the entire course of the rider, the overall bill impacts of the wholesale market on retail rates. The quarterly reconciliation process does not impact that long-term volatility dampening impact and actually provides the customer a more stable and predictable annual impact due to the more timely quarterly update. (*See* Tr. XX at 4978-4979.) The Commission

correctly was not persuaded by Opposing Intervenors' meritless arguments before and should reject them again on rehearing.

**2. The Commission correctly credited the projections of AEP Ohio's witnesses and discounted the projections of Opposing Intervenors' witnesses. (OCC AOE 6; OMAEG AOE 3(a); P3/EPSA/RESA AOE 20-23, 25, 27-29)**

In the course of determining that the Company's PPA Rider proposal, as modified by the Stipulation and as further modified by the Commission's Opinion and Order, benefits ratepayers, the Commission accepted the Company's projections of the rider's revenues and costs (and, thus, its net rate impacts). The Commission declined to accept the criticisms of the Company's projections or any alternative projections offered by Intervenors that opposed the Stipulation. Several Opposing Intervenors contend in their applications for rehearing that the Commission erred. All of their contentions are meritless.

OCC argues that the Commission's rejection of OCC witness Wilson's rate impact projections was in error because the Commission "ignor[ed]" the record evidence demonstrating the projection's reliability. OCC then reiterates the same arguments that it and Mr. Wilson previously made in support of his flawed forwards-based method of forecasting wholesale electric energy prices. OCC AFR at 20-24 (AOE 6). OMAEG also argues on rehearing that the Commission's rejection of OCC's use of forwards to forecast wholesale prices is "flawed and unsupported by the record." OMAEG reiterates several of OCC witness Wilson's already discredited arguments in support of his use of forwards prices. OMAEG AFR at 10-12. These criticisms are meritless. The Commission properly rejected each of the arguments that OCC and OMAEG make in support of using forwards to forecast wholesale electric energy prices and, thus, the rate impacts of AEP Ohio's PPA Rider. That rejection was soundly based upon AEP

Ohio witness Bletzacker's testimony and based upon the patent flaws of Mr. Wilson's forwards-based methodology. (AEP Ohio Ex. 50, at 2-6; AEP Ohio Br. at 82-90.)

P3/EPSA/RESA disagree in a number of respects with the Commission's determination to accept AEP Ohio's projections of wholesale electric energy prices and rate impacts of the PPA Rider and the fact that it rejected P3/EPSA's witness Cavicchi's and other opponents' criticisms of the Company's projections. First, P3/EPSA/RESA claim that the Commission erred as a matter of law because it adopted AEP Ohio's PPA Rider projections without undertaking a substantive detailed analysis of the Company's methodology that shows that it carried its burden of proof. P3/EPSA/RESA AFR at 45-46 (AOE 20). P3/EPSA/RESA quote from the conclusion of the PPA Rider projections discussion in the Commission's Opinion and Order, at page 80, to support its contention that the Commission did not carefully weigh and consider AEP Ohio's evidence in support of its projections. What P3/EPSA/RESA failed to recognize is the Commission's detailed review, at pages 78-79 of its Opinion and Order, of the testimony and evidence that AEP Ohio presented in support of its projections. P3/EPSA/RESA's and OMAEG's arguments that there was not sufficient credible evidence to support the Commission's decision to accept AEP Ohio's rate impact projections or that the Commission did not properly consider the evidence are baseless.

Based upon the evidence in the record, the Commission found that AEP Ohio's PPA Rider analysis is reliable and should be used to determine an estimate of the rider's net impact. The Commission determined that the Company's weather normalized case, which produced an estimated net credit of $214 million over the 8-year term of the PPA Rider, provides a conservative and, thus, reasonable estimate of the PPA Rider's projected rate impacts. Based on the record evidence, that same finding can be scaled back to support a rehearing conclusion that

inclusion of OVEC in the PPA Rider would, by itself, provide a net benefit of $110 million even before inclusion of the additional revenues from the capacity performance product. (IGS Confidential Ex. 1 at 10 (KDB Tab 2 OVEC).)

P3/EPSA/RESA contend that using the estimated rate impacts associated with the weather normalized forecast case is unjust and unreasonable in light of the fact that the Company had recommended using the estimated rate impacts associated with the 5% lower and 5% higher load forecast cases. P3/EPSA/RESA AFR at 46-48 (AOE 21). This criticism misses the point. It would have been well within the bounds of reasonableness for the Commission to estimate the net rate impacts based upon the Company's recommendation, once the Commission had determined that the Company's method for developing forecasts of rate impacts was reasonable. However, it is not unreasonable, let alone unjust, to select a more conservative, i.e., lower, estimate of what the net rate impacts of the rider would be based upon the weather normalized forecast (including the weather normalized forecasted impact of the OVEC entitlement only). P3/EPSA/RESA's arguments to the contrary are without merit.

Next, P3/EPSA/RESA contend that the Commission erred because it failed to address the testimony of P3/EPSA witness Cavicchi. P3/EPSA/RESA AFR at 48 (AOE 22). Contrary to P3/EPSA/RESA's contention, the Commission did address the substance of Mr. Cavicchi's criticisms in the course of generally addressing and declining to accept Opposing Intervenors' criticisms and recommendations. First, the Commission specifically recognized, at page 80 of its Opinion and Order, "the non-signatory parties' critical assessment of AEP Ohio's projections," which of course includes Mr. Cavicchi's criticisms, but concluded that it was not persuaded by those criticisms. In that regard, the Commission observed that "the fact remains that no other party has presented a full projection of energy prices and the net revenues under the PPA Rider."

Opinion and Order at 80. That deficiency applies squarely to Mr. Cavicchi's analysis and criticisms, which were selective and shortsighted.

Second, Mr. Cavicchi's criticisms of AEP Ohio's methodology for projecting the net revenues to be included in the PPA Rider and, thus, the Rider's projected rate impacts is largely based on the use of forwards to forecast future prices of both wholesale electric energy and natural gas. (*See* P3/EPSA Ex. 13, at 11-16; Attachment AJC-S-1; Attachment AJC-S-2.) The Commission's rejection of the use by intervenors of forwards prices as a basis for criticizing the Company's projections and as a basis for alternative projections applies to Mr. Cavicchi's criticisms.

Third, at page 80 of its Opinion and Order, the Commission specifically addressed and rejected intervenor criticisms (which include Mr. Cavicchi's criticism) that near term AEO2015 forecast natural gas prices supported the conclusion either that the Company's 2013 fundamentals forecast was unsuitable for use in this case or that it should be selectively adjusted on the basis of recent changes to near-term forecasted natural gas prices:

> Additionally, although several parties argue that the 2013 fundamentals forecast used by AEP Ohio is outdated and that the Company should have updated its projections using the 2015 fundamentals forecast, the U.S. Energy Information Administration (EIA) noted in its Annual Energy Outlook (AEO) for 2015 that the projected electricity prices for the Reference case, over the long term, actually increased in comparison to the Reference case in the AEO for 2014. Specifically, EIA found that:
>
> > In the AEO2015 Reference case delivered natural gas prices to electricity generators are lower than in the AEO2014 Reference case in the first few years of the projection but higher throughout most of the 2020s. From 2020 to 2030, the generation cost component of end-use electricity prices is, on average, 4% higher in AEO2015 than in AEO2014.
>
> (Co. Ex. 18 at E-7.) Therefore, it is possible that, even if Mr. Bletzacker had used an updated fundamentals forecast, higher electricity prices may have resulted in AEP Ohio's PPA rider projections becoming more favorable to customers rather than less favorable.

Opinion and Order at 80. In sum, the Commission more than adequately addressed the substance of Mr. Cavicchi's criticisms in the course of discussing non-signatory parties' contentions that the Commission should not rely upon the Company's comprehensive analysis, including its use of the 2013 fundamentals forecast, to project energy prices and the net revenues under the PPA Rider.

In their AFR at 49-50 (AOE 23), P3/EPSA/RESA assert that the Commission erred by discounting criticisms of AEP Ohio's projections on the grounds that the critics did not present a full projection of energy prices and net revenues under the PPA Rider. This assertion also is meritless. The Commission considered the various criticisms, which primarily were based on forwards pricing theories, addressed those criticisms, and found them fundamentally flawed. The Commission also specifically rebutted the contention that the Company's 2013 Fundamentals Forecast should have been updated, and, as set forth above, in the course of that rebuttal the Commission explained why it found that near-term reductions in natural gas prices, such as those reported in EIA's AEO2015 Reference case, did not undermine the reliability of the Company's forecast.[16] In the course of doing so, the Commission pointed out that criticisms which focus on just one element of a forecast or just one portion of the period addressed by the forecast miss the point of a long-term fundamentals forecast, which is to take into account all relevant factors over the longer term that it covers. Thus, criticisms, like those raised by Mr. Cavicchi and P3/EPSA/RESA, which selectively criticize a forecast, ignore offsetting

[16] It is also worth pointing out again, regarding reliance upon the EIA 2015AEO, that the EIA cautions that its forecasts do not attempt to take into account the impacts of the U.S. EPA's Clean Power Plan initiative. (AEP Ohio Ex. 18, at ii (Preface).) Mr. Cavicchi takes no account of that in his efforts to use the EIA 2015AEO to support his point of view. In addition, he selectively includes natural gas pricing data from the 2015AEO Low Oil Price forecast in his Attachment AJC-S-2, but conveniently omits the comparable, significantly higher, natural gas pricing information from the 2015AEO High Oil Price forecast. (*Id.* at 6.) These examples of selectivity further undercut the credibility of Mr. Cavicchi's analyses. Again, the Commission properly declined to accept his analyses or recommendations.

adjustments that necessarily would be made if they had undertaken a comprehensive analysis. In that regard, the Commission's observation that the Company presented the only comprehensive actual forecast of long-term energy prices in the record, and that no other party presented a full projection of energy prices and net revenues under the PPA Rider, is also an observation that criticisms that are selective, such as Mr. Cavicchi's, are inherently unreliable.

In its AFR, at 52 (AOE 25), P3/EPSA/RESA assert that the Commission erred by not adequately taking into account near-term changes in natural gas prices. They contend that the Commission ignored this important evidence. As explained above, the Commission specifically addressed P3/EPSA/RESA's point, at page 80 of its Opinion and Order. It is P3/EPSA/RESA who ignore the larger point that selectively focusing on one element of a long-term forecast over a near-term period fails to take into account the countervailing impacts that the broader and longer view would have on the assessment.

In their AFR at 54-56 (AOE 27-29), P3/EPSA/RESA raise three issues, all of which are tied to the 8-year term of the PPA Rider. First, in AOE 27, P3/EPSA/RESA claim that the Commission's conclusion that the PPA Rider is reasonably estimated to provide a net credit over its 8-year term, based on AEP Ohio's weather-normalized projection, is in error because the Commission did not make adjustments to the weather-normalized projected rate impacts to correct for the errors that P3/EPSA/RESA believe affect that projection. Because P3/EPSA/RESA's underlying criticisms of AEP Ohio's rate impact projections are without merit, P3/EPSA/RESA's contention that the weather-normalized projection requires adjustment also is meritless.

Second, in AOE 28, P3/EPSA/RESA contend that the Commission erred in evaluating the impact over the 8-year term, while ignoring short-term impacts, which include charges to

ratepayers. The Commission did not err in evaluating the net impact of the PPA Rider over its 8-year term. There may be times when the rider produces a charge and other times when it produces a credit. That is due, in large part, to its design as a cost-based hedging mechanism that operates in a manner that is countercyclical to wholesale market prices. It was appropriate for the Commission to evaluate the rider's net impact on customers over its 8-year term.

Third, in AOE 29, P3/EPSA/RESA also argue that by directing the Company to use an updated forecast of the PPA Rider's impact during the first quarterly adjustment filing on September 1, 2016 (for the charge or credit to be applied in the fourth quarter of 2016), the Commission has recognized that it was improper to use the Company's 2013 long-term fundamentals forecast as the basis for estimating the net rate impacts of the rider over its full 8-year term. P3/EPSA/RESA confuse the purpose of the Company's long-term forecast to estimate the rider's net rate impacts over its 8-year term and, based on that estimate, approve its use for that 8-year term, on the one hand, and the task of establishing the quarterly rider rate for use in the October to December 2016 quarter, based on the information available on September 1 regarding the expected impact of the rider in that upcoming quarter, on the other hand. They are two entirely different exercises, and the Commission's approach to performing each of those separate tasks is appropriate and not inconsistent.

### 3. The Commission correctly concluded that the Stipulation will promote competition among competitive retail suppliers. (P3/EPSA/RESA AOE 41)

The Commission properly recognized that the Stipulation will "promote retail competition by enabling competitive providers to offer innovative products to serve customers' needs." Opinion and Order at 77. The Stipulation advances this important state policy objective by including, among other things, "numerous commitments by AEP Ohio to offer proposals in future proceedings that are intended to promote economic development and retail competition."

*Id.* at 84. Specifically, as AEP Ohio explained at length in its initial and reply post-hearing briefs, the proposed pilot Competition Incentive Rider promotes retail competition by incentivizing shopping in furtherance of the state policy objective set forth in R.C. 4928.02(C), which the Commission has previously recognized as a significant benefit to customers and the development of the retail market. AEP Ohio Br. at 119-121; AEP Ohio Reply Br. at 81-82. Similarly, the proposed Pilot Supplier Consolidated Billing Program and pilot EDU third-party agent transfer program advance R.C. 4928.02(C)'s and (E)'s objectives by enhancing the information available to customers, the Commission and competitive suppliers and defraying billing and educational costs that CRES providers would otherwise bear. AEP Ohio Br. at 121-124; AEP Ohio Reply Br. at 81-82.

Despite their clear benefits, P3/EPSA/RESA contend, as Opposing Intervenors did in their post-hearing briefs (*see* OCC Br. at 43; RESA Br. at 52), that the above commitments do not promote retail competition because their details of their approval and implementation will not be decided in this case. P3/RESA/EPSA AFR at 71-73 (AOE 41). Because P3/EPSA/RESA have raised no new arguments regarding this issue that the Commission did not already consider in its Opinion and Order, the Commission should disregard their argument on that basis alone. Moreover, as AEP Ohio already explained, and the Commission already found, P3/EPSA/RESA's position is substantively without merit. Indeed, as the Commission correctly recognized, each of AEP Ohio's pro-competitive commitments provides "value for customers in AEP Ohio's commitment to bring [them] before the Commission for further consideration." Opinion and Order at 84 (citing Tr. XIX at 4870 (AEP Ohio witness Allen explaining that the Company's pro-competitive commitments could not exist without the AEP Ohio's agreement to include them in the Stipulation)).

By approving the Signatory Parties' agreement to address the details of each pro-competitive proposal in future filings that will include additional, detailed Commission review and oversight, the Commission has guaranteed that the proposals, if approved, will be based on the facts and circumstances attendant at that time, will incorporate the most advanced analysis and considerations then available, and will promote the most current Ohio energy policies. The Commission also has properly exercised its ample discretion over the management of its dockets in recognizing the proposals' significant benefits but choosing to address the details of their approval and implementation in separate proceedings. *See, e.g.*, *Toledo Coalition for Safe Energy v. Pub. Utils. Comm'n of Ohio*, 69 Ohio St.2d 559, 560 (1982). For these reasons, the Commission did not err in recognizing that the Stipulation will promote retail competition by enabling competitive providers to offer innovative products that might not otherwise be available absent their inclusion in the Stipulation.

### C. The Commission correctly concluded that the ESP III factors and requirements support the Stipulation.

#### 1. The Commission's use of the ESP III factors was procedurally proper. (OCC AOE 9)

In its Application for Rehearing, OCC contends that the Commission unlawfully evaluated whether the Stipulation and its PPA Rider benefit customers and the public interest by applying the four factors delineated by the Commission in the ESP III proceeding. OCC AFR at 29 (AOE 9). OCC further references the pending applications for rehearing in ESP III and the Ohio Supreme Court's October 28, 2015 dismissal of OCC's appeal for review of ESP III as evidence that the ESP III Order is not legal precedent. OCC AFR at 30. Here OCC asserts that such an analysis was unlawful because there is no final appealable order in ESP III and any use of the four factors by the Commission would deprive OCC of its due process and appeal rights. *Id.*

As has been discussed, the parties to this case participated in 21 full days of hearing – including 5 days of hearing on the Stipulation. AEP Ohio Reply Br. at 122. On February 1, 2016, OCC filed a 174-page Initial Post Hearing Brief followed by a 47-page Reply Brief seven days later. Nowhere in the record of this proceeding, prior to its Application for Rehearing of May 2, 2016, inclusive of all its briefs, its prepared witness testimony and its cross examination of witnesses for other party, has OCC raised this question. For OCC to now contend that this creates a fatal procedural flaw in the Commission's ability to apply its own precedent to the facts in this proceeding is patently disingenuous. Conversely, OCC used 32 of the pages of its Initial Post Hearing Brief to detail, with great specificity and intricate analysis, the reasons it believed AEP Ohio had not met the required burden of proof in regards to the satisfying the four factors laid out by the Commission in ESP III. In doing so, OCC never questioned the procedural integrity of the application of those factors to facts regarding the PPA Rider or suggested that there were possible due process concerns regarding the lack of a final appealable order in the ESP III proceeding. OCC Reply Brief 112-144. Further, OCC presented testimony of numerous witnesses who not only critically analyzed the four factors, but also provided additional interpretations of and suggested modifications to the factors. Without question, OCC certainly had notice of and ample opportunity to address whether or not it believed the ESP III factors being applied by the Commission to this proceeding would run counter to the due process rights of the parties.

OCC failed to raise this issue anywhere in the underlying proceeding, has certainly had its proverbial "day in court" and has forgone any right it might previously have possessed to question the procedural appropriateness of the application of the ESP III factors. The Commission's use of the four ESP III factors was proper and for the reasons stated above OCC

cannot now question the use of those factors as procedurally inappropriate at this stage in the proceeding.

**2. The Four ESP Factors.**

**a. First Factor: The PPA Units have a financial need. (Dynegy AOE 9; OCC AOE 10; OMAEG AOE 3(b))**

OCC, OMAEG, and Dynegy each contend that the Commission erred by finding that the PPA Units, including both the Affiliate and OVEC Units, have a financial need for the revenue stability that the PPA Rider would provide. OCC AFR at 32 (AOE 10); OMAEG AFR at 13-15 (AOE 3(b)); Dynegy AFR at 27-29 (AOE 9). OCC contends that the fact that the total assets of American Electric Power Co., Inc. (AEP), the parent of AEP Ohio and AEPGR, have increased from 2014 to 2015 indicates that the generating units do not have a financial need. OCC and OMAEG also claim that AEP's public statements that its generating fleet, including the PPA Units, is well-positioned from a cost and operational standpoint to compete in the competitive market are inconsistent with any financial need. OMAEG also takes exception to the Commission's finding that the generating units are at risk of premature retirement, due to the insufficiency of near-term capacity market revenues, even with the revenue uplift from the recent Capacity Performance auctions. Dynegy contends that acceptance of the Company's claim that the PPA Units are at risk of premature retirement and thus face a financial need is misplaced, because a number of the units are co-owned with Dynegy and Dayton Power & Light Co. (DP&L) and retirement of the co-owned units is subject to the consent of the co-owners.

The Commission properly found, based on the Company's testimony, that near-term capacity market revenues are not sufficient to support necessary capital investment, even with the revenue uplift from the recent Capacity Performance auctions, and have increased the risk of premature retirement of the PPA Units. Opinion and Order at 86. OCC's, OMAEG's, and

Dynegy's arguments to the contrary are without merit. For example, contrary to OCC's argument, the financial need of the PPA units, and the financial challenges that they face as a result of the current market construct and circumstances, have absolutely no connection to the fluctuation in AEP's total assets.

In addition, the argument by OCC and OMAEG that there is an inconsistency between AEP's statements that the units are competitive "from a cost and operational standpoint" and AEP Ohio's testimony in this case that they have a financial need is baseless. The financial challenge that these units face is not the result of any inefficiency or shortcoming in how the units are being operated or how their costs are being managed. Rather, the challenge, and thus the financial need, results from the revenue side of the equation. Low near-term market prices and both short and long-term market price volatility create the need for the revenue stability that the PPA Rider would provide that will, in turn, allow for continued capital investment in the units and their long-term viability.

The basis for OMAEG's contention that the PPA Units (including the OVEC Units) are not at risk of retirement and, thus, do not face a financial need is based in part on the fact Company witnesses could not guarantee that the units would retire absent the PPA Rider. OMAEG simply misses the point. Without the PPA Rider the generating units face a materially elevated risk of early retirement. AEP Ohio witness Pearce explained in Table III of his direct testimony that near-term PJM capacity market revenues are far below the fixed costs of the plants. (AEP Ohio Ex. 3 at 31.) And, as AEP Ohio witness Allen explained, while the results of PJM's recent Capacity Performance auctions (for the 2016/17, 2017/18, and 2018/19 delivery years) do provide some capacity revenue uplift for the PPA Rider units, they do not alter the central point of AEP Ohio witness Dr. Pearce's Table III: near-term PJM capacity market

revenues remain far below the fixed costs of the Affiliated PPA and OVEC generating units. (*See* AEP Ohio Ex. 52, Ex. WAA-2[17]; Tr. XVIII at 4569.) [18] The bottom line is that, even with Capacity Performance revenue uplift, those generating units continue to have a significant financial need, at least in the near term. AEP Ohio witness Vegas reinforced that the PPA units are now on the economic "bubble," where low short-term capacity and energy market prices have increased the risk of premature retirement. (AEP Ohio Ex. 1 at 17.) Although OMAEG refuses to recognize this point, the Commission correctly did.

Dynegy's and OMAEG's argument that these financial and economic circumstances will not affect co-owned generating units, and the fact of co-ownership either will insulate those units from their financial and economic circumstances, including the increased risk of early retirement, or will preclude the co-owners from responding to those increased risks is simply not credible. Nor should the Commission take any comfort from assurances by Dynegy, as a co-owner, that it would simply ignore the elevated risks of premature retirement that those generating units currently face and continue to invest in and operate the units without regard to those risks.

In sum, the record evidence supporting the financial need factor justifies the inclusion of the OVEC Units in the PPA Rider and supports consideration of additional rate stability proposals on rehearing.

**b. Second Factor: The PPA Units support supply diversity. (Dynegy AOE 10; OMAEG AOE 3(c))**

Opposing Intervenors question the Commission's finding that "the PPA units will support supply diversity in the state." Opinion & Order at 86; *see* Dynegy AFR at 30 (AOE 10);

[17] Attachment WAA-2 is a modified version of AEP Ohio Exhibit 3, Attachment KDP-2.

[18] Compare, for example, the Fixed Capacity Costs for 2016 and 2017 (approximately $500/MW-day), *see* AEP Ohio Ex. 3 at 31, tbl. III, ln. 1; with the Capacity Performance revenues provided for qualifying generating units for the 2015/16, 2016/17 and 20117/18 Delivery Years (an approximate range of $50 to $150/MW-day), *see* OCC Ex. 19.

OMAEG AFR at 15-17 (AOE 3(c)). But the Commission's finding on supply diversity was supported by ample record evidence, as the Commission expressly noted. *See* Opinion & Order at 86. This included evidence that "the continued operation of the coal-fired PPA units will help to protect against a potential over-reliance on natural gas generation facilities and ensure that the region has a diversified fuel source portfolio." *Id.* (citing AEP Ohio Ex. 1, at 8, 13; AEP Ohio Ex. 3, at 6-7).

The Commission's conclusion regarding the benefits of coal-fired generation on supply diversity – and the record evidence supporting that conclusion – apply equally to the inclusion of OVEC in the PPA Rider. The Kyger Creek and Clifty Creek Units are coal-fired generators that share all of the reliability benefits attributable to coal-fired generation. That includes an ability to store fuel on site, which differentiates coal-fired units from gas-fired units. As AEP Ohio witness Bradish testified, on-site fuel storage provides substantial relatability benefits during adverse weather conditions. (AEP Ex. 7 at 3.) Moreover, as AEP Ohio witness Fetter testified, it is important to maintain a diverse generation portfolio, since any fuel source supply can experience temporary or prolonged constraints. (AEP Ex. 3 at 6-7.) Because new power plant construction in Ohio is overwhelmingly focused on gas-fired generation (*see* AEP Ohio Ex. 11 at 8-12.), inclusion of OVEC in the PPA Rider will help maintain the availability of critical coal-fired assets for Ohio customers.

Opposing Intervenors' criticisms of the Commission's fuel diversity finding lack merit. Dynegy argues that the Commission's supply diversity conclusion is flawed because it "hinge[s] on the assumption that the PPA units will close without the PPA Rider." Dynegy AFR at 30. But Dynegy errs in framing the issue in such a binary manner. The Commission's approval of the Stipulation – including the inclusion of the OVEC Units in the PPA Rider – will

unquestionably *promote* supply diversity by discouraging the premature retirement of those Units.

In addition, OMAEG argues that the Commission should ignore fuel diversity issues and trust that PJM and FERC will ensure that Ohioans are served by diverse and reliable generation sources. OMAEG AFR at 15-17. As an initial matter, the Commission properly clarified in its Opinion and Order that its approval of the Stipulation was based solely on its "retail ratemaking authority under state law," and its ultimate decision "[did] not turn on" the issue of "resource diversity." Opinion and Order at 86. The Commission should not deviate from that approach in including OVEC in the PPA Rider on rehearing. Indeed, fuel diversity is another factor that supports consideration of additional rate stability proposals on rehearing.

In any event, OMAEG's argument improperly ignores the traditional role that this Commission and other state commissions have played in resource planning. A state commission's resource planning role at the retail level is complementary to the resource planning role played by PJM and FERC on the wholesale level. That is, the fact that PJM and FERC consider reliability and supply diversity in setting wholesale rates does not mean that the Commission should ignore those issues where, as here, it is setting retail rates.

**c. Third Factor: The Commission's treatment of environmental compliance costs was appropriate. (OMAEG AOE 3(d))**

In its Opinion and Order in the *ESP III* case, the Commission directed AEP Ohio to address in this proceeding "how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations." *ESP III*, Opinion and Order at 25. In its decision in this proceeding, the Commission correctly found, based upon the record evidence, that this factor has "been thoroughly addressed by AEP Ohio in its testimony and by the signatory parties in the stipulation." Opinion and Order at 87.

Specifically, the Commission recognized that AEP Ohio satisfied this factor through witness testimony that demonstrated that "the PPA units are either already equipped with the environmental controls necessary to comply with six important environmental regulations, including the [Clean Power Plan], or that there are budgetary estimates for future compliance incorporated within the financial analysis provided as part of the PPA cost estimates." *Id.* at 86.

No party has challenged these findings on rehearing. Rather, OMAEG argues that the Commission erred by allowing environmental compliance costs to be passed through to customers through the PPA Rider. OMAEG AFR at 17-18 (AOE 3(d)). But the Commission already thoroughly considered and rejected the very arguments that OMAEG raises now in reaching the decision discussed above. *See* Opinion and Order at 71 (discussing OMAEG's identical arguments, at pages 34-36 of OMAEG's initial post-hearing brief). OMAEG has raised no new arguments on this issue on rehearing. Moreover, as AEP Ohio explained in its reply post-hearing brief, OMAEG's arguments on this topic, which concern the potential effects that future environmental regulations may or may not have on the OVEC units' output and market revenues, have nothing to do with the subject of the Commission's third ESP III factor, viz., the OVEC units' compliance with existing environmental regulations and plan for compliance with future regulations. For these reasons, OMAEG's request for rehearing should be denied, and the Commission should uphold the inclusion of OVEC in the PPA Rider. Indeed, the Company's thorough presentation on this factor supports consideration of additional rate stability proposals on rehearing.

**d. Fourth Factor: The Commission's findings concerning economic benefits were correct. (OMAEG AOE 3(e); P3/EPSA/RESA AOE 30)**

Opposing Intervenors raise various arguments against the Commission's treatment of the issue of economic benefits. *See* Opinion and Order 86-87; OMAEG AFR 18-20 (AOE 3(e));

P3/EPSA/RESA AFR at 57-58 (AOE 30). As with the issue of supply diversity, the Commission made clear that its approval of the Stipulation "[did] not turn on" certain issues, including "local economic impact." Opinion and Order at 86. Thus, even if Opposing Intervenors' arguments were sound, they would not undermine the Commission's ultimate determination in this proceeding.

In any event, Opposing Intervenors' arguments are meritless. OMAEG claims that the Commission's finding of economic benefits was "unsupported by the record." OMAEG AFR at 18. But as the Commission itself noted, there was voluminous record evidence showing the economic impact of the Affiliate PPA and OVEC Units, including specific figures for number of workers employed, direct annual payroll income of these workers, annual property taxes, and additional supported jobs and income. *See* Opinion and Order at 86-87 (citing AEP Ohio Ex. 1 at 10,13, 25-26; AEP Ohio Ex. 7 at 10; AEP Ohio Ex. 10 at 11-13, Ex. WAA-3, Ex. WAA-4). This evidence credited by the Commission also specifically itemized the substantial economic benefits related to the OVEC Units in Ohio – including over $40 million of economic benefit in Meigs, Vinton, Gallia, Jackson, Scioto, and Pike Counties and $100 million of economic benefit in Ohio annually. (AEP Ohio Ex. 10 at 11.)

OMAEG again raises the same criticisms it levied in its post-hearing briefs against the economic modeling AEP Ohio introduced into the record. *See* OMAEG AFR at 18-20. But the Commission already rejected OMAEG's baseless claims, and OMAEG offers no new arguments in its Application for Rehearing. As AEP Ohio witness Allen explained, the economic base model he sponsored as a part of his testimony was a simple straightforward method to measure the overall economic impact of a generating facility on its community. (Tr. VII at 1804.) That economic base model provided the Commission a reasonable approximation of the likely

economic impact of a plant closure, and it was appropriate for the Commission to credit and rely on it. That is especially true given that no other party (least of all OMAEG) introduced an alternative economic model, or any specific figures showing an alternative view of the Affiliate PPA and OVEC Units' economic impact.

Other Opposing Intervenors criticize the Commission's economic impact findings, but as with OMAEG's arguments, their criticisms are not new on rehearing and, in any event, are meritless. P3, EPSA, and RESA complain that AEP Ohio did not propose to develop any *new* jobs at the Affiliate PPA and OVEC Units. P3/EPSA/RESA AFR at 57-58. But the *ESP III* factor asked AEP Ohio to address "the impact that a *closure* of the generating plant would have on electric prices and the resulting effect on economic development within the state." *ESP III*, Opinion and Order at 25 (emphasis added). And that is what AEP Ohio addressed in the record here. Moreover, just as a penny saved is a penny earned, *retaining* a job and *creating* a job have an equal effect on the employment rate and overall economic prosperity.

Finally, P3, EPSA, and RESA attack the Commission's treatment of avoided transmission costs, but once again, the Commission made clear that its approval of the Stipulation "[did] not turn on" this issue. Opinion and Order at 86. In any event, P3, EPSA, and RESA note, without elaboration, that "[p]arties contested [AEP Ohio's] transmission upgrades study," but they fail to explain, specifically, why the Commission erred in crediting AEP Ohio's witnesses and evidence on this issue. That is not a proper basis for rehearing. The Commission's treatment of the avoided transmission cost issue was reasonable.

In sum, the Commission's findings concerning economic benefits support the inclusion of the OVEC Units in the PPA Rider, and this is another factor that supports consideration of additional rate stability proposals on rehearing.

### 3. The Four ESP III Requirements.

#### a. First and Second Requirements: The Stipulation provides for rigorous oversight and full information sharing. (Dynegy AOE 6; OCC AOE 12; OMAEG AOE 3(i))

Opposing Intervenors further criticize the Commission's treatment of the second and third ESP III requirements: sufficient oversight and full information sharing. *See* Opinion and Order at 87-90; Dynegy AFR at 22-23 (AOE 6); OCC AFR at 36-38 (AOE 12); OMAEG AFR at 26-27 (AOE 3(i)). But the Commission correctly found that the Stipulation reflects a thorough review process, as well as a commitment by AEP Ohio to full information sharing. As the Opinion and Order "emphasize[d]," the Commission "will conduct an annual prudency review of any retail charges flowing through the PPA Rider." Opinion and Order at 87. This review process "will be carried out in a manner that is consistent with the process for AEP Ohio's prior fuel adjustment clause (FAC) mechanism." *Id.* at 89. Thus, it will include "quarterly PPA rider filings," with "appropriate work papers," that the Commission's Staff will review for "completeness, computational accuracy, and consistency" with Commission rulings, as well as an "annual audit and reconciliation, through which Staff, or another auditor selected by the Commission, will review the accuracy and appropriateness of the rider's accounting and the prudency of AEP Ohio's decisions and actions." Opinion and Order at 90. In this way, the Commission will conduct detailed accounting and prudency reviews of the PPA Rider costs and revenues. And this review process will work the same way – and be just as rigorous and thorough – for the inclusion of OVEC in the PPA Rider, since the PPA Rider costs and revenues attributable to OVEC have always been part of the oversight and information-sharing process contemplated in the Stipulation and approved by the Commission in its Opinion and Order.

Opposing Intervenors arguments against the proposed oversight and information-sharing process do not withstand scrutiny. Dynegy claims that the Commission "failed to substantively

address the objections of intervenors, including Dynegy, that the Commission's oversight of the PPA Rider was inadequate to protect ratepayers and the public interest." Dynegy AFR at 22. But the Commission addressed the oversight and information-sharing process at length, *see* Opinion and Order at 87-90, and expressly "disagree[d] with claims that the annual prudency review is inadequate or illusory," *id.* at 88.

In any event, Dynegy's specific critiques can be easily disposed of. First, Dynegy argues that the Commission's annual review of the PPA Rider is "limited to the scope of [AEP Ohio's] selling activities—not a review of the PPA Rider broadly." Dynegy AFR at 22. But that is not true. As with the current FAC process, the Commission will review all PPA Rider *costs* in addition to PPA Rider revenues, including the prudence of AEP Ohio's decisions concerning those costs. *See* Opinion and Order at 87 (the Commission "will conduct an annual prudency review of any retail charges flowing through the PPA Rider"); *id.* at 90 (the Commission will "the prudency of AEP Ohio's decisions and actions"); *see also* AEP Ohio Br. at 61-68; AEP Ohio Reply Br. at 50-56).

Second, Dynegy, joined by OMAEG, argue that there will be insufficient information sharing because the Commission allegedly does not have a right to audit the books of AEPGR or OVEC. *See* Dynegy AFR at 22; OMAEG AFR at 26. But in the Stipulation, AEP Ohio committed to providing "AEPGR fleet information on any cost component . . . pursuant to a reasonable Staff request (as determined by the Commission)." Jt. Ex. 1 at at 7. Moreover, the OVEC Agreement contains express provisions entitling AEP Ohio to gain access to information concerning the OVEC Units. Specifically, the OVEC Agreement allows AEP Ohio "reasonable access to the books, records, and accounts of [OVEC]," and the Agreement requires OVEC to "furnish [AEP Ohio] such information as [AEP Ohio] may reasonably request." (Sierra Club Ex.

3 at 18 (OVEC Agreement ¶ 9.08).) Accordingly, AEP Ohio has the ability to gain access to OVEC cost information, and should any such OVEC information be necessary to determine the accuracy of PPA Rider costs or the prudence of AEP Ohio's decisions related to such costs, AEP Ohio will exercise its contractual rights and provide the information, either as part of AEP Ohio's PPA Rider audit application or pursuant to a reasonable Staff request.

Third, Dynegy claims that the information-sharing process will be undermined because it allegedly depends on the Commission's Staff requesting specific information, and the Staff, in Dynegy's view, will not "know what to ask for." Dynegy AFR at 22-23. But the PPA Rider audit process is the same process that has applied for years in the FAC context, and the process has functioned well. The Commission's Staff will receive detailed cost information as part of AEP Ohio's PPA Rider filings, and the Staff will have ample opportunity to make reasonable information requests concerning the source and nature of specific costs. The Commission's Staff has considerable expertise and experience in conducting audits of this kind, and thus Dynegy's criticisms are baseless.

For its part, OCC claims that the PPA Rider oversight process is flawed because the Commission "does not have authority to review bilateral contracts between AEP Ohio and its affiliates." OCC AFR at 37. But as the Commission explained in its Opinion and Order, "[i]t is well-established that state commission can review whether a utility prudently entered into a particular transaction in light of alternatives." Opinion and Order at 88 (citing *Pike Cnty. Light and Power Co. v. Penn. Pub. Utils. Comm'n*, 77 Pa. Commw. 268 (1983)); *Duke Energy Retail Sales, LLC*, 127 FERC ¶ 61,027 (2009); *Ky. W. Va. Gas Co. v. Penn. Pub. Utils. Comm'n*, 837 F.2d 600, 609 (3d Cir. 1988)). OCC makes no attempt to engage with this "well-established" precedent, or to explain why it does not apply. Its arguments, therefore, are meritless.

Lastly, OMAEG complains that no provision of the Stipulation gives intervening parties the right to review information AEP Ohio submits to the Commission's Staff in connection with PPA Rider audit proceedings. OMAEG AFR at 27. But the Commission made clear that "interested stakeholders may seek to intervene and participate in the annual audit process." Opinion and Order at 90. Thus, PPA Rider audits will involve the usual process for intervenor participation, in the vein of AEP Ohio's FAC process and numerous other audit reviews conducted regularly by the Commission. As a result, OMAEG's concerns about intervenor participation are misguided.

**b. Third Requirement: The Stipulation reflects an appropriate sharing of financial risk. (OMAEG AOE 3(f))**

OMAEG makes a number of arguments claiming that, even with the Commission's modifications, the Stipulation does not fulfill the third ESP III requirement: an appropriate sharing of financial risk. *See* OMAEG AFR at 20-23, AOE 3(f). The Commission should reject each of these arguments.

First, OMAEG argues that the PPA Rider should be subject to refund. As discussed below, *see infra* Section III.E.2, making the PPA Rider subject to refund would contravene existing precedent and would be inappropriate.

Second, OMAEG criticizes the modification of the Stipulation in which the Commission eliminated AEP Ohio's commitment to initially populate the PAP Rider with a $4 million customer credit. OMAEG AFR at 21. In general, AEP Ohio opposes the large number of modifications that the Opinion and Order made to the stipulation, and obviously AEP Ohio had agreed to the $4 million credit. But AEP Ohio did not oppose the Commission's elimination of that credit on rehearing and has already filed its compliance tariff to implement that modification.

Third, OMAEG argues that the Commission erred in its treatment of the 5% limit on customer rate increases. OMAEG AFR at 22. Specifically, the Commission excluded from the 5% limit any increases related to (a) "past proceedings, including any distribution-related proceedings, or in subsequent proceedings," and (b) "cost associated with the renewable energy projects implemented under Section III.I of the Stipulation." Order and Opinion at 81. OMAEG believes that these two categories of costs should not have been excluded from the 5% cap.

As an initial matter, as described in its Application for Rehearing, AEP Ohio opposes the 5% customer bill cap and requests that the cap be eliminated. *See* AEP Ohio AFR at 13. However, if the Commission retains the current cap (or a cap at a different rate other than 5%), the Commission should retain the two exclusions referenced in the Opinion and Order. First, it is appropriate for the Commission to exclude rate increases related to separate proceedings, since the point of the cap is to limit customer rate increases due to the *PPA Rider,* not the varied other customer benefits and programs addressed elsewhere in the Stipulation. Second, it is also appropriate for the Commission to exclude costs associated with renewable energy projects. Those projects will be subject to future proceedings in which the Commission can address customer bill impacts and implement appropriate rate mechanisms with the benefits of specific projected costs and rate projections.

Fourth, OMAEG argues that the Commission erred in addressing the inclusion of costs in the PPA Rider related to outages that exceed ninety days. OMAEG AFR at 22-23. The Commission held that it "reserves the right to prohibit recovery" of such costs "unless otherwise recommended by Staff and approved by the Commission." Opinion and Order at 88. OMAEG believes that the Commission should have outright prohibited such cost recovery. OMAEG AFR at 22-23. But there is no need to prejudge costs incurred for an outage before such an outage

takes place. In the annual accounting and prudence audits, the Commission and its Staff will have every opportunity to investigate and costs included in the PPA Rider for outages exceeding ninety days. In those proceedings, the Commission will be able to evaluate the prudence of AEP Ohio's actions and decisions relating to such costs, and do so with the benefit of specific evidence concerning the specific circumstance of the outage. The Commission should not tie its hands in such a proceeding; rather, it should address the inclusion of outage costs – as with all other costs – in the PPA Rider as they occur. That is a standard regulatory practice for riders and should not be deviated from here.

Fifth, OMAEG criticizes the Commission's holding that any excess rate increase above the 5% cap should be included in the next reconciliation. If the 5% cap remains, this is an appropriate measure.

**c. Fourth Requirement: The Commission's treatment of the severability provisions of the Stipulation was reasonable and lawful. (P3/EPSA/RESA AOE 43)**

Consistent with the fourth ESP III requirement, the Commission properly approved with modifications the Signatory Parties' proposed severability provision. Opinion and Order at 87. P3/EPSA/RESA take issue with the severability provision the Commission approved because it allegedly "addresses invalidation of Rider PPA in a limited fashion," which Intervenors argue is inappropriate because there is ongoing legal activity in other forums, including FERC, that Intervenors contend has and/or may bear on the legality of the PPA Rider. P3/EPSA/RESA AFR at 74-75 (AOE 43). Intervenors thus request that the Commission further modify the severability provision contained in Section IV.D of the Stipulation to also apply if a regulatory authority "precludes" the PPA Rider's application. *Id.* at 75.

P3/EPSA/RESA's request appears to be yet another attempt to advance Opposing Intervenors' now-familiar arguments regarding their erroneous view of FERC's authority over

this retail ratemaking matter. AEP Ohio has already addressed Opposing Intervenors' incorrect position on this issue in detail in its post-hearing briefs (*see, e.g.*, AEP Ohio Br. at 59-61; AEP Ohio Reply Br. at 97-99), and the Commission has considered and properly rejected it. *See, e.g.*, Opinion and Order at 86 (correctly noting that the Commission's approval of the PPA Rider "is based upon [the Commission's] retail ratemaking authority under state law, which does not conflict with the Federal Power Act or FERC's responsibility to regulate electricity at wholesale").

Again, to be clear, FERC has no authority to invalidate or preclude the PPA Rider. FERC has authority to approve AEP Ohio's *wholesale* purchases under the OVEC PPA, Affiliate PPA, and future renewable and other PPAs. As AEP Ohio pointed out in its rehearing application (at 3), FERC has already accepted the OVEC PPA. Only this Commission – not FERC – has, and properly exercised, the authority to determine the *retail rate treatment* of the costs or credits that AEP Ohio seeks to pass through to retail customers as a result of the inclusion of FERC-approved PPAs in the PPA Rider. *See Pike Cty. Light & Power Co. v. Penn. Pub. Serv. Comm'n*, 77 Pa. Commw. 268, 273-74 (distinguishing FERC's jurisdiction "to determine whether it is just and reasonable for *[a power supplier] to charge* a particular rate" from a state commission's jurisdiction to determine "whether it is just and reasonable for *[a utility] to incur* such a rate as an expense" (emphasis added)); *Cent. Vt. Pub. Serv. Corp.*, 84 FERC ¶ 61,194, ¶ 61,975 (1998) (endorsing the *Pike County* doctrine). Because this Commission is the only regulatory authority with jurisdiction over the PPA Rider itself, it is unnecessary and inappropriate to include P3/EPSA/RESA's proposed additional language in the severability provision regarding some other regulatory authority's invalidation or preclusion of the rider.

### D. The Commission's treatment of the ESP versus MRO test was reasonable and lawful. (OCC AOE 16; OMAEG AOE 4(b); P3/EPSA/RESA AOE 6)

The Commission noted in its Opinion and Order at 105 that, because this is not an ESP case, the ESP/MRO test does not apply. Nevertheless, it addressed that test in order to consider and resolve the parties' arguments on this issue. In light of its finding that the Stipulation, including the PPA Rider proposal, will result in a net benefit for customers, the Commission agreed that the Company's ESP III remains more favorable than the expected outcome under an MRO. In the course of rejecting non-signatory parties' contentions that the PPA Rider proposal in the Stipulation upsets the positive results of its previous ESP/MRO analysis in its *ESP III* decision, the Commission concurred with the following inescapable logic:

> When the net positive benefit of the PPA rider proposal is combined with the existing net positive results of the ESP/MRO test conducted by the Commission in the *ESP 3 Case*, the result must remain, as a matter of basic addition, a net benefit, with the ESP becoming that much more favorable in the aggregate than the expected results of an MRO.

Opinion and Order at 105. Accordingly, the Commission rejected the non-signatory parties' arguments regarding the ESP/MRO test.

Nevertheless, several Opposing Intervenors contend that the Commission erred. OCC argues that the Commission should have included its witness Wilson's estimates that the PPA Rider will impose $580 million of costs over the current ESP III term; that the Commission improperly considered qualitative benefits, rather than just quantitative benefits, in its evaluation; and that the Commission did not include the costs to consumers of future filings that will be made pursuant to commitments that AEP Ohio has made in the Stipulation. OCC AFR at 44-46 (AOE 16). OMAEG also argues that the Commission should have factored Mr. Wilson's estimate that the PPA Rider would create $580 million of costs. OMAEG AFR at 32 (AOE 4.b.). P3/EPSA/RESA contends that the Commission conducted the analysis improperly because

it was not clear whether the quantitative benefits of the PPA Rider that it relied upon were those related to the rest of the current three-year term of ESP III or to the eight-year term of the rider; and because the Commission's explanation of its analysis was cursory and insufficient. P3/EPSA/RESA AFR at 21-23 (AOE 6). All of these criticisms are baseless.

With regard to OCC's and OMAEG's argument regarding Mr. Wilson's cost estimates, the Commission properly rejected them because the analysis he relied upon to create them was flawed. As the Commission has previously concluded, including in its Opinion and Order at 105, note 36, qualitative factors are appropriate to consider in the ESP/MRO comparison test. In any event, the Commission found that the Stipulation, including the PPA Rider, provided a net quantitative benefit. Accordingly, the conclusion that the Stipulation provides a net quantitative benefit and, thus, only enhances the advantage of ESP III over an MRO alternative is also compelling even without consideration of other qualitative benefits that the Stipulation also provides. OCC's contention that the Commission erred by not including the costs of future filings that the Company will make pursuant to the Stipulation is also meritless. The benefits that future filings may provide will be evaluated in the future proceedings in which the Commission reviews them. It would be inappropriate to speculate about them at this point.

P3/EPSA/RESA's criticism that it is not clear whether the Commission factored the rider's $37 million of quantitative benefits over the current ESP III term through May 31, 2018, or its $214 million of benefits over its full eight-year term is pointless because, in either case, the PPA Rider proposal provides a net quantitative benefit. Their complaint that the Commission's analysis was too cursory and insufficient is belied by the Opinion and Order's lengthy and detailed discussion of this issue at pages 104-105.

All of these Intervenors' criticisms on rehearing should be rejected. In addition, it is worth noting that the premise of the Commission's analysis that the Stipulation, including its PPA Rider proposal, provides a net benefit and its conclusion that, as a result, the Stipulation only enhances the advantage of ESP III over the MRO alternative remains intact even with an OVEC-only PPA Rider. (IGS Confidential Ex. 1 at 10.)[19]

### E. Opposing Intervenors' requested modifications to the PPA Rider and Stipulation – and all remaining Opposing Intervenor arguments – are meritless.

#### 1. The PPA Rider should not be subject to refund. (OCC AOE 11; P3/EPSA/RESA AOE 39)

OCC and P3/EPSA/RESA argue that the Commission should make the PPA rider subject to refund. OCC AFR at 35 (AOE 11); P3/EPSA/RESA AFR at 69-70 (AOE 39). The Commission addressed the issue of refunds when it modified the Stipulation and determined that the prohibition against refunds should be removed. Opinion and Order at 87. This action was not enough for Intervenors who assert that the Order is error absent an order to implement the PPA Rider subject to refund. P3/EPSA/RESA AFR at 70. OCC also assert that that jurisdictional questions related to the PPA Rider justify a finding subject to refund. OCC AFR at 35. The Intervenor arguments are without merit and should be denied.

The lack of a standing "subject to refund" standard is a matter of following established Ohio law and cannot be reasonably considered a shortcoming of the Stipulation or the PPA Rider. *See e.g. In re Columbus Southern Power Co.*, 128 Ohio St. 3d 512 (2011). The

[19] In particular, IGS Confidential Ex. 1 at 10 (Tab KDP 2 OVEC) provides an estimate of the "Net PPA Rider Credit/(Charge) excl. PJM CP including CO2 tax" of $4 million for 2016, $5 million for 2017, and $14 million for 2018. When pro-rationed for the last seven months of 2016, the entire twelve months of 2017, and the first five months of 2018, the total estimated credits for the last two years of the current term of ESP III (through May 31, 2018) is $11 million. Accordingly, the existing record fully supports the finding that inclusion of OVEC in the PPA Rider is projected to provide a net credit during the current ESP III term (through May 31, 2018), even before consideration of the additional revenue uplift that would result from Capacity Performance bonuses.

Commission is well aware of the common request by intervening parties for orders to be approved subject to refund. However, such a practice is unnecessary and inappropriate as it undermines the certainty of Commission orders. The Commission issues an order with the presumption that it is correct and enforceable under the Commission's jurisdiction. And the Commission orders are valid when ordered unless overturned by a court of competent jurisdiction.

The authority cited by OCC does not support OCC's request that the PPA Rider be made subject to refund in this case. The Columbus Southern case cited in footnote 131 of the OCC's application for rehearing involves the Commission's order in CSP's 1981 Zimmer construction work- in-progress (CWIP) rate case. OCC AFR at 34. Case No. 81-1058-EL-AIR is inapposite. In that case, the Commission ordered a rate reduction, after rehearing. CSP obtained a stay of the rate reduction pending completion of its appeal of the rehearing order to the Supreme Court of Ohio. Notably, CSP filed an undertaking in order to obtain that stay in accordance with the requirements of R.C. 4903.16. Accordingly, the procedural posture of that stay request, which CSP made before the rates became final approved rates after rehearing, before the Court had heard the resulting appeal, and after CSP filed an undertaking, is completely different than the circumstances of Intervenors' request in this case. Likewise, the recent case cited by OCC involving the ordering of rates subject to refund involved the Court's finding that the basis of the prior charge was at question and remanding to the Commission to determine the next step. OCC AFR at 34. The subject to refund language was ordered because the approved rate was subject to change already to the Court's remand and the Commission needed to hold a remand proceeding to determine the next step for the rate.

The existing rates are the Company's approved filed rates. Unless and until they are revised, they must remain the Company's filed rates. This concept is part-and-parcel of the filed-rate doctrine, which exists to provide security and certainty in Commission decisions. The Commission already removed the prohibition against refunds but should not establish a subject to refund standard that would serve to undermine the confidence in Commission decisions.

**2. If the Commission requires AEP Ohio to exclude capacity performance costs from the PPA Rider, it should not revise its decision to allow AEP Ohio to retain capacity performance bonuses. (OCC AOE 13)**

Under the OVEC PPA, AEP Ohio bears the costs of Capacity Performance (CP) penalties and retains CP bonus revenues that result from the operation of the OVEC units in accordance with its OVEC entitlement share. Accordingly, AEP Ohio's Amended Application and the Stipulation would flow AEP Ohio's entitlement share of the net costs and revenues of both CP penalties and bonuses from the OVEC PPA into the PPA Rider. This is a reasonable approach relative to inclusion of OVEC in the PPA Rider because AEP Ohio is only one of many OVEC owners and its retail cost recovery does not affect the plant operator's decisions.

At pages 87-88 of its Opinion and Order, the Commission modified the Stipulation so that AEP Ohio will bear the burden of any CP penalties, which it stated "will not be considered prudent expenditures." The Commission further modified the Stipulation to provide that all CP bonus revenues will be retained by AEP Ohio.

In its AFR at 12-13 (AOE II.B), AEP Ohio urged the Commission to reverse its modifications so that both OVEC CP penalty costs and bonus revenues would be allowed to flow through the rider, subject to the Commission's review of the prudence of any CP penalty costs. This is a balanced approach, and the Company urges the Commission to adopt it on rehearing.

OCC agrees that precluding AEP Ohio from the opportunity to demonstrate that CP penalty costs are not imprudent is appropriate and supports that aspect of the Commission's order, but it urges the Commission to flow bonus revenues through the PPA Rider to customers and so seeks rehearing on that point. OCC AFR at 13 (AOE 13). OCC's "heads the Company loses" (requiring it to bear the burden of any CP penalties), "tails the Company also loses" (crediting the PPA Rider with any CP bonus revenues) position is patently unreasonable. It is internally inconsistent and clearly designed to be punitive. The Commission should adopt AEP Ohio's rehearing request to flow both penalties and bonuses through the rider (subject to a prudence review), which is internally consistent and, moreover, is fair.

**3. If the Commission keeps the five percent customer bill cap, it should reject Opposing Intervenors' criticisms of that cap. (OCC AOE 7; P3/EPSA/RESA AOE 24, 35)**

The Commission directed AEP Ohio to limit customer rate increases related to the PPA Rider to five percent of the June 1, 2015 SSO rate plan bill schedules, through May 31, 2018, the remainder of the current term of ESP III. The Commission further directed that any under-recovery resulting from the five percent rate impact mechanism would be deferred and then reflected in the calculation of the rider's over/under-recovery balance for future recovery in subsequent quarterly rider filings. Opinion and Order at 81-82.

OCC requests on rehearing that the Commission revise the five percent bill cap mechanism. OCC requests that the Commission apply the five percent bill cap to the generation portion of customers' bills, rather than the total bill as the order contemplates. OCC also attempts to cut off recovery of any revenue reduction deferrals that result from the bill cap during the of the current term of ESP III after the end of that current term on May 31, 2018. OCC AFR at 24-26 (AOE 7). P3/EPSA/RESA also criticize the five percent bill cap. They contend that the bill cap is unreasonable because it does not actually provide the additional rate stability or

protection from rate volatility and price fluctuations that the Commission found it would provide. In particular, they complain that the PPA Rider can still be a charge during the two years when the bill cap will be in place; that the bill cap should apply longer than two years; that it does not keep the rider from increasing or decreasing on a quarterly basis during the two years when it will be in effect; and that once the two-year period ends, the rider would still permit remaining unrecovered revenue reduction deferrals to be included in subsequent rider rates. P3/EPSA/RESA AFR at 50-52 (AOE 24). P3/EPSA/RESA also seek clarification in a number of respects regarding how the five percent bill cap mechanism will be implemented. P3/EPSA/RESA AFR at 63-65 (AOE 35).

The Commission should reject OCC's and P3/EPSA/RESA's arguments. First, as the Company's rehearing application requested, the five percent cap on customer bill impacts should be reversed. In the event there are unanticipated future circumstances that lead the Commission to desire rate mitigation for the PPA Rider for non-shopping customers, it could always authorize an additional deferral at that time. If the five percent cap on bill impacts is eliminated, OCC's and P3/EPSA/RESA's arguments will be moot.

Nonetheless, in the original context of a non-bypassable rider encompassing the costs and revenues of all of the PPA Units (Affiliate and OVEC PPA Units), OCC's and P3/EPSA/RESA's arguments are meritless. The Commission exercised its judgment regarding the appropriate customer bill cap that should be applied, and it concluded in its Opinion and Order that five percent of the total bill, based on SSO rate plan bill schedules in effect as of May 31, 2015, is the appropriate cap level. Accordingly, OCC's attempt to truncate that cap by redefining the base to which it is applied should be rejected. Similarly, OCC's effort to preclude the recovery of revenue reduction deferrals that result from the operation of the five percent cap during the

period through May 31, 2018, which are not also recovered through updated quarterly rider rates by May 31, 2018, is an effort to convert the bill cap mechanism from a deferral and future recovery mechanism into a revenue disallowance mechanism. That is not what the Commission intended.[20]

The complaints that P3/EPSA/RESA raise in their AOE 24 miss the point of the bill cap. The purpose of the Commission's five percent bill cap during the first two years of the PPA Rider is to provide a cap on the magnitude of any PPA Rider charges during the first two years of its term. The purpose is not, as P3/EPSA/RESA apparently assume, to eliminate the possibility of charges (and, thus, to effectively vitiate the PPA Rider and its hedging mechanism) during that period. By establishing a bill cap on the rider's charges for that period, the Commission determined that it would provide an additional level of rate stability and protection against rate volatility and price fluctuations. Similarly, P3/EPSA/RESA's complaints that the bill cap should be applied throughout the term of the rider, that the quarterly rider rates should not be permitted to increase or decrease, and that recovery of any bill cap-related revenue reduction deferrals that remain as of May 31, 2018 is inappropriate are, at bottom, just reformulations of their arguments against the PPA Rider itself.

P3/EPSA/RESA also pose several questions in AOE 35 regarding the implementation of the five percent bill cap mechanism that the Commission established. P3/EPSA/RESA AFR at 63-65 (AOE 35). If the Commission were to confirm the inclusion of OVEC in the PPA Rider and revise the PPA Rider into an OVEC-only bypassable rider, and were the five percent cap on

[20] OCC also requests that the Commission clarify that the collection of revenue reductions in subsequent quarterly rider update filings is also subject to the five percent bill cap. OCC AFR at 26. The Company understands that the five percent bill cap would apply to all customer bills for rates in effect through May 31, 2018, which could be caused by normal operation of the PPA Rider or the quarterly reconciliation component of the PPA Rider associated with the 5% cap. Accordingly, if OCC's request is simply to confirm that understanding of the Commission's Opinion and Order, the Company does not object to it.

bill impacts eliminated, P3/EPSA/RESA's questions regarding how the bill cap mechanism would be implemented also would be moot. In the context of a nonbypassable PPA Rider, the Company provides the following response to P3/EPSA/RESA.

**4. The Commission did not err by failing to impose "annual and aggregate limits" on PPA Rider charges. (P3/EPSA/RESA AOE 26)**

P3/EPSA/RESA request in their AFR that the Commission impose limits, annually or in the aggregate, on any PPA Rider charges, in order to provide additional downside protection against PPA Rider charges. P3/EPSA/RESA AFR at 520-54 (AOE 26). This is a request that the Commission revise the two-year five percent bill cap that it already has established. It should be rejected. First, the Commission has evaluated the need for protection against charges produced by the PPA Rider and it has determined that a five percent bill cap for the first two years' of the rider's term is appropriate. P3/EPSA/RESA has provided no reason for concluding that the Commission's judgment on the appropriate bill cap level and duration is unreasonable. Second, as AEP Ohio explained in its AFR at 13, the two-year five percent bill cap should be eliminated, not expanded in the apparently unlimited fashion that P3/EPSA/RESA have requested.

**5. The June 1, 2016 date for a non-zero PPA Rider is reasonable. (P3/EPSA/RESA AOE 46)**

P3/EPSA/RESA argue that the Commission should not have authorized AEP Ohio to flow the net effects of the OVEC PPA and the Affiliate PPA through the PPA Rider beginning on June 1, 2016 because the Affiliate PPA "cannot be implemented until and unless it is approved by FERC." P3/EPSA/RESA AFR at 78 (AOE 46). Given the scope of AEP Ohio's rehearing application, this argument is moot. As AEP Ohio explained in its application for rehearing, the Affiliate PPA is no longer in effect as a result of FERC's April 27, 2016 Order in Docket EL16-33-000. AEP Ohio AFR at 3. The OVEC PPA, which FERC previously accepted on May 23, 2011, however, remains in effect and should be included in the PPA Rider. *Id.*

Because AEP Ohio is not presently requesting that the Affiliate PPA be included in the PPA Rider, the rider's implementation date is in no way tied to FERC's approval of the Affiliate PPA.

P3/EPSA/RESA also complain that a June 1, 2016 implementation date is too early because that date is before Opposing Intervenors' challenges to the PPA Rider on rehearing and before the Supreme Court of Ohio will have been decided. P3/EPSA/RESA AFR at 78 (AOE 46). Tellingly, Opposing Intervenors cite to no support for their position, which is contrary to established Commission practice. Indeed, the Commission routinely orders that utility rates be implemented within only days or weeks of an order approving them. Moreover, P3/EPA/RESA's request to delay the PPA Rider's implementation until after the Court decides one or more eventual appeals of this case is akin to an inappropriate request for an indefinite stay of the Opinion and Order. Their unsupported request is procedurally improper, substantively without merit, and disregards established Commission and judicial precedent governing a stay. For these reasons, Opposing Intervenors' complaints about the June 1, 2016 implementation date are without merit, and the Commission should disregard them.

**6. Except as noted in AEP Ohio's Application for Rehearing, the Commission's approval of the Stipulation provisions related to renewable resources was proper. (OCC AOE 18)**

In its Application for Rehearing, OCC argues that the Commission's approval of the Stipulation's provisions that provide for the development of new renewable energy projects that include at least 500 MW nameplate capacity of wind energy and at least 400 MW nameplate capacity of solar energy, are contrary to the public interest and governing law. OCC AFR at 40 (AOE 18). Within its argument OCC infers that the General Assembly, thorough its passage of S.B. 3 and S.B 310 respectively, has somehow outlawed by codification and generally expressed its disfavor for the construction of renewable energy here in Ohio. Contrary to OCC's position, a review of the language of both S.B. 3 and S.B 310 reveals nothing indicating that solar, wind or

other renewable projects are either unlawful or contrary to the public interest of Ohio. Although S.B. 3 certainly stands for the premise that electric markets in Ohio should be deregulated, and S.B. 310 effectively froze a previously mandated renewable energy deployment schedule for Ohio utilities, neither act outlaws renewable construction or takes the position that such projects run counter to the benefit of the State of Ohio or its citizens. Further, OCC's argument clearly misunderstands what the General Assembly was saying in S.B. 3 when it proclaimed that the policy of the State of Ohio is to, among other things, recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment (ORC 4928.02(G)).

OCC further expresses a concern with what it asserts is a lack of information and detail regarding the specifics of AEP Ohio's deployment of the proposed renewable projects and how the costs of those would be treated. To be clear, AEP Ohio had neither asked for, nor was it granted by the Commission, an unchecked ability to contract for, develop, deploy, and expense to customers the costs of those approved renewable projects. It is worth repeating what was previously stated in the AEP Ohio Reply Brief, "The commitments AEP Ohio has made to develop 900 MWs of renewable energy resources in Stipulation Section III.I are subject to future Commission review and approval." AEP Ohio Reply Br. at 117. The Stipulation clearly requires AEP Ohio to file EL-RDR applications subject to the Commissions review and approval for cost recovery (Jt. Ex. 1, at 30 (Stipulation Section III.I.b)) and commits AEP Ohio to consult with PUCO Staff regarding projects and project selection (Jt. Ex. 1, at 30 (Stipulation Section III.I.c).

Additionally, in regards to the benefits to Ohio of the construction of the 900 MW of renewables required by the Stipulation, and approved by the Commission, OCC concludes in its

Reply Brief that "the purported public benefits of those plants are counter to the record evidence." OCC Reply Br. at 50. That assertion relies upon statements made by its witness Dr. Noah Dormady in his prefiled testimony. OCC seems to suggest that Dr. Dormady's testimony is clear that the public benefits of the proposed renewable projects are both "purported" and "counter to the record" in this case. No such clarity exists. In fact, a review of Dr. Dormady's testimony reveals that such a negative opinion cannot be so cleanly drawn. While his testimony does question the potential permanency of the manufacturing jobs created in Appalachian Ohio and the possibility for sourcing the necessary solar equipment from somewhere other than Ohio, it is important to note that those thoughts were offered in response to the following question: "The Stipulation purports to provide jobs benefits of siting the solar installations preferentially in Appalachian Ohio. Are these jobs benefits overstated?". (OCC Ex. 36 at 16-17.) OCC conveniently failed to include the initial portion of Dr. Dormady's response in which he asserted: "Possibly. The aim of siting the facilities in Appalachian Ohio is laudable in that it may serve to bring some economic benefit to a region of the state that has been more severely hit by the recession." (OCC Ex. 36 at 16.) Therefore, it is quite clearly stated in the record that even OCC witness Dr. Dormady believes that the proposed deployment of 900 MW of renewables in Ohio has the possibility of bringing economic benefit to Appalachian Ohio as suggested by AEP Ohio and obviously understood by the Commission.

OCC also references the Commission's prior decision rejecting the Turning Point solar project requested by AEP Ohio in its ESP II case to support the assertion that the Commission improperly allowed AEP Ohio to move forward with the renewables proposal in the current Stipulation. Clearly, in this instance, the details and specifics of the Turning Point project are distinctly different from the Stipulation's proposed 900 MW of renewable projects.

Conveniently, it seems that the OCC believes the Commission has the requisite knowledge, expertise and wisdom to deny and reject renewable projects that OCC has previously opposed. Alternately and contradictorily, the OCC then asserts that the Commission is most certainly mistaken, misinformed and has exercised inappropriate judgement when such renewable projects disfavored by OCC are approved. In each instance the Commission reviewed the significant record before it and reached a decision. While the Commission may have reached a different decision here than in the Turning Point case, OCC fails to offer any evidence as to how the Commission may have acted in contravention of law or contrary to the evidence in the record before reaching the decision regarding the Stipulation's solar and wind renewable proposals.

Finally, the Opinion and Order clearly states that "[t]he Commission supports the construction of new renewables in this state," Opinion and Order at 83, "renewable energy plays an integral role in promoting a reliable and cost-effective grid," *id.* at 82, and "[t]he Commission will continue to look to the markets as the primary drivers of an adequate supply of energy from any source, including renewable energy," *id.* But, it is also worth noting that Commissioner Haque, in his concurrence, further addresses the public interest benefits of the Stipulations renewable requirements by stating that:

> Here, I think the public benefits from a few major categories of terms agreed to in the stipulations, especially the grid modernization and clean generation technologies provisions. Many states have opened dockets and are undertaking "utility 2.0" or "utility of the future" grid modernization endeavors. The State of Ohio is due for this conversation. For some time now, I've wondered how we could possibly persuade the electric utilities to have conversations with us about the future of their industries: how they expect to incorporate next generation (and often third party) technologies into the distribution grid, how they expect to cater to millennial consumers who want more control and understanding over how and what they consume, how to better incorporate clean technologies into everything that they do, etc. These conversations could yield revolutionary endeavors that would surely benefit the public interest. The stark reality is that until these PPA cases were resolved, no such conversations would occur.

Opinion and Order, Concurring Opinion of Commissioner Haque, at 5.

This Commission properly exercised its discretion in deciding that the renewables proposed by the Stipulation were clearly in the public interest. OCC's arguments otherwise are without support and meritless.

**7. The Commission correctly approved the provisions of the Stipulation related to grid modernization. (OCC AOE 21; P3/EPSA/RESA AOE 40)**

In its Opinion and Order, the Commission correctly recognized that AEP Ohio's commitment to explore avenues to empower customers through grid modernization initiatives will "promote retail competition," provides "significant long-term value and benefit for customers" that is consistent with efforts to make the grid more reliable and cost effective" for them, and advances the state policy objective set forth in R.C. 4928.02(D). *See, e.g.*, Opinion and Order at 77, 84-85, 82. OCC and P3/EPSA/RESA contend that the Commission's findings in this regard are unreasonable and unlawful because, according to Intervenors, the grid modernization terms in the Stipulation do not require AEP Ohio to do anything and are contingent upon future filings and Commission approval. OCC AFR at 52-54 (AOE 21); P3/EPSA/RESA AFR at 71-73 (AOE 40).

Opposing Intervenors' argument on this point is incorrect. Far from being an empty "future 'promise'" (*see* P3/EPSA/RESA AFR at 73), the Commission has approved AEP Ohio's concrete commitment to file a grid modernization business plan by June 1, 2016, less than one month from now. *See* Opinion and Order at 42, 84-85. Far from being uncertain or illusory, that filing "will include initiatives related to advanced metering infrastructure installation, investment in distribution automation circuit reconfigurations, Volt/VAR Optimization, removing obstacles to distributed generation, and net metering tariffs." *Id.* at 85; *see also* AEP Ohio Br. at 108-109.

In addition to being merely a repetition of arguments made in their post-hearing briefs (*see* RESA Br. at 52; P3/EPSA Br. at 71-72; P3/EPSA Reply Br. at 24-26), and thus not worthy

of rehearing on that basis, Opposing Intervenors' complaint that AEP Ohio did not provide sufficient detail to approve its grid modernization proposals in this proceeding also misses the point. *See* OCC AFR at 53 (AOE 21); P3/EPSA/RESA AFR at 72-73 (AOE 40). AEP Ohio is not seeking approval of those proposals in this case, as the Stipulation and the Commission's Opinion and Order make clear. AEP Ohio will provide the requisite detail supporting its grid modernization business plan in its application due June 1, 2016, and the Commission will have the opportunity to review and determine, based upon the record of that case, whether to approve AEP Ohio's proposals. *See* Opinion and Order at 84. That the Commission will consider and approve AEP Ohio's specific grid modernization plans in another case does not diminish or make inappropriate the Commission's recognition, in this case, of the many benefits of AEP Ohio's commitment to those plans. Indeed, it is common for the Commission to recognize the benefits, in one case, of an EDU's commitment to make a proposal in a separate future proceeding. *See, e.g., ESP II*, Opinion and Order at 23-24 (approving placeholder Generation Resource Rider, rejecting the very arguments Intervenors advance here, and emphasizing that the Commission has broad discretion over the management of its dockets); *see also* Opinion and Order at 98 ("The Commission finds that it is not a violation of an important regulatory principle or practice for the stipulation to enumerate provisions to be included in a subsequent filing.").

For all of these reasons, the Commission did not err in recognizing that AEP Ohio's grid modernization commitments provide significant benefits to customers and retail competition in Ohio. The Commission thus should disregard OCC's and P3/EPSA/RESA's requests for rehearing on this issue.

### 8. The Stipulation does not affect customers' ability to opt-out of AEP Ohio's energy efficiency and peak demand reduction programs. (ELPC AOE 3)

ELPC/OEC/EDF argue, as they did in post-hearing briefing, that Section III.C.11 of the Stipulation conflicts with R.C. 4928.6613, which provides that no account properly identified in the customer's verified opt-out notice under R.C. 4928.6612 shall be subject to any cost recovery mechanism under R.C. 4928.66 or eligible to participate in, or directly benefit from, programs arising from electric distribution utility portfolio plans approved by the Commission. ELPC/OEC/EDF AFR at 15-16 (AOE 3). As their application for rehearing concedes, however, ELPC/OEC/EDF have already raised this argument, and the Commission has already considered and rejected it. *Id.* at 15 (citing ELPC/OEC/EDF Br. at 57-58; Opinion and Order at 98). Because Intervenors have offered no new arguments on this topic, the Commission should deny their request for rehearing on that basis.

Moreover, as AEP Ohio previously explained in response to Opposing Intervenors' argument, Section III.C.11 of the Stipulation merely confirms that nothing in the Stipulation affects a customer's opt-out right under R.C. 4928.6612, as that provision was enacted in 2014 by S.B. 310. Specifically, Section III.C.11 provides that IRP tariff customers may opt out of the opportunity to obtain direct benefits from AEP Ohio's EE/PDR plan as provided in S.B. 310. AEP Ohio Reply Br. at 114. There is no conflict between a customer's participation in the IRP tariff and its exercise of its opt-out rights under R.C. 4928.6612. *Id.* at 114-115. Further, as the Commission correctly noted, to the extent that ELPC/OEC/EDF are asking the Commission to decide an issue that will be the subject of AEP Ohio's next ESP application in this case, Intervenors' request is premature. Opinion and Order at 98. Accordingly, the Commission should deny ELPC/OEC/EDF's request for rehearing on this issue in its entirety.

## IV. The Commission correctly found that the Stipulation package does not violate any important regulatory principle or practice.

### A. The PPA Rider is authorized by and consistent with Ohio Law.

#### 1. The PPA Rider is authorized by R.C. 4928.143(B)(2)(d). (Dynegy No. 2; OCC 14(A); P3/EPSA/RESA Nos. 3-5)

OCC, P3/EPSA/RESA, and Dynegy all argue that the Commission erred in finding that the PPA Rider was authorized by R.C. 4928.143(B)(2)(d). OCC AFR at 40 (AOE 14); RESA AFR at 14 (AOE 3-5); P3/EPSA AFR at 10 (AOE 3-5); Dynegy AFR at 8 (AOE 2). These arguments are without merit.

First, Dynegy and P3/EPSA/RESA argue that the PPA Rider is unlawful because it does not constitute a "charge" as defined by the statute, but instead a "credit." R.C. 4928.143(B)(2)(d) states, in pertinent part, that an ESP may include "terms, conditions or charges relating to limitations on customer shopping for retail electric generation service." AEP Ohio has established that the PPA Rider is projected to result in a net credit to Ohio ratepayers over the life of the plan, and Intervenors are now attempting to use that ratepayer savings projection against AEP Ohio in a desperate attempt to invalidate the Rider.

Dynegy and P3/EPSA/RESA's arguments are patently misguided. The Commission evaluated this argument and held:

> [The] PPA Rider, as presented in the amended application and the stipulation, is a credit or charge that would appear on customers' bills. Thus, the Commission concludes that the first requirement of R.C. 4928.143(B)(2)(d) is met, as the PPA Rider would consist of a charge or credit incurred by customers under the ESP.

Opinion and Order at 93-94 (citations omitted). It is undisputed that the PPA Rider will show up on Ohio ratepayer monthly invoices for the term of the ESP. In any consumer transaction where the consumer has an ongoing relationship with the service provider, the issuance of charges and credits are commonplace. A credit is simply the flip-side of a charge. Further, there is no reason

why the eventual monthly "credit" to Ohio ratepayers could not be considered a "condition" under the ESP. For Dynegy and P3/EPSA/RESA to read this statutory language so narrowly is simply unreasonable, as it seeks to punish AEP Ohio for returning money to Ohio ratepayers.

OCC (AFR at 40), Dynegy (AFR at 9), and P3/EPSA/RESA (AFR at 10) also argue that the PPA Rider is unauthorized under R.C. 4928.143(B)(2)(d) because there is no "actual" or "physical" limitation on customer shopping for retail electric generation service, which is the second component of the statute. Once again, these Intervenors are ignoring a common sense application of the statute in order to satisfy their unwarranted position. The Commission addressed this issue squarely, holding:

> The PPA Rider, as presented in the amended application and stipulation, is non-bypassable and would operate as a financial limitation on customer shopping for retail electric generation service. The effect of the PPA Rider is that the bills of all customers would reflect a price for retail electric generation service that is approximately 30 percent based on the cost of service of the PPA units and 70 percent based on the retail market, thus functioning as a financial hedge against complete reliance on the retail market for the pricing of retail electric generation service.

Opinion and Order at 94. The Commission properly found that because the PPA Rider proposed in the Stipulation would be non-bypassable, and will therefore be paid by all ratepayers in the AEP Ohio service territory, it would operate as a financial limitation on customers.[21] The fact that the "limitation" here is financial, rather than physical, does not change the fact that it is a limitation on shopping and thus satisfies the statutory requirement. In order to survive their rigid interpretation, these Intervenors would have the legislature define every type of limitation that could arise in any given situation. Their position, however, is unreasonable and would restrict the development of innovative rate stability offerings, in direct contravention of the legislature's

[21] If the Commission approves a bypassable OVEC-only PPA Rider on hearing, this argument would be moot.

intent in enacting the flexible and adaptive ESP statute. By any reasonable analysis, the PPA Rider results in a limitation on retail generation service shopping and, therefore, satisfies R.C. 4928.143(B)(2)(d).

Finally, OCC (AFR at 42), Dynegy (AFR at 11), and P3/EPSA/RESA (AFR at 18) argue that the PPA Rider does not have the effect of stabilizing or providing certainty regarding retail electric service. As AEP Ohio has stated before, these Intervenors' arguments claiming that no volatility exists in the energy generation market are anchored in denial. AEP Ohio Reply Brief at 8. AEP Ohio readily acknowledges that staggering and laddering of SSO auctions masks price volatility, but it does not appropriately address the risk in the long term. AEP Ohio Br. at 91. The Commission agreed, holding:

> The PPA Rider proposed in the amended application and stipulation would operate as a financial hedging mechanism, with the effect of stabilizing or providing certainty regarding retail electric service. The PPA Rider would smooth out fluctuations in market prices, because the rider would rise or fall in a way that is counter cyclical to the wholesale market. The PPA Rider, therefore, is intended to mitigate, by design, the effects of market volatility, providing customers with more stable retail pricing and a measure of protection against substantial increases in market prices . . . .

Opinion and Order at 94. Put simply, these Intervenors have not presented any new or novel arguments to support their misguided position. These Intervenors' witnesses presented testimony and evidence that challenged AEP Ohio's position that the industry faces the risk of volatile market prices. That testimony and evidence was considered and evaluated against contravening testimony and evidence presented by AEP Ohio. As shown above, the Commission was persuaded by AEP Ohio's arguments, clearly believing there is a real risk of volatility in the market, and the PPA Rider is the most effective mechanism to combat that volatility. Simply restating arguments that failed to persuade the Commission in the first instance should not be a basis for rehearing.

Accordingly, because the PPA Rider satisfies each of the three factors set forth in R.C. 4928.143(B)(2)(d), OCC's, P3/EPSA/RESA's, and Dynegy's Applications for Rehearing should be denied.

**2. Opposing Intervenors are wrong in claiming that the PPA Rider is an anticompetitive subsidy under R.C. 4928.02(H). (ELPC AOE 1; OMAEG AOE 4(a); RESA AOE 2, 8, 37-38)**

ELPC argues (at 3-11) that the PPA Rider is an anticompetitive cross subsidy of uneconomic generation plants, regardless of whether the rider provides a distribution service. Similarly, OMAEG claims (at 30-31) that the PPA Rider facilitates an anticompetitive subsidy of AEP's unregulated generation assets with ratepayer funds and argues that the Commission's "contrary determination lacks merit." RESA also advances overlapping and redundant claims that the PPA Rider improperly provides a guaranteed return for the AEP generation affiliate and fails to adequately promote rate stability, especially given that AEP Ohio has other riders that fluctuate (at 5-8); that the PPA Rider is an anticompetitive subsidy (at 62-64); and that the Commission did not adequately consider intervenor challenges that the PPA Rider violates R.C. 4928.02(H) by creating an anticompetitive subsidy (at 19-22). Each of the claims supporting these arguments is misguided and incorrect.

These claims under R.C. 4928.02(H) are built on the flawed premise that characterizes the PPA Rider as a distribution charge.[22] Collecting generation costs through a distribution charge would be problematic. As the Supreme Court has ruled under SB 3, R.C. 4928.02(H) "prohibits public utilities from using revenues from competitive generation service components

[22] For example, RESA (at 26, 69) refers to the PPA Rider as being part of the "wires-only charges." ELPC also tries (unsuccessfully) to argue that the status of the PPA Rider as providing a distribution service does not matter – but the very notion of a cross-subsidy belies that position, as further discussed below.

to subsidize the cost of providing noncompetitive distribution service, or vice versa."[23] But the PPA Rider is not a distribution charge and does not involve a distribution service; it is a generation-related rider that would recover generation-related costs. As the Commission has already found:

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

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

> We reject claims the PPA rider would violate R.C. 4928.02(H). Contrary to the arguments of opposing intervenors, the PPA rider mechanism does not facilitate the recovery of generation-related costs through distribution or transmission rates.

Opinion and Order at 96. The Commission's cogent explanation soundly refutes Opposing Intervenors' misguided claims under R.C. 4928.02(H) and should be reinforced on rehearing.

ELPC maintains (at 3-5) that R.C. 4928.02(H) will be violated regardless of whether the PPA Rider facilitates generation-related cost recovery through a distribution or transmission service, characterizing that interpretation as an improperly "narrow reading" of the statute. In particular, ELPC suggests that any anticompetitive subsidy is still prohibited. Regardless, the

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

PPA Rider does not amount to a subsidy and is not anticompetitive. In its Opinion and Order (at 96-97), the Commission made specific findings that the PPA Rider supports competition and does not undermine it. Further, the PPA Rider is based on recovery of net cost in exchange for receiving a financial hedge generation service; as such, it cannot properly be considered a subsidy. ELPC is wrong in claiming otherwise.[24]

ELPC also argues (at 9-10) that the nonbypassable nature of the PPA Rider approved in the Opinion and Order is equivalent to making it a noncompetitive service; ELPC then bootstraps that contention to conclude that the revenues resulting from that noncompetitive service supports a generation service that is competitive. This is flawed pretzel logic because the hedging service that forms the basis for the PPA Rider cannot simultaneously be the source and recipient of the subsidy. And there are not multiple services being provided by the PPA Rider but only one: a generation service that is priced based on net cost. There needs to be two separate services in order for anticompetitive cross subsidization to occur – one service that is competitive receiving revenues from a second, noncompetitive service. ELPC's conclusion in this regard also disregards SB 221, which allows an EDU to provide both bypassable and non-bypassable generation service as part of an ESP. In any case, if the Commission adopts a bypassable OVEC-only version of the PPA Rider in this stage of rehearing, this branch of ELPC's challenge would become moot.

[24] As a related matter, ELPC characterizes AEP Ohio customers (at 4-5) as a "captive audience" and claims that the PPA Rider implements "an anticompetitive subsidy by effectively forcing all of AEP Ohio's distribution customers to pay." While the PPA Rider would still be nonbypassable for future renewable projects that may be approved by the Commission in the future, those matters are not currently before the Commission. Likewise, if additional rate stability proposals are entertained on rehearing, they could be nonbypassable. So while the nonbypassable issues are not completely moot if the Commission adopts a bypassable OVEC-only PPA Rider for now, the nonbypassable issues are unripe and need not be addressed at this time.

OMAEG claims (at 30-31) that the PPA Rider facilitates an anticompetitive subsidy of AEP's unregulated generation assets with ratepayer funds and argues that the Commission's "contrary determination lacks merit." OMAEG's argument that the PPA Rider creates an anticompetitive subsidy completely fails to acknowledge the rate stabilizing hedge service being provided to customers. Providing a generation service that involves either a cost-based charge or a credit does not convey a subsidy, let alone an anticompetitive subsidy.

RESA also rehashes its same arguments made prior to a decision in this case in claiming that the PPA Rider violates R.C. 4928.02(H). P3/EPSA argues (at 25-28) that the Commission erred in failing to find that the PPA Rider violates R.C. 4928.02(H), because intervenors presented testimony that the effect will be anticompetitive. Similarly, RESA also argues (at 67-69) that the Commission should have accepted intervenor positions and evidence from "knowledgeable and experienced witnesses" supporting the conclusion that the PPA Rider is anticompetitive. In addition to being sour grapes, these points are clearly just rehashing their litigation position that the Commission already rejected and do not form a proper basis for rehearing. Rather, those points should be rejected consistent with the Opinion and Order.

RESA further criticizes (at 68) the Commission's observation (Opinion and Order at 97) that the annual prudence audit of PPA costs would safeguard against potential affiliate abuse. However, the Commission's observation that the audit process would help guard against improper costs being passed through is a logical and compelling point. Of course, if the Affiliate PPA is no longer part of the PPA Rider on rehearing, those points (as with most of the anticompetitive arguments) become moot – at least for now.

Finally, RESA's over-arching position is its argument (at 10-13) that approval of the PPA Rider amounts to a "reversal" of the legislative directive to promote competition. That

conclusion ignores the fact that SB 221 took a sharp turn (though not a u-turn) in establishing the hybrid form of market and regulation through enactment of the ESP statute in 2008; if accepted, RESA's position would directly undermine SB 221, which allows an EDU to provide both bypassable and non-bypassable generation service as part of an ESP. A related point RESA makes (at 12-13) is that the PPA Rider does not resolve rate volatility, in part because AEP Ohio has other riders that fluctuate from time to time. Whether distribution rates fluctuate is irrelevant to addressing generation market rate volatility, which is the purpose of the PPA Rider. Of course, the Opinion and Order (at 77) already determined that the PPA Rider as modified by the Commission "will protect consumers against rate volatility and price fluctuations by promoting retail rate stability for all ratepayers." RESA merely disagrees with the Commission's assessment, but that is not a proper basis for rehearing.

In sum, the Opposing Intervenors are wrong in claiming that the PPA Rider violates Ohio energy policies, is anticompetitive, or amounts to an improper cross-subsidy – all of which was already properly addressed in the Opinion and Order. The Commission's existing conclusions in this regard should be affirmed on rehearing.

**3. The PPA Rider and Stipulation are consistent with R.C. 4928.02(A), and Opposing Intervenors' arguments concerning a competitive process are meritless. (OCC AOE 19-20; OMAEG AOE 4(a); ELPC AOE 2; P3/EPSA/RESA AOE 42.) Indeed, the Commission's endorsement of the rate stability benefits of the PPA Rider and its policy decision granting rehearing in Case No. 14-12-1297-EL-SSO and considering replacement rate stability mechanisms suggests it should also explore such matters for AEP Ohio.**

OCC advances Assignment of Error 19, arguing (at 50-51) that the Competition Incentive Rider ("CIR") violates R.C. 4928.02(A) by creating an alleged anticompetitive price increase of

both the SSO and marketer rates.[25] In support of this claim, OCC challenges the Stipulation's supporting statement (Jt. Ex. 1 at 12) that the CIR will incent shopping and recognize that there may be costs associated with providing retail electric service that are not reflected in SSO bypassable rates. OCC also claims (at 51) that the CIR will allow AEP Ohio (and CRES providers that compete with the SSO) to implement an "artificial increase at whatever level they desire." OCC concludes that the CIR is the antithesis of competition that does not produce reasonable priced service, in violation of R.C. 4928.02(A). For numerous reasons, this challenge should be rejected.

As a threshold matter, OCC's claims that the CIR will not facilitate competition and will cause an unsupported increase are premature and unripe for review. The Stipulation provision that created the CIR, Section III.C.12, is merely the Company's commitment to include such a proposal in its ESP III extension filing. The CIR proposal has not even been filed yet. While the Stipulation binds the Signatory Parties to support the CIR (Section III.C.6), the Commission is free to consider whether to approve the CIR as part of the upcoming ESP III extension case; of course, the Company fully supports and advocates approval of the CIR and the Signatory Parties will need to negotiate and alternative replacement proposal if the CIR is not adopted (Section IV.I of the Stipulation). In any case, OCC's challenges to the CIR are premature and should be dismissed on that basis.

If the Commission does presently entertain OCC's challenges of the CIR, it should reject them as lacking merit. First, OCC's entire premise of the CIR being an increase to SSO rates is false. OCC ignores the fact that SSO customers will get an offsetting credit for 100% of the CIR

[25] OCC then repeats (at 51-52) the same exact argument as Assignment of Error No. 20, which should likewise be rejected.

based on the same rate design associated with the PPA Rider. (Section III.C.12.b of the Stipulation.) Thus, SSO customers will not experience a bill increase as a result of the CIR being implemented. Second, OCC fails to acknowledge that the Commission has long-employed shopping incentives to promote retail shopping – since the first stages of deregulation in 2000. Indeed, with the implementation of customer choice came several such incentives, including a shopping incentive of $2.50/MWh to the first twenty-five percent of the Columbus Southern Power residential class load that switched during the market development period and waiver of the regulatory transition charge on the first twenty percent of Ohio Power residential customers switching from the SSO. *See* Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP, Opinion and Order. More recently, the transition plan that the Commission approved in AEP Ohio's ESP II included discounted capacity provided to CRES providers to incentive shopping. *ESP II*, Opinion and Order. Third, it is inherently flawed for OCC to make a legal argument relying on the Ohio energy policy of ensuring reasonably priced electric service, since the Commission is the ultimate arbiter of what is reasonable and OCC merely disagrees with the Commission's policy findings. In sum, the CIR is reasonable and any challenges to it can be deferred to the ESP III extension case.

Next, OMAEG questions whether the PPA Rider is supported by Ohio energy policy on three grounds. First, OMAEG argues (at 30) that the PPA Rider violates the "reasonably priced retail electric service" policy of R.C. 4928.02(A) because it is likely to cause an aggregate rate increase over the extended ESP term. This assertion ignores the Commission's finding (Opinion and Order at 80) that the PPA Rider is reasonably estimated to provide a net credit of $37 million over the existing ESP term or $214 million over the extended ESP term. The Opinion and Order (at 96) found that adoption of the PPA Rider is "consistent with our obligation under R.C.

4928.02(A) to ensure the availability to consumers of reasonably priced retail electric service" and OMAEG's challenge merely reflects the fact that it disagrees with the Commission. And as the Company pointed out in its own application for rehearing (at 5), the same data and record-based findings also support a net credit projection for the OVEC portion of the PPA Rider. In any event, OMAEG's challenge in this regard merely reflects its disagreement with the Commission's factual findings and does not constitute a valid grounds for rehearing.

OMAEG's second policy argument (at 30-31) is that the PPA Rider violates R.C. 4928.02(H)'s policy against subsidies flowing from a noncompetitive service to a competitive service, which was discussed and refuted above.

Third, OMAEG claims (at 31) that the PPA Rider's nonbypassable nature violates the policy in R.C. 4928.02(B) to ensure unbundled and comparable retail electric service that provide the options they elect to meet their needs. Of course, this challenge would be unripe if the Commission adopts the bypassable version of the OVEC-only PPA Rider in this stage of rehearing.[26] Regardless, the Commission has the authority under R.C. 4928.143(B)(2)(d) to adopt the nonbypassable PPA Rider and that specific grant of authority trumps the general policy goal – to the extent there is a conflict (which there is not). In short, OMAEG has a policy disagreement with the Commission about how to implement Ohio energy policy goals; it is the Commission, however, that has the duty and discretion to do so, not OMAEG.

RESA also challenges (at 73-74) the Affiliate PPA on the ground that it was a no-bid contract that was not the product of a competitive procurement process. As a threshold matter,

[26] Although the PPA Rider would still be nonbypassable for future renewable projects that may be approved by the Commission in the future, those matters are not currently before the Commission. So while the nonbypassable issues are not completely moot if the Commission adopts a bypassable OVEC-only PPA Rider for now, the nonbypassable issues are certainly unripe and do not need to be addressed at this time.

this challenge relates to the Affiliate PPA which is not being advanced at this point due to the FERC decision holding the contract over for *Edgar* review as part of an untimely and cumbersome bureaucratic process. To that extent, the no-bid challenge is moot. Further, RESA's perspective ignores the ESP statute and attempts to insert requirements that are not found in SB 221. Although RESA would like to think that an EDU must competitively procure SSO supply as part of an ESP, that is not the case and only applies to a market rate offer (MRO). Moreover, nothing in the evidentiary record supports the presumption embedded in RESA's argument that viable alternatives exist that are superior than the Stipulation's PPA Proposal – notwithstanding that several CRES witnesses testified and had the opportunity to advance such offers. For these reasons, RESA's challenge that the Affiliate PPA was not competitively procured is misguided. ELPC complains in its application for rehearing (at 11) that the Commission did not undertake an "additional analysis of alternative hedging options."

In order for the Commission to explore additional hedging options for rate stability beyond the OVEC-only version of the PPA Rider and pursue a consistent rate stability policy, however, it should first approve the OVEC-only PPA Rider on rehearing and then direct AEP Ohio to develop an additional hedging proposal for further consideration. The Company would then formulate an appropriate option that it could support, either along the lines of the proposal pending in Case No. 14-1297-EL-SSO or another feasible alternative, and present it through testimony. The Commission could then establish an additional procedural schedule to further consider the Company's supplemental proposal on rehearing.

**4. The PPA Rider is consistent with R.C. 4928.02(I). (OMAEG AOE 4(e))**

OMAEG argues that the Commission's Order approving the PPA Rider for the Affiliate PPA Units violated R.C. 4928.01(I), which states that it is the policy of Ohio to "ensure retail

electric service consumers protection against unreasonable sales practices, market deficiencies, and market power." OMAEG AFR at 35 (AOE 4(e)). Given the scope of AEP Ohio's Application for Rehearing and the issue presented for decision in this stage of rehearing, this argument is moot.

In any event, as applied to the former Affiliate PPA Rider or any other rate stability mechanism AEP Ohio may seek, or the Commission may request, OMAEG's argument is without merit. OMAEG's argument pre-supposes inherent affiliate abuse in energy pricing, and rests on the misguided and unsupported claim that the Affiliate PPA is nothing more than a subsidy borne by Ohio ratepayers in favor of AEP Ohio and its shareholders. This argument completely misses the fundamental intention of the PPA Rider – it is specifically designed to hedge against market volatility and provide long term certainty and stability. In fact, the Commission held that "the stipulation will provide numerous benefits to customers that are in the public interest and consistent with the policy of the state, as set forth in R.C. 4928.02." Opinion and Order at 82. Opposing Intervenors have not set forth any valid arguments to demonstrate that the PPA Rider subjects Ohio ratepayers to "unreasonable sales practices, market deficiencies, and market power."

By contrast, the PPA Rider acts to ensure long term stable electricity rates for consumers, which cannot be accomplished through the continued practice of staggering and laddering SSO auctions. Further, the PPA Rider will provide added rate stability during periods of extreme weather, a time when the rider will act to offset price spikes. Opinion and Order at 83. Accordingly, because the PPA Rider does not violate Ohio policy set forth in R.C. 4928.02(I), OMAEG's Application for Rehearing should be denied.

### 5. The PPA Rider is consistent with R.C. 4928.03, R.C. 4928.17, and other corporate separation rules. (Dynegy AOE 3-4; P3/EPSA/RESA AOE 9-10)

Dynegy and P3/EPSA/RESA claim that the Commission improperly ruled that the PPA Rider satisfies R.C. 4928.03 and 4928.17's separation of service and corporate separation rules, as well AEP Ohio's code of conduct in its open access distribution tariff. Dynegy AFR at 14-18 (AOE 3-4); P3/EPSA/RESA AFR at 28-30 (AOE 9-10). P3/EPSA/RESA, particularly, argue that the former PPA Rider "requires shopping customers to pay for AEP Ohio's affiliated generation, which merges competitive services (affiliated generation) with regulated services (AEP Ohio's wires-only rider) in violation of R.C. 4928.03." P3/EPSA/RESA AFR at 28. Given the scope of AEP Ohio's Application for Rehearing and the issue presented for decision in this stage of rehearing, this argument, at least to the extent it applies to the non-OVEC AEP Ohio affiliate units, is moot.

In any event, as applied to the former Affiliate PPA Rider, or any other rate stability mechanism AEP Ohio may seek, or the Commission may request, Dynegy and P3/EPSA/RESA's arguments are without merit. The Commission thoroughly addressed the corporate separation and code of conduct arguments presented by these Intervenors:

> In regard to the claim that the PPA rider and stipulation violate AEP Ohio's code of conduct in its open access distribution tariff, the Commission finds that the argument overlooks the basic premise that the PPA Rider operates as a financial hedge for retail customers, not a physical hedge. Ohio retail customers will not receive the physical generation from the PPA units. The energy, capacity, and ancillary services from the PPA charge would flow through the PPA rider to customers. In this manner, AEP Ohio's regulated services are not linked to the goods or services from AEPGR. The Commission finds that opposing intervenors' claims that the PPA rider and the stipulation would violate the corporate separation requirements of R.C. 4928.17 also lack merit. We conclude that R.C. 4928.17 sets forth a number of corporate separation provisions that generally apply to AEP Ohio as an electric utility. However, the statute mandates certain exceptions, providing that an electric utility's compliance is required, 'except as otherwise provided in sections 4928.142 or 4928.143 . . . of the Revised Code.' Having determined in these proceedings, as well as in *ESP 3*

> *Case*, that a PPA Rider is authorized pursuant to R.C. 4928.143(B)(2)(d), the Commission finds opposing intervenors' arguments regarding R.C. 4928.17 misplaced.

Opinion and Order at 101-102. As explained above, *see supra* Section IV.A.1, the PPA Rider satisfies the three specific requirements of R.C. 4928.143(B)(2)(d). Accordingly, it fits squarely within a delineated exception to R.C. 4928.17.

Further, as AEP Ohio has consistently maintained, it makes sense that the corporate separation statute defers to the ESP statute because the former is aimed at ensuring that competitive generation services remain competitive, and is not aimed at SSO service or anything else provided by an EDU under the statute. *See* AEP Ohio Reply Br. at 111. Lastly, the PPA structure necessarily means that AEP Ohio does not own the generation assets and is buying power from a separate and distinct corporate entity. Affiliate transactions are not prohibited by the Revised Code or the Commission's Code of Conduct, and AEP is committed to following its corporate separation plan and applicable laws and regulations when conducting any such transactions. *Id.* at 112.

Accordingly, because the PPA Rider does not violate R.C. 4928.03 and 4928.17's separation of service and corporate separation rules, or AEP Ohio's code of conduct in its open access distribution tariff, Dynegy and P3/EPSA/RESA's Application for Rehearing should be denied.

#### 6. The PPA Rider does not constitute an unreasonable charge under R.C. 4905.22. (Dynegy AOE 5; P3/EPSA/RESA AOE 11)

Dynegy and P3/EPSA/RESA argue that the PPA Rider constitutes an "unreasonable charge" as contained in R.C. 4905.22, which states, in pertinent part, that "all charges made or demanded for any service rendered . . . shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission." Dynegy AFR at 15 (AOE 5);

P3/EPSA/RESA AFR at 30 (AOE 11). The basis of this argument echoes the overall (yet misguided) position presented by these Intervenors that AEP Ohio seeks to unlawfully and improperly transfer unknown future market risk from AEP Ohio to Ohio ratepayers. Given the scope of AEP Ohio's Application for Rehearing and the issue presented for decision at this stage of rehearing, this argument, at least to the extent it applies to the non-OVEC AEP Ohio affiliate units, is moot.

However, as applied to the former Affiliate PPA Rider, or any other rate stability mechanism AEP Ohio may seek, or the Commission may request, Dynegy and P3/EPSA/RESA's argument is without merit. After a thorough review, the Commission found:

> [T]he record in these proceedings demonstrates a projected net credit to customers of $37 million over the current ESP term through May 31, 2018, or $214 million through May 31, 2024, under the terms of the PPA rider. Further, we find that the stipulation, as modified, will protect customers against rate volatility and price fluctuations by promoting retail rate stability for all ratepayers in this state, modernize the grid through the deployment of advanced technology and procurement of renewable energy resources, and promote competition by enabling competitive providers to offer innovative products to serve customers' needs.

Opinion and Order at 77. The PPA Rider is not a risk transferring mechanism, it is a rate stabilization mechanism. In fact, in the Stipulation, AEP Ohio voluntarily agreed to reduce its ROE for from a variable rate of 11.24% (with a range up to 15.9%) down to a fixed rate of 10.38%, resulting in $86 million in savings to Ohio ratepayers. AEP Ohio also agreed to shorten the originally proposed PPA term down to eight years. Finally, AEP Ohio committed in the Stipulation to fund ratepayer credits of up to $100 million over the last four (4) years of the PPA term if the actual revenues under the PPA Rider are below projections. (Opinion and Order at 84.)

Dynegy and P3/EPSA/RESA rely on this misguided notion that a stable market status quo will effectively continue to exist in perpetuity, and that measures already implemented

(staggering and laddering) are sufficient to meet any future volatility. That is simply not a realistic approach, and the Commission has explicitly agreed with AEP Ohio's plan to curb long term market instability through implementation of the PPA Rider. Accordingly, the PPA Rider is not an unreasonable charge under R.C. 4905.22, and Dynegy and P3/EPSA/RESA's requests for rehearing on this issue should be denied.

**7. The PPA Rider does not allow the recovery of transition revenues under R.C. 4928.38. (OCC AOE 15; OMAEG AOE 4(c); P3/EPSA/RESA AOE 36)**

Pointing to the Ohio Supreme Court's inapposite recent decision regarding AEP Ohio's ESP II, OCC, OMAEG, and P3/EPSA/RESA repeat the tired argument, advanced in seemingly every recent proceeding, that the PPA Rider allows AEP Ohio to collect untimely transition revenues (or their equivalent) in violation of R.C. 4928.38. OCC AFR at 43-44 (AOE 15); OMAEG AFR at 32-33 (AOE 4(c)); P3/EPSA/RESA AFR at 65-67 (AOE 36). Opposing Intervenors' argument is without merit for several reasons.

As an initial matter, Opposing Intervenors already raised this argument in post-hearing briefing (*see* OCC Br. at 96-98), and the Commission already considered and rejected it, correctly finding that it decided this issue in the ESP III case and that nothing about this case changes the Commission's position. Opinion and Order at 102. Intervenors have offered no new arguments to support their position on rehearing. Accordingly, the Commission should deny rehearing on that basis alone. Moreover, given the proposal that AEP Ohio has made in its rehearing application, and the issue currently presented in this stage of rehearing, their argument is moot.

The very Ohio Supreme Court decision to which Intervenors cite makes clear that, in general, transition costs are generation costs "that would have been recovered through regulated rates before competition began, but that are no longer recoverable from customers who have who

have switched to another generation provider." 2016-Ohio-1608, at ¶ 15. A bypassable OVEC-only PPA Rider would not ecover any costs from shopping customers. Thus, it would not seek recovery of transition revenues.

In any event, as applied to the former Affiliate PPA or any other rate stability mechanism that may be addressed in rehearing, Intervenors' transition revenue argument is just as meritless. R.C. 4928.143(B)(2)(a) expressly permits an EDU to recover the prudently incurred "cost of purchase power supplied under [an ESP], including the cost of energy and capacity, and including purchased power acquired from an affiliate." Clearly, the General Assembly specifically contemplated that EDUs could recover purchased power costs through provisions in their ESPs. Indeed, before it moved to an auction-based SSO, AEP Ohio was permitted to recover its purchased power capacity and energy costs, including those associated with its OVEC entitlement, through the Fuel Adjustment Clause ("FAC") approved and included in its ESPs since 2009. *See In re Columbus S. Power Co.*, 2011-Ohio-1788, ¶¶ 65-69 (affirming creation of the FAC); *ESP II*, Opinion and Order at 16-17 (Aug. 8, 2012) (approving continuation of the FAC during the term of AEP Ohio's ESP II); *ESP I*, Opinion and Order at 13-24 (Mar. 18, 2009) (authorizing creation of the FAC to recover "prudently incurred costs associated with fuel, including consumables, related to environmental compliance, purchased power costs, emission allowances, and costs associated with carbon-based taxes and other carbon-related regulations"). Thus, R.C. 4928.143(B)(2)(a) refutes the contentions that capacity and energy costs incurred through PPAs (including affiliate PPAs) are transition costs or that their recovery through a provision in an ESP amount to the improper receipt of transition revenues, prohibited by R.C. 4928.38. In this case the Commission has approved an EDU's recovery of PPA costs, net of wholesale revenues, to establish the measure of a financial hedge, as part of an ESP provision

authorized by R.C. 4928.143(B)(2)(d) to provides rate stability to customers. In any event, even if the costs of the Affiliate PPA (or the OVEC entitlement) were considered to be transition costs and their recovery by AEP Ohio were considered to be the equivalent to the receipt of transition revenues, the PPA Rider would still not conflict with R.C. 4928.38 because R.C. 4928.143(B) specifically provides that the provisions that it allows to be included in an ESP are permissible "notwithstanding any other provisions of Title XLIX of the Revised Code to the contrary." *In re Columbus S. Power Co.*, 2016-Ohio-1608, ¶ 37, n. 3.

The PPA Rider is distinguishable from the RSR that was the subject of the Court's recent decision regarding AEP Ohio's ESP II case, not only because R.C. 4928.143(B)(2) expressly authorizes the recovery of purchased power costs, as set forth above, but also for several other reasons. First, as the Commission correctly found, the PPA Rider is expected to produce a net credit to customers both over the current ESP term (through May 31, 2018) and through the eight-year term of the rider (through May 31. 2024). Opinion and Order at 77. That finding is well-supported by the record in this case, as discussed in above, *see supra* Section III.B.2. The PPA Rider is projected to produce a credit because it is expected that AEP Ohio will be able to sell the power it purchases from AEPGR and receives from its OVEC entitlement for more than its costs under either PPA. Thus, the costs of the PPA Units are not transition costs.

Moreover, the nature of the PPA Rider and the costs, if any, that would be recovered through it are fundamentally different from the non-deferral portion of the RSR. As the Court recently noted, that component of the RSR was intended, among other things, to "provide AEP [Ohio] with sufficient revenue to maintain its financial integrity and ability to attract capital during the ESP [II]." 2016-Ohio-1608, ¶ 8. The PPA Rider is not designed for that purpose. Rather, as the Commission has twice confirmed, it is a financial hedging mechanism that "has

substantial value" as a rate stability mechanism and will provide significant benefits to retail customers. Opinion and Order at 80-81. Moreover, the Court concluded that only revenues that exceed the Company's costs were unlawful. *See* 2016-Ohio-1608, ¶¶ 34, 40. Finally, AEP Ohio does not even own the generation assets whose costs Intervenors contend are stranded. For all of these reasons, the Commission should reject Intervenors' untimely and meritless transition revenue argument.

### B. Opposing Intervenors' procedural arguments fail.

#### 1. The Commission did not violate the Due Process Clauses of the U.S. or Ohio Constitutions. (P3/EPSA/RESA AOE 12)

P3/EPSA/RESA argue that the Commission failed to properly address the due process arguments they previously propounded in their Initial Post Hearing Briefs. P3/EPSA/RESA AFR at 31-33 (AOE 12). P3/ESPA/RESA claim in the second phase of the proceedings their due process rights were violated because the Commission established a short procedural schedule in this proceeding at the same time the FirstEnergy ESP IV case was progressing in parallel. *Id.* P3/ESPA/RESA further asserted that the procedural schedule was fully within the Commission's discretion, and by imposing such an accelerated schedule, they were denied a full and fair opportunity to adequately prepare and be heard, falling short of their due process rights as they interpret them. *Id.*

In their Application for Rehearing, P3/EPSA/RESA recognize that the Commission, in its Opinion and Order, analyzed, among other things, the length of time the case had been pending, the competency and capabilities of the parties legal counsel, and the significance of the then contemporaneously pending First Energy ESP IV case. The Commission then determined that the procedural schedule was fully appropriate. P3/EPSA/RESA AFR at 32-33 (AOE 12). Still, P3/EPSA/RESA believes the Commission failed to address the due process arguments presented.

To satisfy the requirements of due process, the Commission need not set a procedural schedule that grants each and every party the time it arbitrarily feels necessary to properly prosecute its case strategy, even in circumstances where a party is participating in multiple cases progressing along the same schedule. What is necessary "is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case." *Mathews v. Eldridge*, 424 U.S. 319 (1976). Additionally, "[d]ue process of law involves only the essential rights of notice, hearing or opportunity to be heard before a competent tribunal." *Luff v. State*, 117 Ohio St. 102 (1927), paragraph four of the syllabus. It cannot be questioned that in this proceeding P3/EPSA/RESA had clear notice, that they are sophisticated parties represented by experienced and competent counsel, and that they were given a meaningful opportunity to present their case through hearing and subsequent briefs.

The Commission, upon review of the arguments regarding procedural due process that P3/EPSA/RESA previously advanced, clearly believed that the schedule established was appropriate, holding: "The Commission finds that the schedule established in these proceedings, including the deadlines for discovery, testimony, and briefs as well as the dates for both evidentiary hearings, provided the intervenors with a fair and full opportunity to address the issues raised in AEP Ohio's application, as amended, and the stipulation." Opinion and Order at 10. Further, the ongoing assertion by P3/EPSA/RESA that the Commission simply failed to directly address the due process argument clearly ignores the Commission's statement: "In short, we find that ample due process was provided to all parties and that no party has been prejudiced by the procedural schedule established in these proceedings." *Id.* at 11.

Based upon the record in this proceeding and the review of P3/EPSA/RESA's due process claims provided for and described in the Commissions' Opinion and Order, it is apparent that the Commission already squarely confronted P3/EPSA/RESA due process concerns. In setting the procedural schedule for the second phase of this proceeding, the Commission in no way denied or impinged P3/EPSA/RESA's constitutional due process rights.

**2. The Attorney Examiners' procedural rulings did not deprive the Commission of a full record. (OCC AOE 1)**

OCC argues, as it did in its post-hearing briefs, that the Commission erred by failing to reverse certain evidentiary rulings that the Attorney Examiners made during the lengthy and thorough hearing in this case. OCC AFR at 3-10 (AOE 1). AEP Ohio opposed each of OCC's complaints about the Attorney Examiners' evidentiary rulings (AEP Ohio Reply Br. at 120-122), and the Commission already thoroughly considered and rejected each of OCC's arguments. Opinion and Order at 16-18. Specifically, the Commission rejected, as a factual matter, OCC's contention that non-signatory parties were precluded from asking questions "regarding the occurrence of settlement meetings, the individuals in attendance, or other aspects of the bargaining process; questions about the specific provisions in the stipulation or how they may impact ratepayers or the public interest; or questions about the stipulation's effect on important regulatory principles or practices," correctly finding that the record demonstrates that "non-signatory parties were permitted a full and fair opportunity to cross-examine AEP Ohio witness Allen regarding the three-part test during the evidentiary hearing," often over counsel for AEP Ohio's objection. Opinion and Order at 17.

With respect to OCC's eleventh-hour hearing subpoenas to Sierra Club, Direct Energy, and IGS, the Commission correctly held that the Attorney Examiners acted properly in quashing the subpoenas as unreasonable because permitting such subpoenas would have a chilling effect

on settlement negotiations in Commission proceedings. Opinion and Order at 17-18. Finally, with respect to the Attorney Examiners' rulings denying motions to strike the economic analysis attached to AEP Ohio witness Allen's testimony, the Commission correctly exercised its considerable discretion regarding the admission of expert testimony and held that the Attorney Examiners acted properly in allowing the analysis and associated testimony. *Id.* at 18.

OCC has offered no new support for its complaints about above evidentiary rulings. *Compare* OCC AFR at 3-10, *with* OCC Br. at 163-170. As set forth above, the Commission acted properly in denying OCC's challenges to those rulings in the first instance; it should do so again here.

**3. OCC's motion to stay was properly denied. (OCC AOE 2)**

OCC similarly has offered nothing new in support of its argument that the Commission should have granted it and other Intervenors' motion to stay these proceedings pending FERC's decision in the *EPSA* case. *Compare* OCC AFR at 11-12 (AOE 2), *with* Motion to Stay (Mar. 21, 2016). Instead, OCC erroneously argues only that the Commission "did not consider the Reply in Support [of that motion], as [the Commission's] Opinion and Order was issued the day after [the reply] was filed." OCC AFR at 11 (AOE 2). That argument, of course, is contradicted by the Commission's Opinion and Order, in which the Commission expressly identifies the reply that OCC contends it did not consider. Opinion and Order at 19. And, as the Commission explained in its Opinion and Order, the Commission correctly denied the motion to stay because it was procedurally improper and substantively inadequate. *Id.* at 20. That the Commission did not, while discussing the procedurally improper and substantively inadequate motion and reiterating its own broad discretion to manage its dockets, also specifically discuss other Commission precedent that the reply memorandum cited regarding that discretion does not

constitute error. The Commission should, therefore, deny OCC's meritless request for rehearing on this issue.

#### 4. Opposing Intervenors' notice argument is meritless. (P3/EPSA/RESA AOE 44)

P3/EPSA/RESA contend that the Commission violated R.C. 4928.141(B) by "failing to give due notice" of several provisions included in the Stipulation that did not appear in AEP Ohio's original or amended applications in this proceeding. P3/EPSA/RESA AFR at 75-76 (AOE 44). Although Opposing Intervenors failed to raise this argument when the Stipulation was filed in December 2015, they did already raise it in their post-hearing briefing (*see* P3/EPSA Br. at 75), and the Commission has already considered and rejected it. Opinion and Order at 9-11, 77-78. As Opposing Intervenors have raised nothing new on this score on rehearing, the Commission should disregard their notice argument on that basis alone.

P3/EPSA/RESA's argument also is substantively flawed for several reasons. First, R.C. 4928.141(B) applies, by its express terms, only to an SSO application filed under R.C. 4928.142 or 4928.143. This proceeding is not an SSO proceeding, and its scope and nature differ from that of AEP Ohio's ESP III – as Intervenors concede – with some provisions of the Stipulation potentially taking place after the term of ESP III. P3/EPSA/RESA AFR at 76 (AOE 44). Simply put, the SSO statute's notice and publication requirements do not apply here. Moreover, as the Commission recognized in its Opinion and Order in this case, it is hardly novel for a stipulation to "address a wide variety of issues, often resolving several pending proceedings at the same time." Opinion and Order at 77. Indeed, it is common for a stipulation, such as the one in this case, to include terms and conditions that address numerous issues of importance to the diverse stakeholders involved in a proceeding. Thus, it was proper for the Signatory Parties to include in the Stipulation the provisions about which Intervenors complain, and the Commission acted

correctly in approving them as part of a comprehensive package of settlement terms. Finally, to the extent that P3/EPSA/RESA's notice argument can be construed as a refrain on their due process argument, AEP Ohio addresses that argument above, *see supra* Section IV.B.1.

### C. The PPA Rider does not threaten competition or competitive markets. (Dynegy AOE 7; OMAEG AOE 4(d); P3/EPSA/RESA AOE 2)

Several Opposing Intervenors continue to claim that the PPA Rider threatens competition and the competitiveness of wholesale markets. *See* Dynegy AFR at 24, AOE 7; OMAEG AFR at 33, AOE 4(d); P3/EPSA/RESA AFR at 10-13, AOE 2. Given the scope of AEP Ohio's rehearing application, and the issues presented at this stage of rehearing, these arguments are moot. Opposing Intervenors' competition arguments are targeted almost exclusively at the Affiliate PPA or the alleged affect the Affiliate PPA would have on AEPGR and its Units. *See, e.g.*, Dynegy AFR at 26 ("the PPA Rider gives *AEPGR* a significant advantage over other competitors" (emphasis added)); P3/EPSA/RESA AFR at 11-12 ("*AEPGR* will be able to receive full cost recovery . . . and not be subject to the risk of not recovering all those costs when the power is sold into the PJM market" (emphasis added)).

Opposing Intervenors' competition arguments have no force regarding inclusion of OVEC in the PPA Rider. The OVEC Agreement will exist regardless of whether AEP Ohio's OVEC entitlement is included in the PPA Rider. Thus, AEP Ohio will be required to pay its share of the OVEC Units' costs – and AEP Ohio will need to sell the output of the OVEC Units on the wholesale markets – no matter how the Commission rules with respect to the PPA Rider here. In light of that fact, it is difficult to fathom how the Commission's inclusion of OVEC in the PPA Rider will affect any alleged incentives with respect to selling the OVEC Units' output.

Furthermore, although AEP Ohio's 440 MW OVEC entitlement remains a substantial retail price hedge for AEP Ohio's customers, it is not significant when compared to the overall

PJM market, representing is less than one quarter of one percent of the roughly 180,000 MW of generation in PJM. (*See* Tr. XII at 3057-3058.) Opposing Intervenors' claims that the PPA Rider will "distort prices" or "discourage the siting of new generation in Ohio," *see* Dynegy AFR at 26; *see also* OMAEG AFR at 33-34, ring hollow when applied to the 440 MW OVEC entitlement.

Critically, moreover, FERC has already accepted the OVEC Agreement,[27] and the OVEC entitlement has been included as a component of AEP Ohio's retail rates, in one form or another, for over fifty years. Most recently, the costs of the OVEC PPA were recovered in AEP Ohio's retail rates from 2009 to 2014, as part of AEP Ohio's FAC Rider and Fixed Cost Rider. Opposing Intervenors' claims of market distortion and skewed incentives did not manifest during any of the previous occasions on which OVEC costs were included in AEP Ohio's retail rates, and, notably, when the last amendment to the OVEC agreement was submitted to FERC in 2011, neither FERC nor any intervenor sought to block its approval on the ground that OVEC costs were passed through AEP Ohio's retail rates. In sum, none of the competitive concerns raised by Opposing Intervenors apply to inclusion of OVEC in the PPA Rider.

In any event, as applied to the former Affiliate PPA or any other rate stability mechanism AEP Ohio may seek or the Commission may request, Opposing Intervenors' arguments about wholesale competition are meritless. As explained in AEP Ohio's post-hearing briefing, *see* AEP Ohio's Br. at 135-38; AEP Ohio's Reply Br. at 86-91, the element of the PPA Proposal that Opposing Intervenors believe will harm PJM's markets – the Affiliate PPA's cost-based compensation model – is already commonplace in PJM. There are tens of thousands of megawatts of generation in PJM that fully participate in PJM's energy and capacity markets and,

[27] The OVEC PPA was previously accepted by FERC in Docket No. ER 11-3181-00, ER 11-3440-000, and ER 11-3441-000 (May 23, 2011 Letter Order).

separately, also receive cost-based compensation from retail ratepayers – just as would be the case under AEP Ohio's original PPA Proposal. Opposing Intervenors' claims that the PPA Proposal would be a "subsidy" that is "inconsistent" with the PJM markets are demonstrably false. Something cannot be "inconsistent" with PJM market structures if it is – and for many years has been – commonplace in PJM.

It is notable, moreover, that although Opposing Intervenors and other parties raised the same "distortion" arguments in the FERC proceeding, FERC's recent order concerning the Affiliate PPA did not hold that the Affiliate PPA would somehow "distort" the PJM markets. (Nor do any Opposing Intervenors argue that it held this.) Rather, FERC held that the nonbypassable nature of the PPA Rider meant that AEP Ohio's customers were "captive" in this one respect, and as a result, FERC concluded that the Affiliate PPA was subject to FERC's *Edgar* and *Allegheny* standards. May 23, 2011 Letter Order ¶¶ 63-64. Thus, FERC did not hold that the Affiliate PPA would somehow harm PJM's markets; it only held that the Affiliate PPA was subject to *Edgar* and *Allegheny* prior to being effective in order to allegedly protect AEP Ohio's customers. By contrast, OVEC was previously accepted by FERC and has been in effect for years.

Dynegy again invokes the recent state programs in New Jersey and Maryland that were struck down, and it quotes the Market Monitor's testimony that the PPA Rider is "analogous" to these programs. Dynegy AFR at 24 (quoting IMM Ex. 2, at 4). But the recent U.S. Supreme Court decision in those cases makes clear that the PPA Rider here is *not* akin to the New Jersey and Maryland programs. In *Hughes v. Talon*, No. 14-614, Slip Op. (U.S. Sup. Ct. Apr. 19, 2016), the U.S. Supreme Court held that the Maryland program violated the Federal Power Act because it required the generators who benefited from the program to clear the PJM capacity

auction. In so doing, however, the Court made clear that its "holding is limited." Slip. Op. 15. The Court explained: "So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable." *Id.* Here, nothing in the Stipulation or the Commission's Opinion and Order "condition[s] payment of funds on capacity clearing the auction," and thus the PPA Rider here does "not suffer from the fatal defect" at issue in *Hughes*. *Id.*

The Court also made clear that the Maryland program "differs from traditional bilateral contracts in this significant respect: The contract for differences does not transfer ownership of capacity from one party to another outside the auction." Slip Op. at 14. Here, however, both the Affiliate PPA and the OVEC PPA *do* "transfer ownership of capacity."

Indeed, *Hughes* left room for states to pursue precisely the kind of retail rate treatment of bilateral contracts reflected by the PPA Rider. The Court went out of its way to caution that its opinion did "not call into question" certain "long-term financial hedging contracts based on the auction clearing price," which, in the Court's view, "do not involve state action to the same degree as Maryland's program, which compels private actors (LSEs) to enter into contracts for differences – like it or not – with a generator that must sell its capacity to PJM through the auction." Slip Op. 14. Thus, as AEP Ohio explained in its post-hearing briefing, the Affiliate PPA and OVEC PPA are distinguishable because they are completely *voluntary*. *See* AEP Ohio Reply Post-Hearing Brief at 99-102. Because the Commission did not "compel" AEP Ohio to enter into the Affiliate PPA or OVEC entitlement, the Commission's approval of the PPA Rider "do[es] not involve state action to the same degree as Maryland's program" and is permissible. Slip Op. 14.

Finally, *Hughes* clarified that it "need not and d[id] not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, *direct subsidies*, construction of state-owned generation facilities, *or re-regulation of the energy sector*." Slip Op. 15 (emphasis added). Thus, although AEP Ohio has sought to uphold the inclusion of OVEC in the PPA Rider at this stage of rehearing due to FERC's application of its affiliate standards to the Affiliate PPA, AEP Ohio continues to believe that a retail stability measure akin to the Affiliate PPA would benefit ratepayers and the public interest, and AEP Ohio remains willing to explore alternative arrangements, including the "various other measures States might employ" that are referenced in *Hughes*.

### D. The Commission's treatment of AEP Ohio's right to withdraw from ESP III was appropriate. (P3/EPSA/RESA AOE 7)

P3/EPSA/RESA allege that this Commission in its review of AEP Ohio's PPA Rider Proposal concluded that this proceeding is not an ESP proceeding, but rather a tariff proceeding made in order to populate the PPA Rider. P3/EPSA/RESA AFR at 24-25 (AOE 7). P3/EPSA/RESA further allege that the Commission cannot determine, as it did in the Opinion and Order (at 82), that AEP Ohio has the option to reject any Commission modifications to its ESP III, and to withdraw its ESP III application in this situation. P3/EPSA/RESA AFR at 24 (AOE 7). Finally, P3/EPSA/RESA continue to maintain, as in their initial briefs, that AEP Ohio's application sought to change the ESP III and should be subjected to a completely new ESP analysis because the Rider PPA proposal is substantially new and different from the original OVEC-only proposal in ESP III. *See* P3/EPSA Br. at 57-60; RESA Br. at 29.

For clarity, given the scope of AEP Ohio's rehearing application, and the issue presented for decision in this stage of rehearing, the portions of P3/EPSA/RESA's argument here that

address the previously requested addition of any "substantially new and different" non-OVEC capacity into the PPA Rider are moot. An OVEC-only PPA Rider and overall approval of the PPA Rider mechanism are what the Commission considered in the ESP III proceeding.

P3/EPSA/RESA's allegation that the Commission considered the PPA Rider only a tariff-populating mechanism fails to explain why the Commission, in its Opinion and Order, explicitly subjected the PPA Rider to a comprehensive ESP analysis and found that "the PPA Rider mechanisms, as proposed in the amended application and the stipulation, meets the three requirements set forth in R.C. 4928.143(B)(2)(d)." Opinion and Order at 93. Ironically, the Commission is quite clear that the ESP analysis it performed in regards to the PPA Rider in this case was made as an effort to satisfy the concerns of numerous intervening parties (P3/EPSA/RESA likely among them) that an ESP analysis must occur. In its Opinion and Order the Commission stated that it "does not believe it is strictly necessary, in these rider proceedings, to reassess the statutory basis for the PPA rider. Nonetheless, in response to the parties' arguments, we will affirm that the PPA rider mechanism can be included as a provision of an ESP, based on the record before us." *Id.*

The plain language of the Opinion and Order makes it clear that the Commission considers the PPA Rider an acceptable and integral provision of a statutory ESP proceeding. The Commission carefully subjected the PPA Rider to a R.C. 4928.143 review, found the PPA Rider satisfied the requirements of R.C. 4928.143(B)(2)(d), and therefore can properly provide the opportunity to AEP Ohio to withdraw from ESP III if it rejects modifications made by the Commission.

### E. Opposing Intervenors' arguments about captive customers are meritless. (OCC AOE 17, OMAEG AOE 3(h))

OMAEG and OCC argue that the Commission erred in finding that AEP Ohio's retail customers are not captive in light of FERC's decision last month in Docket No. EL16-33-000. OMAEG AFR at 25-26 (AOE 3(h)); OCC AFR at 47-49 (AOE 17). In that decision, which concerned EPSA's request that FERC rescind the waiver of FERC's affiliate power sales restrictions previously granted to AEP Ohio and AEPGR, FERC found that AEP Ohio's customers "are captive to the extent they are subject to the non-bypassable charge associated with the Affiliate PPA." FERC Docket No. EL16-33-000, Order, ¶ 63. Given the scope of AEP Ohio's rehearing application, and the issue presented for decision in this stage of rehearing, Intervenors' argument is moot. If an OVEC-only PPA Rider is adopted and is bypassable, AEP Ohio's retail customers cannot possibly be captive to any costs associated with the PPA Rider. The Commission should reject Intervenors' arguments on rehearing on this basis.

In any event, as applied to the former Affiliate PPA or any other rate stability mechanism AEP Ohio may seek or the Commission may review, OMAEG's and OCC's argument is meritless. As the Commission correctly found, AEP Ohio's retail customers are not captive customers because the PPA Rider, even were the Affiliate PPA included does not prohibit or otherwise curtail SSO customers from securing their electric service from a CRES provider of their choice and will not restrict current CRES customers from continuing to obtain service from CRES providers in the future. Opinion and Order at 95. Because the PPA Rider mechanism will merely function as a financial hedge against price changes in the retail market, it will not affect retail customers' ability to shop or return to AEP Ohio's SSO. *Id.* Accordingly, regardless of the PPAs included in the PPA Rider, AEP Ohio's retail customers are not captive.

## CONCLUSION

For the foregoing reasons, Opposing Intervenors' applications for rehearing should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing *Memorandum Contra Applications for Rehearing* has been served upon the below-named counsel and Attorney Examiners via electronic mail this 12th day of May, 2016.

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Summary: Memorandum -Ohio Power Company's Memorandum Contra Applications for Rehearing electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company