

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of )  
Ohio Power Company for Authority to )  
Establish A Standard Service Offer ) Case No. 16-1852-EL-SSO  
Pursuant to R.C. 4928.143, In the Form of )  
an Electric Security Plan. )

In the Matter of the Application of Ohio )  
Power Company for Approval of Certain ) Case No. 16-1853-EL-AAM  
Accounting Authority. )

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**MEMORANDUM CONTRA  
APPLICATIONS FOR REHEARING OF OHIO POWER COMPANY,  
INTERSTATE GAS SUPPLY, INC., AND RETAIL ELECTRIC SUPPLY  
ASSOCIATION  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

AEP's application in this case included many charges to customers arising from the PUCO-approved settlement in Case No. 14-1693-EL-RDR ("PPA Case") and other subsidies that customers will pay. Among the bad news for customers are the continued charges for a Power Purchase Agreement Rider ("PPA Rider") for customers to subsidize two 60-year old coal-fired power plants owned by OVEC and a so-called Competition Incentive Rider. The latter charge would, in effect, increase what consumers pay for AEP's standard service offer ("SSO") relative to offers from energy marketers.<sup>1</sup>

Regarding the OVEC plant subsidy, the only consolation in the recent PUCO Order for customers is that AEP is prohibited from charging customers under the PPA Rider for transmission system additions, improvements, or other transmission-related

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<sup>1</sup> Application at 11.

projects.<sup>2</sup> But AEP, apparently not content with the amount of the subsidy it will receive, argues (without record support) that the PUCO should allow it to charge customers even more under the existing PPA rider for subsidizing transmission projects. The PUCO should reject AEP's argument and find that customers should not subsidize AEP's transmission projects under the PPA Rider.

Regarding the so-called Competition Incentive Rider, the PUCO acknowledged that the rider has nothing to do with competition and renamed it the Retail Reconciliation Rider ("RRR").<sup>3</sup> The RRR, as proposed, would require AEP to make its SSO customers pay more. And those higher payments from standard offer customers would then be used in part for the benefit of, in effect, lowering rates for marketer customers. The RRR would add unjustified charges to AEP's otherwise competitively-priced SSO for customers. Fortunately, after weighing the record evidence, the PUCO determined that it was not appropriate for AEP to charge its SSO customers under the RRR at this time.<sup>4</sup> The PUCO should reject the arguments raised by IGS and RESA to implement the RRR.

## **II. ARGUMENT**

### **A. The PUCO set forth the reasons prompting its decision to exclude AEP from charging customers for transmission costs under the existing PPA Rider.**

Since the PUCO's approval of AEP's PPA Rider (in Case No. 14-1693), and after the hearing in this case, OVEC sought to be integrated into PJM. The integration agreement would allow for transmission projects deemed necessary for OVEC to be

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<sup>2</sup> See Opinion and Order at ¶252 ("the Commission clarifies that AEP Ohio's recovery of its portion of OVEC PPA costs through the PPA Rider shall not include any costs associated with transmission system additions, improvements, or other projects under PJM's Regional Transmission Expansion Plan or supplemental transmission projects.").

<sup>3</sup> Order at 99.

<sup>4</sup> Order at 92, 96-100.

allocated (charged) to PJM customers.<sup>5</sup> But the PUCO stated in its Order that the Settlement is for AEP to “retain the *status quo* recovery of OVEC costs through the non-bypassable PPA Rider” through the Extended ESP III term – May 31, 2024.<sup>6</sup>

Under this recent development, the PUCO clarified that the PPA Rider it had authorized in AEP's prior case, which did not include the costs that AEP wants to charge customers for now, should still not include any costs associated with transmission system additions, improvements, or other projects under PJM's Regional Transmission Expansion Plan or supplemental transmission projects.<sup>7</sup> The PUCO found that its clarification was necessary to make sure that AEP's customers receive the intended benefit of the PPA rider and to ensure that customers receive reasonably priced retail electric service.

AEP applied for rehearing on the PUCO's finding. AEP argues there is no evidence in the record regarding OVEC's actual or expected transmission costs. Therefore, according to AEP, the PUCO's Opinion and Order violates R.C. 4903.09 because the PUCO did not issue “findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.”<sup>8</sup>

AEP's argument lacks merit. The lack of record support is exactly why transmission costs should be excluded from the PPA Rider. AEP's argument cuts both ways; if there is no record support for the PUCO to *exclude* transmission costs from the PPA Rider, then there is necessarily no record support to *include* transmission costs in the

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<sup>5</sup> Order at 117.

<sup>6</sup> Order at 116.

<sup>7</sup> *Id.*

<sup>8</sup> AEP Application for Rehearing at 3.

PPA Rider. While AEP must carry its burden and develop an evidentiary record to charge customers, the PUCO has no such burden to create an evidentiary record to limit the scope of a charge to just that which has been addressed in the record. In this case, OVEC-related transmission projects (and all else related to OVEC, as charging customers to subsidize OVEC under AEP's PPA Rider occurred in Case No. 14-1693) are outside the scope of the record, so AEP should be prohibited from charging customers for OVEC-related transmission projects under the PPA Rider.

**B. The PUCO should uphold its lawful determination that OVEC transmission costs should not be charged to customers under the existing PPA Rider.**

The PUCO is well within its authority to prohibit AEP from collecting future OVEC transmission costs from customers through the existing PPA Rider. The PUCO asserted that its determination to exclude transmission costs from the PPA Rider was “necessary to . . . effectuate [the PUCO’s] intention in approving the inclusion of the OVEC generating units in the PPA Rider . . . .”<sup>9</sup> The PUCO determined in a previous proceeding that authorized the PPA rider (Case No. 14-1693-EL-RDR), that there was sufficient record support to include the OVEC generating units, and *only* the OVEC generating units, in the PPA Rider.<sup>10</sup> The PUCO properly and lawfully determined that transmission costs should be excluded from the PPA Rider. As AEP points out, there is no record for adding transmission projects to the PPA Rider subsidy.<sup>11</sup> Rehearing should be denied.

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<sup>9</sup> Order at 116.

<sup>10</sup> As is apparent from OCC’s pending appeals before the Ohio Supreme Court (SC Nos. 2017-0749 and 2017-0752), OCC believes that the PUCO’s decisions regarding the PPA Rider are unlawful; See also *In re Ohio Power Co.*, Case No. 14-1693-EL-RDR, Opinion and Order (Mar. 31, 2016).

<sup>11</sup> AEP Application for Rehearing (May 25, 2018) at 3-5.

**C. The PUCO should deny AEP's request to clarify its determination that transmission costs should not be recovered through the PPA Rider because AEP's OVEC-related transmission costs are outside the scope of this proceeding.**

The PUCO determined that the PPA Rider shall not include any costs associated with transmission system additions, improvements, or other projects under PJM's Regional Transmission Expansion Plan or supplemental transmission projects.<sup>12</sup> That determination needs no clarification. Quite simply, the PPA Rider is not the mechanism for AEP to charge customers for OVEC-related transmission projects. AEP's request for the PUCO to clarify that AEP may charge customers for transmission expansion through the PPA Rider exceeds the scope of this proceeding. AEP even concedes that the evidentiary record does not support a determination regarding charging customers for OVEC-related transmission projects.<sup>13</sup>

AEP asserts there is a *Pike County* doctrine that grants the PUCO authority to judge the prudence of wholesale purchases for the purposes of retail ratemaking.<sup>14</sup> AEP argues that this *Pike County* doctrine provides a preemption exception such that states can perform their own examination of a utility's wholesale purchase agreement (even if FERC has approved the agreement's wholesale rate), so long as the state does not take it upon itself to re-examine FERC's approval of the wholesale rate and attempt to prevent a utility from recovering that rate based on its unreasonableness.<sup>15</sup> AEP then says that through periodic audits, under R.C. 4928.143, the PUCO has and will continue to exercise its *Pike County* authority to ensure that OVEC costs are properly accounted for

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<sup>12</sup> Order at 116.

<sup>13</sup> AEP Application for Rehearing at 3-5.

<sup>14</sup> *Id.*; See *Pike Cty. Light & Power Co. v. Penn. Pub. Serv. Comm.*, 78 Pa. Commw. 268, 237-74 (1983)

<sup>15</sup> AEP Application for Rehearing at 5-8.

in rates and that AEP has prudently exercised its OVEC contractual rights.<sup>16</sup> So far, so good.

But then AEP goes further and argues that precluding AEP from charging customers in the future for OVEC-related transmission projects would exceed the type of prudence that the PUCO has permissibly conducted under the *Pike County* doctrine.<sup>17</sup> The PUCO should reject this argument, as charging customers for transmission projects under the PPA Rider plainly exceeds the scope of this proceeding. The *Pike County* doctrine does not require a state to authorize recovery, and it certainly does not dictate that a particular rider must be used to charge customers for transmission projects. AEP's argument is misguided and lacks merit. Rehearing should be denied.

**D. The PUCO should deny the arguments by IGS and RESA that the PUCO cannot protect consumers by modifying and approving a Settlement.**

Interstate Gas Supply, Inc. ("IGS") and the Retail Energy Supply Association ("RESA") argue that the Order is unreasonable and unlawful because the PUCO modified the Settlement. Specifically, IGS and RESA are complaining that the PUCO declined to authorize a charge for the RRR that benefits themselves (marketers) to the detriment of standard offer consumers.<sup>18</sup> This is nonsense. The PUCO, not utilities or energy marketers, is the regulatory authority in this state.<sup>19</sup> The PUCO rightly has a rule to codify its authority under law: "No stipulation shall be considered binding upon the commission."<sup>20</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 7-8.

<sup>18</sup> RESA Application for Rehearing at 7-8; IGS Application for Rehearing at 17-19.

<sup>19</sup> Revised Code Title 49.

<sup>20</sup> Ohio Admin. Code 4901-1-30(E).



AEP proposed to charge just its SSO customers \$1.05/MWh under the RRR, which would then be paid to *all* of its distribution customers, thus effectively raising the price of the SSO for standard offer consumers. The RRR was proposed by marketers who claimed that customers who shop for service from marketers are allegedly double-charged for certain (unidentified) services that the customers receive from both their distribution utility and their marketer.<sup>21</sup> The Signatory Parties, including AEP, proposed a RRR charge of \$1.05/MWh. And since the amount charged to AEP's SSO customers is then redistributed to the entire customer base, the RRR is revenue neutral to AEP.

Fortunately, after weighing the evidence in the record, the PUCO determined that it was not appropriate for AEP to charge its SSO customers under the RRR at this time.<sup>22</sup> The PUCO concluded that while shopping customers may pay distribution costs that support the SSO, this has not been clearly established.<sup>23</sup> Accordingly, the PUCO determined that AEP, in its next base distribution rate case, should analyze its actual costs of providing SSO generation service and its actual costs associated with customers shopping for retail electric service.<sup>24</sup> The PUCO reasoned that by analyzing the SSO and shopping customer costs in AEP's next base rate case, the PUCO will be able to determine whether it is necessary to reallocate costs between shopping and non-shopping customers through the RRR.<sup>25</sup> The PUCO should uphold its determination and deny the arguments by IGS and RESA.

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<sup>21</sup> See Order at 91-92.

<sup>22</sup> Order at 92, 96-100.

<sup>23</sup> Order at 99.

<sup>24</sup> Order at 99.

<sup>25</sup> Order at 99.

IGS and RESA then argue that modifying settlements undermines and erodes faith in the settlement process.<sup>26</sup> This argument has no merit. Contrary to their claims, the PUCO's modification of the Settlement to protect standard offer consumers from paying the RRR charge is the kind of result allows for some faith in the settlement process. If anything, more of the Settlement should have been rejected in the interest of 1.3 million Ohioans.

It is undisputed—and in fact RESA readily admits—that the PUCO has the authority to modify settlements.<sup>27</sup> IGS and RESA undoubtedly entered into the Settlement with this knowledge. In fact, this is proven by the Settlement's inclusion of a provision explicitly identifying a Signatory Party's rights and obligations if the PUCO “rejects or materially modifies” the Settlement.<sup>28</sup> Thus, IGS and RESA were fully aware of the possibility that the Settlement could be modified. Both parties may exercise the rights afforded to them under the Settlement and the law in light of the PUCO's modification. But, as is obvious per Ohio Admin. Code 4901-1-30(E), any claim that the Order is unreasonable and unlawful because it modified the proposed Settlement has no legal merit, is contrary to the public interest, and should be denied.

**E. The PUCO should deny IGS's argument that its decision is against the manifest weight of the evidence.**

IGS argues that the PUCO's decision that the record lacks sufficient evidence to authorize a charge under the RRR is against the manifest weight of the evidence. IGS claims that the evidence demonstrated that specific costs are recovered through base

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<sup>26</sup> IGS Application for Rehearing at 18; RESA Application for Rehearing at 7-8.

<sup>27</sup> See RESA Application for Rehearing at 7-8; RC 4928.143(C)(1).

<sup>28</sup> See Settlement at 40-41.

distribution rates that are attributable to customer shopping.<sup>29</sup> IGS then asserts that once this evidence is provided, “the PUCO is required to rectify the matter.”<sup>30</sup> This claim has no merit.

The PUCO, after analyzing all the evidence, made a factual determination, as opposed to a legal determination, not to authorize a charge under the RRR. The legal standard for overturning a PUCO decision regarding a factual matter on appeal is steep. The Ohio Supreme Court has traditionally deferred to the judgment of the PUCO in situations involving the PUCO’s special expertise.<sup>31</sup> The Court will not reverse or modify a PUCO decision on questions of fact where the record contains sufficient probative evidence to show that the PUCO’s decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.<sup>32</sup> Further, the Court has held that decisions on the level of shopping incentives seeking to encourage utility customers to seek alternate providers are likewise within the PUCO’s sound judgment.<sup>33</sup> The burden is on the appellant to show that the PUCO’s decision is against the manifest weight of the evidence or is clearly unsupported by the evidence.<sup>34</sup> IGS cannot carry this burden here and thus the PUCO should not grant the assignment of error.

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<sup>29</sup> IGS Application for Rehearing at 20-23.

<sup>30</sup> IGS Application for Rehearing at 21.

<sup>31</sup> *AT & T Communications of Ohio, Inc. v. Pub. Util. Comm.* (1990), 51 Ohio St.3d 150, 154, 555 N.E.2d 288.

<sup>32</sup> *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004 Ohio 6896, 820 N.E.2d 921, at P 29.

<sup>33</sup> *Constellation*, 104 Ohio St.3d 530, 2004 Ohio 6767, 820 N.E.2d 885, at P 34.

<sup>34</sup> *AK Steel Corp. v. Pub. Util. Comm.*(2002), 95 Ohio St.3d 81, 86, 2002 Ohio 1735, 765 N.E.2d 862.

Deciding what amount to charge customers under a rider purportedly designed to incent shopping is unequivocally a matter that is within the PUCO's expertise. And the PUCO's decision not to authorize a charge for the RRR *is* supported by sufficient probative evidence. The PUCO analyzed testimony from AEP witness Allen and RESA witness White about the costs and rider at issue and considered objections and evidence in opposition. That other evidence included testimony from OCC, that is consistent with the case outcome on the RRR.

After analyzing all of the record evidence, the PUCO concluded that sufficient evidence did not exist to determine what the RRR charge should be or if a RRR charge was even necessary.<sup>35</sup> Accordingly, the PUCO found that the RRR failed the third prong of the three-part settlement test.<sup>36</sup> The PUCO's factual decision is based on ample evidence and does not show misapprehension, mistake, or willful disregard of duty. Thus, it is not against the manifest weight of the evidence, would most likely not be disturbed on appeal, and IGS's assignment of error should be denied.

**F. The PUCO set forth the reasons prompting its decision to deny charging SSO customers under Rider RRR.**

IGS claims the Order is unlawful and unreasonable because it violates R.C. 4903.09 by failing to state findings of facts and reasons prompting its decision to not authorize AEP to charge customers under the RRR.<sup>37</sup> This claim has no merit. To meet R.C. 4903.09's requirements, the PUCO's Order must show in sufficient detail the facts

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<sup>35</sup> Order at 98-100.

<sup>36</sup> See Order at 92-93, 96-100.

<sup>37</sup> IGS Application for Rehearing at 23-24.

in the record upon which the Order is based, and the reasoning followed by the PUCO in reaching its conclusion.<sup>38</sup> The PUCO has satisfied that burden here.

The PUCO specifically identified findings of fact and the reasons behind its decision not to authorize a charge under the RRR. As stated above, the PUCO took and analyzed testimony and other evidence on both sides of the issue. After explaining the relevant facts and parties' positions in the Order, the PUCO concluded that sufficient evidence did not exist to determine what the RRR charge amount should be or whether a RRR charge was even necessary.<sup>39</sup> Thus, additional evidence was necessary before a decision could be rendered. Should this issue be appealed to the Supreme Court, there will be a sufficient record for the Court to make a determination. Therefore, the PUCO did not violate R.C. 4903.09.

**G. The PUCO should deny IGS's argument that the Opinion and Order resulted in unjust and unreasonable rates for consumers; if anything, the PUCO's ruling avoided an unreasonable charge to consumers.**

IGS claims that the PUCO's decision created unjust and unreasonable rates because it failed to authorize a charge for the RRR despite the record evidence that a charge is necessary.<sup>40</sup> This claim has no merit. As stated above, the PUCO determined that there was insufficient evidence to determine what the RRR charge should be or whether a RRR charge was even necessary.<sup>41</sup>

Further, as the Order noted, the Signatory Parties readily admitted that the proposed RRR charge in the Settlement and the second proposed RRR charge in RESA's

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<sup>38</sup> See *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306, 312, 513 N.E.2d 337.

<sup>39</sup> Order at 96-100.

<sup>40</sup> IGA Application for Rehearing at 21.

<sup>41</sup> Order at 96-100.

testimony were not completely accurate.<sup>42</sup> Implementing, not denying, an inaccurate charge would have created an unjust and unreasonable rate. Instead of implementing an inaccurate rate unsupported by facts and evidence, the PUCO opted to deny the proposed charge at this time. IGS's assignment of error should be denied.

**H. The PUCO should deny the argument raised by IGS and RESA that the Opinion and Order violates state policy set forth in R.C. 4928.02.**

IGS and RESA both claim that the Order is unlawful and unreasonable because it authorized an SSO that does not comport with the state policies identified in R.C. 4928.02(A),<sup>43</sup> (B),<sup>44</sup> and (H).<sup>45</sup> The parties argue that by not authorizing a charge for the RRR, the PUCO failed to ensure nondiscriminatory prices,<sup>46</sup> unbundled and comparable electric service,<sup>47</sup> and the avoidance of anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service.<sup>48</sup> IGS and RESA's arguments both center around the same mistaken beliefs: (1) that the evidence unequivocally demonstrated that shopping customers are subsidizing non-shopping customers and (2) that the PUCO's failure to authorize a RRR charge allowed this unlawful practice to continue in violation of state policy.

IGS and RESA are wrong on all counts. Both parties fail to recognize that the PUCO properly determined that there was insufficient evidence to prove the illegality

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<sup>42</sup> See Order at 98 ("AEP Ohio witness Allen testified that the \$1.05/MWh charge proposed for the CIR is a negotiated value, because the various parties have differing views as to what it should be.").

<sup>43</sup> See RESA Application for Rehearing at 3-5; IGS Application for Rehearing at 25-27.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> RC 4928.02(A).

<sup>47</sup> RC 4928.02(B).

<sup>48</sup> RC 4928.02(H).

that IGS and RESA allege. That is, the PUCO stated that further evidence and analysis was required before it could determine if, and to what extent, there are costs recovered from all customers through distribution rates that are clearly incurred by AEP to support the SSO.<sup>49</sup> Accordingly, the PUCO could not authorize a charge for the RRR. Therefore, the PUCO should deny the assignments of error raised by IGS and RESA.

**I. The PUCO should deny RESA's argument that the Opinion and Order violates the PUCO's previous Order in Case No. 14-1693-EL-SSO.**

RESA argues that the Order is unlawful and unreasonable because it violates the PUCO's own order in the PPA Case.<sup>50</sup> In the settlement there, AEP committed to "file and advocate for" the RRR in the instant proceeding. While AEP's commitment was misguided for its effect on standard offer consumers, AEP made the proposal. The PPA Case settlement also stated that parties would attempt to determine a RRR charge to include in this case and that the RRR charge "would take effect...upon final order of the ESP extension proceeding."<sup>51</sup> RESA's argument has no merit.

That the settlement in the PPA Case states that the charge from the RRR "would take effect...upon final order" in this case did not obligate the PUCO to authorize a RRR charge in this case. The PUCO has full discretion to approve, modify, or reject a proposed ESP.<sup>52</sup> And Section 4901-1-30(E) of the Ohio Administrative Code states that "no stipulation shall be considered binding upon the commission." Thus, modifying AEP's RRR request was not in and of itself unlawful. Regardless, the PUCO has authority to modify a prior order adopting a stipulation. Indeed, IGS and RESA urged the

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<sup>49</sup> Order at 98-100.

<sup>50</sup> RESA Application for Rehearing at 2-3, 5-7.

<sup>51</sup> Case No. 14-1693-EL-SSO, Order at 30 (March 31, 2016).

<sup>52</sup> See RC 4928.143(C)(1).

PUCO to do exactly that in FirstEnergy's 2012 ESP proceeding, Case No. 12-1230-EL-SSO.<sup>53</sup>

Finally, RESA's claim is without merit because the settlement in the PPA Case explicitly included a provision outlining the parties' rights if the PUCO denied certain AEP Ohio requests (including the RRR) in the present ESP extension case.<sup>54</sup> This provision was approved by the PUCO. Therefore, even assuming RESA's claim were true, the provision would be unlawful because it would limit the PUCO's authority to reject or modify the request. Instead, the provision would have the unlawful effect of making the stipulation binding upon the PUCO.

### III. CONCLUSION

The PUCO should deny the assignments of error raised by AEP, IGS, and RESA. Regarding the coal plant subsidy, the PUCO should reject AEP's argument to expand the subsidy in the existing PPA rider to include AEP's transmission projects. And regarding the RRR, the PUCO should uphold its determination that SSO customers should not be charged more in order to subsidize customers who shop for retail electric service.

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<sup>53</sup> See *In the Matter of the Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Ed. Co., 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 at 40-42 (July 18, 2012) ("Accordingly, although the Commission retains the authority to modify a prior order adopting a stipulation, the Commission finds that RESA, IGS, and Direct Energy have not demonstrated sufficient grounds to disturb the stipulation adopted in *WPS Energy*.").

<sup>54</sup> See PPA Order at 47 ("As set forth in Section III.C of the stipulation, AEP Ohio agrees to file a separate application with the Commission seeking to extend its current ESP to May 31, 2024. AEP Ohio further agrees to include in that application, among other appropriate proposals to be developed, certain provisions and features specified in Section III.C of the stipulation. If the Commission denies AEP Ohio's request to include in its extended ESP any of the provisions and features specified in Section III.C, any adversely affected signatory party agrees to work in good faith with the Company to develop new provisions to restore or replace the invalidated provision to its equivalent value and jointly request approval of any new agreed to provisions by the Commission. If such signatory parties are unable to reach agreement, each of those signatory parties may petition the Commission for appropriate relief limited to the equivalent value of the specific provision that is not included in AEP Ohio's extended ESP.")



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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic service, this 4<sup>th</sup> day of June 2018.

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Summary: Memorandum Memorandum Contra Applications for Rehearing of Ohio Power Company, Interstate Gas Supply, Inc., and Retail Electric Supply Association by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.