

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2018 Long-Term)	
Forecast Report on behalf of Ohio Power)	Case No. 18-0501-EL-FOR
Company and Related Matters.)	

In the Matter of the Application Seeking)	
Approval of Ohio Power Company's)	
Proposal to Enter into Renewable Energy)	Case No. 18-1392-EL-RDR
Purchase Agreements for Inclusion in the)	
Renewable Generation Rider.)	

In the Matter of the Application of Ohio)	Case No. 18-1393-EL-ATA
Power Company to Amend its Tariffs.)	

**INITIAL BRIEF
OF
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Bruce Weston (0016973)
Ohio Consumers' Counsel

Maureen R. Willis, Counsel of Record
Senior Counsel (0020847)
William J. Michael (0070921)
Christopher Healey (0086027)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor
Columbus, Ohio 43215
Telephone [Willis]: (614) 466-9567
Telephone [Michael]: (614) 466-1291
Telephone [Healey]: (614) 466-9571
Maureen.willis@occ.ohio.gov
William.michael@occ.ohio.gov
Christopher.healey@occ.ohio.gov

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I. INTRODUCTION

Renewable energy is a good thing. But AEP's proposal to re-monopolize power plants in Ohio is an illegal thing. Under Ohio's deregulation law, an AEP proposal to develop and charge monopoly customers to subsidize solar or any type of power plant would be unlawful unless customers need the power to keep the lights on. The PUCO Staff found that AEP's 1.5 million customers do not need the power. And AEP is not even proposing to dedicate the solar power for use by Ohio customers; rather, the power would be sold into the regional PJM market.

OSU Professor Sioshansi testified for OCC that Ohio's competitive market is already providing AEP's customers with more than four dozen marketer offers for renewable energy and nearly three dozen marketer offers for 100% renewable energy. The PUCO Staff and others presented similar testimony.

An electric customer commented in response to AEP's survey, "I already have options for renewables though the deregulated choice market. AEP Ohio should not be building generation. The financial risk of any generation including renewables should be left to independent developers and certainly not ratepayers of AEP Ohio." IGS Ex. 3 at 1.

That customer's response to AEP's survey was echoed by the positions of the PUCO Staff, Ohio Manufacturers' Association, Kroger, Direct Energy, Industrial Energy Users, the Ohio Coal Association, IGS and OCC. The competitive market under Ohio law is providing consumers with plenty of power.

AEP's proposal violates the deregulation law that utilities charged Ohioans billions of dollars to implement and that should now be lowering Ohioans' electric bills. The PUCO has no authority to undo electric deregulation two decades after its enactment.

II. THE PUCO CANNOT ADOPT AEP'S RE-REGULATORY PROPOSAL THAT VIOLATES OHIO LAW FOR BENEFITING ELECTRIC CUSTOMERS THROUGH A COMPETITIVE DEREGULATED POWER PLANT MARKET.

A. Ohio law requires meeting customers' need for electric generation by the competitive market.

The regulatory scheme adopted in Chapter 4928 of the Revised Code was first enacted in 1999, under S.B. 3. S.B. 3 was later supplemented by S.B. 221 (the "2008 Energy law"). Both of these legislative enactments were aimed at facilitating and encouraging the development of power plant competition in the electric market to provide customers with the benefits of lower prices, higher innovation, and reliable service. *See generally*, OCC Ex. 18 at 16 (Dr. Lesser) ("relying on the marketplace to develop power sources, including renewables, not only is consistent with the Ohio General Assembly's

plan for Ohioans to be served by non-utility owned competitive power plants, it was the objective of the Assembly.”)

Under S.B. 3 competition replaced government regulation. With the passage of S.B. 3, retail generation service has been considered a competitive service (under R.C. 4928.03). *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2011-Ohio-4164, 871 N.E.2d 1176, ¶50. Generation service is no longer subject to traditional cost-based regulation. Instead, under Ohio law, retail electric generation and the charges to customers for it are to be established through the competitive market.

S.B. 3 contained many provisions to assure that competition could succeed (for customers’ benefit) by establishing a level playing field for all players: unbundling services (R.C. 4928.35), providing for corporate separation and divestment of generation (R.C. 4928.17), instituting state policies promoting competition and prohibiting subsidies (R.C. 4928.02), and allowing transition plans providing limited support for utilities in moving to competitive generation (R.C. 4928.31 -.40).

These provisions were largely unchanged in the 2008 Energy law. The underlying theme of Ohio law has not changed: retail electric generation charges to customers are to be established through the wholesale competitive market, without the heavy hand of government.

B. Ohio Law (R.C. 4928.143(B)(2)(c)) creates a limited exception (and a safety net for consumers) by allowing utilities to own or operate power plants if, inter alia, there is a “need” for the generation and that need is not being met in the competitive market. AEP’s proposal does not meet this exception, and thus should be rejected as unlawful.

With limited exceptions, Ohio generating plants (including renewable projects) are to be developed in the marketplace, without involvement of monopoly utilities and

charges to their captive customers.¹ Under Ohio law, the risks and rewards of owning and operating power plants are transferred away from retail customers. Instead, in Ohio's competitive market, merchant generators (who can effectively manage the risks) assume such risks.²

Under Ohio law, however, a utility has a limited opportunity to ask the PUCO to approve customer funding for a new generation plant that it proposes to own or operate. The limited opportunity is presented in R.C. 4928.143(B)(2)(c). This provision of law sets forth numerous requirements that must be met before customers are charged for monopoly megawatts. If these provisions are not met, there is no legal authority for the PUCO to approve monopoly megawatts funded by captive customers.

A utility's ability to charge customers for monopoly megawatts under R.C. 4928.143(B)(2)(c) comes into play if and only if numerous pre-conditions are met. First, the statute constricts the charge to a "non-bypassable" surcharge, meaning that all customers must pay for it. Second, the generating plant must be owned or operated by the utility.³ Third, the statute requires that the generating facility was sourced through a competitive bid process, a provision meant to achieve least cost for consumers. Fourth, there must be a need for the facility "based on resource planning projections submitted by the electric distribution facility." Fifth, the capacity and energy from the facility must be

¹ OCC Ex. 18 at 14 (Dr. Lesser).

² OCC Ex. 18 at 14 (Dr. Lesser).

³ In this regard OCC notes that AEP does not propose to own the solar projects and is not operating the projects. The PUCO has designated this a Phase II issue. Dr. Lesser's testimony addressing the fact that AEP is not operating the solar plants was deferred to Phase II.

dedicated to Ohio consumers⁴ with the PUCO ensuring that “the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge.” R.C. 4928.143(C)(1). “Otherwise, the commission by order shall disapprove the application.”⁵ As the PUCO Staff testified, AEP’s proposal fails the need test under Ohio law.

The PUCO has recognized that this specific provision of law acts as a safety net for consumers. It operates in the event that market-based solutions do not emerge for this state’s generation needs.⁶

Here, however, AEP itself admits it has sufficient renewable generation to meet its renewable portfolio mandate and there is no statutory need for renewable generation.⁷ AEP has not provided any evidence that the PJM market is not working. AEP also admits that it has procured sufficient overall generating capacity to meet its reliability requirement.⁸ As the PUCO Staff testified, AEP has failed under the law to establish there is a need for the projects.

⁴ In this regard OCC notes that AEP is not dedicating the energy and capacity from the solar facilities to Ohioans. The PUCO has designated this a Phase II issue. Dr. Lesser’s testimony addressing the fact that AEP has not dedicated the capacity and energy to Ohioans was deferred to Phase II.

⁵ *Id.*

⁶ OCC Ex. 18 at 26 (Dr. Lesser) (describing the law as a market “safety valve;” *see also, In the Matter of the Application of Columbus S. Power Co.*, Case No. 11-346-EL-SSO, Opinion and Order at 39-40 (Dec. 14, 2011) (describing the generation resource rider as a “lifeline”).

⁷ AEP Ex. 3 at 13 (Allen).

⁸ AEP Ex. 3 at 8 (Allen); AEP Ex. 2 at 3 (“PJM wholesale markets are adequately supplying capacity and energy to the AEP Ohio load zone.”).

U.S. Supreme Court Justice Benjamin Cardoza once remarked “[h]istory, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future.”⁹ The PUCO’s history on this issue dates back at least to 2011. In 2011, AEP sought approval of the generation resource rider (“GRR”) as a placeholder mechanism within its electric security plan.¹⁰ At that time, AEP had planned to use the generation resource rider to collect future costs associated with either its Turning Point solar project or its MR 6 shale gas project.¹¹ While the PUCO approved the generation resource rider to collect future costs from customers for the construction of an electric generating facility under R.C. 4928.143(B)(2), the PUCO took care to address arguments by FirstEnergy Solutions (FES), RESA, and IEU against the generation resource rider. Among the arguments the PUCO addressed was FirstEnergy Solutions’ claim that the generation resource rider would “cast a cloud of uncertainty over competitive markets.”

Though not persuaded by FES’ claim, the PUCO clarified that utility construction of generating units would be a solution only if the competitive market failed to provide the generation:

Although we will first look to the market to build needed capacity, the proposed GRR provides a lifeline in the event that market-based solution do not emerge for this state’s generation needs. While Section 4928.143(B)(2), Revised Code, provides the Commission with authority to order construction of new generation facilities in Ohio, such new generation or capacity projects will only be authorized when generation needs cannot be met through the competitive market. Therefore, generation projects under the GRR, or any other surcharge authorized by Section

⁹ <http://www.memorablequotations.com/cardoza.htm>.

¹⁰ *In the Matter of the Application of Columbus S. Power Co.*, Case No. 11-346-EL-SSO, Application at 10 (Jan. 27, 2011).

¹¹ *Id.*, Opinion and Order at 38 (Dec. 14, 2011).

4928.143(B)(2), Revised Code, must be based upon a demonstration of need under the integrated resource planning process and be narrowly tailored to advance the policy provisions contained in Section 4928.02, Revised Code, or the statutory mandates contained in Section 4928.64, Revised Code.¹²

A little over a year later, when faced with AEP's request to approve the need for its Turning Point project (where the PUCO found no need), the PUCO reiterated its earlier findings that construction of generation by utilities can only occur if the generation needs for customers are not being met by the competitive market:

As the parties note, the Commission has previously addressed the Turning Point project in the ESP 2 Case. Specifically, the Commission stated that AEP-Ohio would have the opportunity to demonstrate that the Turning Point project is necessary to comply with the SER provisions contained in Section 4928.64(B)(2) Revised Code, and that sufficient SER are not available through competitive markets. The Commission noted that it would first look to the market to build needed capacity and that new generation or capacity projects would only be authorized under Section 4928.143(B)(2), Revised Code, when generation needs cannot be met through the competitive market.¹³

Three years later, in addressing AEP's proposal for a revamped power purchase agreement the PUCO once again repeated its finding that markets (instead of monopolies) must be relied upon for sourcing new generation: "The Commission will continue to look to the markets as the primary drivers of an adequate supply of energy from any source, including renewable energy."¹⁴

¹² *Id.*

¹³ *In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters*, Case No. 10-501-EL-FOR, Opinion and Order at 26 (Jan. 9, 2013) (citation omitted).

¹⁴ *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement*, Case No. 14-1693-EL-RDR, Opinion and Order at 82-83 (Mar. 31, 2016).

Under the Ohio law that AEP seeks to circumvent here, the PUCO has had a stalwart reliance on markets to provide adequate power to serve customers. That statutory approach avoids potentially unnecessary construction of new generation assets, at customer expense, by utilities like AEP, when resources can be found in the competitive market.

1. Under Ohio law a “need based on resource planning projections” means that the PUCO must evaluate whether the electric supply exceeds the customers’ demands for electricity, with room to spare.

Under the 2008 Energy law, before charging customers for monopoly megawatts, utilities must establish, among other things, that there is a need for the facilities “based on resource planning projections submitted by the electric distribution utility.” Resource planning projections” which are the basis for a need finding under R.C.

4928.143(B)(2)(c), refer to supply and demand –the projections the PUCO reviews in the long-term forecast filings by utilities. The projections of resource planning pertain to whether the projected supply (considering additions and retirements) is sufficient to meet the projected energy demand, peak load and reserve requirements. In other words “need” based on resource planning projections merely means “having sufficient electricity supplies to ensure that customers’ lights will always stay on, including a minimum amount of excess generating capacity in case of unplanned or forced outages.”¹⁵

When Ohio law (R.C. 4928.143(B)(2)(c)) directs the PUCO to determine “need” for the facility to be owned or operated by a utility, it means need as measured in the utility’s long-term forecast filing. No more and no less. The PUCO has no authority,

¹⁵ OCC Ex. 18 at 23 (Dr. Lesser).

under any rule of statutory construction, to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for.¹⁶

2. The PUCO has construed “need” under Ohio law to mean sufficient resources to meet customers’ demand as measured under law by resource planning projections and sufficient resources to comply with Ohio’s renewable energy mandates.

Importantly, the PUCO has construed R.C. 4928.143(B)(2)(c) before. About six years ago, AEP sought a PUCO finding of need for another solar project, a 49 MW facility called Turning Point.¹⁷ AEP’s application for the Turning Point project, like the two solar projects in this case, was supported by a settlement agreement. Additionally, both the Turning Point project and the two solar projects proposed in this proceeding were brought into the resource planning process through a supplemental forecast report filing.¹⁸

In the Turning Point proceeding, four months after the evidentiary hearing and after all briefs had been filed, the PUCO took the unusual step of reopening the record, *sua sponte*. In this regard, the PUCO sought additional briefing specifically on the “need” for the Turning Point project.¹⁹ The PUCO requested parties to address:

how the Commission should properly determine whether there is a need for the Turning Point project. How should need be defined and what is the proper legal standard that should be applied to the

¹⁶ [*State, ex rel. Foster, v. Evatt* \(1944\)](#), 144 Ohio St. 65, 29 O.O. 4, 56 N.E. 2d 265, at paragraph eight of the syllabus.

¹⁷ *In the Matter of the 2010 Long Term Forecast Report of the Ohio Power Company*, Case No. 10-501-EL-FOR.

¹⁸ *Id.*, Application (Dec. 20, 2010); AEP Ex. 2.

¹⁹ *In the Matter of the 2010 Long Term Forecast Report of the Ohio Power Company*, Case No. 10-501-EL-FOR., Entry (Sept. 5, 2012).

Commission's analysis of need? Is need limited to energy and capacity only, or does need include compliance with the renewable portfolio standard (RPS)? What evidence is relevant to the Commission's determination of need?²⁰

And the PUCO also asked parties to address

whether the Commission, in evaluating the need for the Turning Point project, should solely consider AEP-Ohio's need for the project, or whether the Commission should look beyond the need of the Company or its service territory. For example, should the Commission consider whether the Turning Point project is needed by other electric utilities or electric companies in Ohio, or whether the state as a whole has a need for the project? Should the Commission consider whether there is a need for the Turning Point project outside of the state, given that the solar renewable energy credits (SRECs) generated from the project may be used in meeting the RPS in other states and that SRECs generated from facilities outside the state may be used to meet Ohio's RPS?²¹

In the supplemental briefs filed by supporters of the Turning Point project (PUCO Staff, AEP Ohio, and University of Toledo Innovation Enterprises ("UTIE")) a broad definition of need was urged²² that included factors such as the state's overall energy policy, environmental quality, and jobs. Other parties (Industrial Energy Users, FirstEnergy Solutions, Retail Energy Supply Association (RESA), and Direct Energy) urged the PUCO to define need more narrowly, consistent with energy and capacity requirements shown in a resource planning sense under Ohio law..

²⁰ *Id.* at ¶10 (a).

²¹ *Id.* at ¶10(b).

²² *See, e.g.*, AEP Supplemental Brief at 3, 4-8 (Oct. 3, 2012) (the Commission should consider factors beyond just energy and capacity, including the state's overall energy policy and the facilities' role in furthering that policy); UTIE Post Hearing Brief at 2, 4-6 (Oct. 3, 2012) (the Commission should consider the "overall betterment of Ohio" including "protection of public health and safety," "preservation of environmental quality," "maintenance of a sound economy" and "conservation of energy and material resources").

Three months following the submission of two rounds of supplemental briefs on “need,” the PUCO issued its decision. The PUCO found that parties had not shown there was a need for the Turning Point project during AEP’s ten year forecast planning period (2010-2019).²³ Because the PUCO found no need for the Turning Point project, it found “there is no basis upon which we can find that the Turning Point provision of the stipulation benefits AEP-Ohio’s ratepayers.” The PUCO went onto modify the settlement, striking the Turning Point provision from it.²⁴

The PUCO’s Turning Point decision is remarkable in that it was the PUCO’s first interpretation of “need” under Ohio law (R.C. 4928.143(B)(2)). There has been no other case before the PUCO which has addressed need, as defined under the 2008 Energy law.

Key takeaways from the PUCO’s decision are:

- The PUCO declined to adopt what it characterized as the “holistic approach” to determine need. That approach (advocated by University of Toledo Innovation Enterprises and others) would have broadly defined need to include issues such as job creation, economic development, diversity of supply, and environmental benefits, as well as portfolio standards.²⁵
- The PUCO found “no evidence that AEP-Ohio has a need for the Turning Point project to comply with its solar energy renewable benchmarks under Section 4928.64(B)(2), Revised Code, or in any other respect.”²⁶

²³ *In the Matter of the 2010 Long Term Forecast Report of the Ohio Power Company*, Case No. 10-501-EL-FOR., Opinion and Order at 26 (Jan. 9, 2013).

²⁴ *Id.* at 29.

²⁵ *Id.* at 19 (describing UTIE’s definition of need).

²⁶ *Id.* at 26 (citation omitted). The PUCO in a footnote indicated that it was not deciding that the determination of need may take into account the SER benchmarks, but rather assumed that for purposes of reaching its decision. *See* footnote 10 at 26.

- The PUCO continued to maintain its view of the statute as a safety valve. In this respect the PUCO reiterated that it would “first look to the market to build needed capacity and that new generation or capacity projects would only be authorized under Section 4928.143(B)(2), Revised Code, when generation needs cannot be met through the competitive market.”²⁷
- The PUCO evaluated the market for solar capacity and found that the in-state solar market showed a trend of solar additions since 2009, with no evidence that the trend would not continue.²⁸
- The PUCO was careful to point out that when it evaluated need in terms of the solar energy renewable benchmarks and whether AEP Ohio needed the Turning Point project to meet its benchmarks, it was not deciding that need under Ohio law may take into account the solar energy renewable benchmarks.²⁹
- The PUCO declined to accept arguments that there was a general need (by other electric distribution utilities or marketers) for solar renewable energy credits in 2015 or beyond.³⁰
- The PUCO explained that regardless of its finding that there was no need established under Ohio law for the project, it recognized that there was support for the project (“considerable public testimony and written correspondence”). The PUCO also noted the project “may potentially provide numerous benefits, particularly for the project region.”³¹

²⁷ *Id.* (referring back to its decision in Case No. 11-346-EL-SSO).

²⁸ *Id.* at 27.

²⁹ *Id.* at 26, *see* footnote 10.

³⁰ *Id.*

³¹ *Id.* at 27.

The PUCO found that “[t]he evidence offered by AEP-Ohio, as well as Staff, in support of the stipulation, indicates that *there is not presently a need for the* Turning Point project.”³² And because there was no demonstration of need under 4928.143(B)(2)(c), and 4928.64, the PUCO concluded that it could not find the Turning Point provision of the stipulation “benefits ratepayers and the public interest.” *Id.* at 27.

The PUCO’s decision in the Turning Point case is precedent that the PUCO should follow when applying Ohio law to determine if there is need in this proceeding for at least 900 MW of renewable energy. Once precedent is established, unless it is in error or there is a clear need to change, the PUCO should respect it..³³ Neither AEP nor the intervenors who support the project have shown that the PUCO’s Turning Point decision was in error. And AEP and its supporters have not shown that there is a clear need to change how the PUCO has determined need under Ohio law. The PUCO should respect its precedent to assure the predictability that is essential in all areas of the law, including administrative law. *Id.*

Applying the Turning Point case as precedent should lead the PUCO to conclude there is no need for the solar projects. The PUCO should reject sweeping assertions that need equates to customer wants, jobs, or economics, just as it did in the Turning Point case. “Need” as defined under Ohio law relates to resource planning. The PUCO should find no need here for the proposed solar projects.

³² *Id.* (emphasis added).

³³ *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 431, 71 O.O.2d 393, 409, 330 N.E.2d 1, 19-20.

III. UNDER OHIO LAW, THE OHIO GENERAL ASSEMBLY HAS DETERMINED THE AMOUNT OF RENEWABLE AND SOLAR ENERGY THAT IS REQUIRED TO MEET CUSTOMERS' ELECTRIC NEEDS THROUGH 2026

Not only did the 2008 Energy law establish the way that Ohioans would be charged for electric service, but it also established a renewable portfolio standard for the state of Ohio. That standard requires load serving entities to procure a portion of their electricity from renewable resources. The standard began in 2000 and required, with each passing year, that an increasing percentage of renewable energy be procured through 2026 (referred to as the renewable portfolio standards). The 2008 Energy law also enacted solar specific standards requiring load serving entities to procure an escalating percentage of their customers' load from solar resources through 2026 (referred to as the solar renewable portfolio standards). The 2008 Energy Law also required that at least half of the portfolio standards and solar portfolio standards to be procured through in-state resources.

But in 2014, the Ohio Legislature enacted S.B. 310. S.B. 310 froze any percentage increases in Ohio's renewable portfolio standard and solar renewable portfolio standard requirements for two years, from 2014 until 2016. The Bill also eliminated the requirement that load serving entities purchase half of their renewable and solar energy requirements from Ohio. Thus, under current Ohio law there is no in-state requirement for renewable portfolio standards or solar renewable portfolio standards. Solar renewable credits can be sourced from any resource that can be shown to be deliverable to Ohio.³⁴ The PUCO has interpreted this requirement as allowing renewable energy credits to be

³⁴ IEU Ex. 1 at 8 (Murray).

sourced by any generating facility physically located within the multi-state PJM region.
Id.

Through the 2008 Energy Law and S.B. 310, the General Assembly has established renewable portfolio standards and solar renewable portfolio standards that set the amount of renewable and solar energy that is required to meet Ohioans' electric needs through 2026. IGS Ex. 11 at 7-8. The Ohio General Assembly has, under S.B. 310, explicitly declined to provide any specific incentives to build Ohio based solar or wind, beyond what is presently being built in the competitive market by market participants. While Ohio's Legislature could increase the renewable energy requirement or add an in-state procurement requirement back into Ohio law, it has chosen not to do so. The fact that the Ohio General Assembly eliminated the former in-state renewable requirements, indicates its belief that there is no need to build additional resources beyond what the market is already building under current state and federal incentives. IGS Ex. 11 at 11.

A renewable portfolio standard like that in Ohio is an effective means to incent renewable energy development in competitive states, as IGS Witness White testified.³⁵ According to Mr. White, a renewable portfolio standard in a restructured state (such as Ohio) is a market-based solution that creates a market for renewable energy certificates and solar renewable energy certificates that allows load serving entities to meet the requirements most efficiently.

Ohio's renewable portfolio standards are working. The cost of renewable portfolio standard compliance has come down significantly while the percentage of

³⁵ IGS Ex. 11 at 9 (White).

renewable energy being built and supplied in Ohio continues to rise.³⁶ Since the PUCO began certifying renewable energy facilities, it has certified 592.47 MW of solar generation.³⁷ On a combined basis these facilities have the capability to generate 15,730,818 MWHs of renewable energy credits. This is more than 35.7 times Ohio's 2018 solar renewable mandate.³⁸ Other testimony adduced at the hearing (including from Direct Energy) established that energy suppliers are not having trouble meeting their renewable energy requirements.³⁹ And the current market price of renewable energy certificates and solar renewable energy certificates allows load serving entities to meet their portfolio standards under the three percent statutory cost cap.⁴⁰ There is just no reason to believe this will change in the foreseeable future.

But AEP's approach in this case would undermine the market, as discussed *infra*. The Ohio Legislature has already determined the level of renewable resources needed for Ohioans through the setting of renewable portfolio standards and solar portfolio standards. IGS Witness White testified that AEP should not now be allowed to circumvent the intent of the Ohio Legislature by flooding the market with 400 MW of solar subsidized by captive Ohio customers.⁴¹

³⁶ IGS Ex. 11 at 9 (White).

³⁷ IEU Ex. 1 at 8 (Murray).

³⁸ IEU Ex. 1 at 8.

³⁹ Direct Energy Ex. 1 at 10-11; IGS Ex. 11 at 9.

⁴⁰ IGS Ex. 11 at 9.

⁴¹ IGS Ex. 11 at 13.

IV. PJM IS PROVIDING ADEQUATE CAPACITY AND ENERGY AND AEP HAS MET ITS RENEWABLE ENERGY MANDATES. UNDER OHIO LAW THERE IS NO NEED FOR 400 MW OF SOLAR GENERATION

AEP admits that it currently has a surplus of renewable energy certificates.⁴² AEP Witness Allen testified that AEP Ohio does not need additional RECS to comply with the renewable energy portfolio standards.⁴³ AEP also admits that it has more than enough capacity to meet its peak load obligations now and into the foreseeable future.⁴⁴ And AEP admits that it does not have “a traditional integrated resource planning (IRP) need for generation.”⁴⁵ These admissions of AEP are strong testament to opposing parties’ position in this case: Under Ohio law, there is no need for the two solar facilities, *based on resource planning projections*. Nor is there a need, under Ohio law, for at least 900 MW of renewables, based on *resource planning projections*. Therefore, AEP’s proposal should be rejected.

Prior to restructuring, all local electric utilities had an obligation to serve customers’ generation needs. That meant that a utility was required to meet its customers’ demand for electricity at all times, which utilities typically did by building generating plants or entering into long-term purchase contracts with other utilities.⁴⁶ “Need” in a resource planning sense related to an electric utility having sufficient resources to meet customer demand at all times and to ensure that customers were provided with reliable

⁴² OCC Ex. 18 at 7; 32 (Dr. Lesser).

⁴³ AEP Ex. 3 at 13; OCC Ex. 18 at 31 (Dr. Lesser concurs).

⁴⁴ AEP Ex. 3 at 8 (Allen); AEP Ex. 2 at 3 (“PJM wholesale markets are adequately supplying capacity and energy to the AEP Ohio load zone.”).

⁴⁵ AEP Ex. 2 at 3.

⁴⁶ OCC Ex. 18 at 23 (Dr. Lesser).

service.⁴⁷ Dr. Lesser defined need as “having sufficient electricity supplies to ensure that customers’ lights will always stay on, which includes a minimum amount of excess generating capacity⁴⁸ in case of unplanned or forced outages.”

But Ohio’s 2008 Energy Law changed all that. Under Ohio’s 2008 Energy Law, AEP and all other electric distribution utilities have little or no responsibility for balancing generation supply with demand. Generation has been divested, consistent with R.C. 4928.17. The electric distribution utilities no longer own generation. The generation needs of Ohioans are secured under competitive market for electric generation. Customers can contract with marketers for generation service or customers can take standard offer service, with the power being procured and priced under 100% competitively bid auctions, with the supply coming from marketers or merchant generators.⁴⁹

When Ohio decided to deregulate, Ohio’s statutory scheme recognized that PJM would take over determinations of resource adequacy in the region.⁵⁰ PUCO Staff Witness Benedict rightly testified that traditional resource planning has “largely become

⁴⁷ *Id.*

⁴⁸ Excess generating capacity is typically referred to as “installed reserve margin” (“IRM”) or just “reserve margin.” OCC Ex. 18 at 23.

⁴⁹ *See, e.g.*, Staff Ex. 2 at 2 (Staff Witness Benedict testifying that since 1/1/16 all investor owned electric distribution utilities source generation needs of non-shopping customers through competitive auctions).

⁵⁰ *See, e.g.*, Staff Ex. 2 at 7 (Staff Witness Benedict testifying that PJM is responsible for ensuring resource adequacy across its footprint, including Ohio Power and all of the state of Ohio); IGS Ex. 11 at 14 (Witness White testifying that as Ohio is a competitive generation state, the reliability needs of electric generation have been turned over to competitive markets).

obsolete in Ohio, due to the restructured nature of the state's utility industry.”⁵¹ Under Ohio law (R.C. 4928.12), PJM is the regional entity responsible for improving service reliability within the state, assuring an open and competitive generation market, substantially increasing economical supply options for consumers, promoting positive generation performance to satisfy the electricity requirements of customers and maintaining real-time reliability.

As acknowledged by virtually every witness in this proceeding, PJM, not the PUCO, determines which resources shall operate to meet reliability objectives.⁵² PJM administers a wholesale electricity market and engages in resource planning to safeguard that sufficient generating capacity exists to meet the needs of the region, which includes Ohio.⁵³ PJM members are bound by various agreements including the Reliability Assurance Agreement, which is intended to “ensure that adequate Capacity Resources, including planned and Existing Generation Capacity resources, planned and existing Demand Resources, and Energy Efficiency Resources will be planned and made available to provide reliable service to loads with the PJM Region, to assist other Parties during Emergencies and to coordinate planning of such resources consistent with the Reliability Principles and Standards.”⁵⁴ PJM is regulated by FERC.

To safeguard there is sufficient generating capacity to meet customers' peak electric demand and to meet reliability standards, PJM requires the total amount of

⁵¹ Staff Ex. 2 at 2.

⁵² *See, e.g.*, AEP Ex. 3 at 8 (Allen); OCC Ex. 18 at 26 (Dr. Lesser); OCC Ex. 25 at 9 (Dr. Sioshansi); OCA Ex. 2, Expert Report at 30 (Brown); Direct Energy Ex. 2 at 5 (Lacey).

⁵³ Direct Energy Ex. 2 at 5 (Lacey).

⁵⁴ *Id.*

generating capacity to be greater than forecast peak demand.⁵⁵ In that way, if some generators are unable to operate at such times, or if a transmission line is not operating, PJM can still meet reliability standards.⁵⁶

Ohio is part of PJM's region (consisting of 13 states plus the District of Columbia). OCC's Witness Dr. Lesser testified that PJM's most recent generation reserve margin forecast (for its region that includes Ohio) shows reserve margins far greater than the approximately 16% reserve requirement PJM has determined is required to meet reliability standards (set by the North American Energy Reliability Corporation "NERC") for customers.⁵⁷ In other words, there is no need for this generation being proposed by AEP for Ohio and the other PJM states.

Other witnesses came to this very same conclusion. For example, OCC Witness Dr. Sioshansi concluded "[t]here is no issue of obtaining reliable wholesale capacity and energy by the Utility to serve its customers."⁵⁸ Dr. Sioshansi's testimony relied on recent information issued by NERC, the entity responsible for developing and enforcing mandatory electricity reliability standards under the Federal Energy Regulatory Commission's oversight.⁵⁹ According to NERC's most recent assessment of the reliability for the PJM power system, it is anticipated that PJM will have a 40% reserve

⁵⁵ OCC Ex. 18 at 23.

⁵⁶ *Id.*

⁵⁷ OCC Ex. 18 at JAL-7, "Draft 2018 PJM Reserve Requirement Study," October 10, 2018 ("PJM 20-18 IRM Study").

⁵⁸ OCC Ex. 25 at 17.

⁵⁹ OCC Ex. 25 at 1.

margin for the 2018/2019 winter period.⁶⁰ Dr. Sioshansi testified that “the PJM-operated wholesale markets are delivering on their design goal of ensuring that sufficient capacity is installed and available to maintain the reliability of the electric power system that serves the customers of the Utility (and customers across the state of Ohio).⁶¹

Direct Energy Witness Lacey testified that capacity resources in the region are sufficient to meet the future needs of customers.⁶² Mr. Lacey relied upon a 2018 fuel security study (attached to his testimony, Ex. FL-2) conducted by PJM that looked five years into the future at fuel supply resilience in the PJM region.⁶³ The study concluded that in a “14-day period of cold weather with typical winter load and generation retirements announced as of Oct. 1, 2018, PJM’s system can withstand an extended period of stress while remaining reliable. Even in an extreme scenario, such as an extended period of severe weather combined with high customer demand and a fuel supply disruption, the PJM system would still remain reliable.”⁶⁴ PJM further concluded that its system “is reliable today and will remain reliable into the future.”⁶⁵

PUCO Staff Witness Benedict also conducted a review of whether sufficient resources exist to meet Ohio Power’s projected customer demand. Mr. Benedict examined the results of the most recent Base Residual Auction to procure capacity

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Direct Energy Ex. 2 at 6.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Direct Energy Ex. 2 , FL-2 at 1.

needed through the 2021/2022 delivery period.⁶⁶ Mr. Benedict reported the results of the auction as showing a reserve margin of 21.5%, well in excess of PJM's target reserve margin of 15.8%.⁶⁷ Mr. Benedict also provided the historic reserve margins achieved by PJM since the PJM Base Residual Auctions were started, beginning with a 2007/2008 delivery year. That data also showed reserves margins consistently in excess of the target reserve margin of 15.8%.⁶⁸ According to Mr. Benedict, PJM has consistently procured capacity at levels that exceed that resource adequacy standards.⁶⁹

Intervenor after intervenor testified there is no need, *based on resource planning projections*, for the solar facilities that AEP is seeking. OCC's witness Dr. Lesser testified that AEP's proposed Renewable Agreements are not required to provide customers adequate generating capacity and energy.⁷⁰ PUCO Staff Witness Benedict testified that "[h]aving determined that supply is sufficient to meet the needs of Ohio Power's customers and to ensure that resource adequacy is maintained, Staff therefore finds that the Company has not demonstrated a need to construct any additional resources at this time."⁷¹ According to OMAEG Witness Seryak, AEP "has not demonstrated the requisite resource planning need, or any other need, for AEP Ohio to own or operate

⁶⁶ Staff Ex. 2 at 7; *see also* IEU Ex. 1 at 5 (Mr. Murray testifying that the results of PJM's most recent base residual auction demonstrate that the region does not need additional capacity).

⁶⁷ *Id.*

⁶⁸ Staff Ex. 2 at 8.

⁶⁹ Staff Ex. 2 at 7.

⁷⁰ OCC Ex. 18 at 6-7.

⁷¹ PUCO Staff Ex. 2 at 8.

these renewable energy projects and receive cost-recovery from its customers.”⁷² Kroger Witness Bieber testified that AEP has not demonstrated a need for the projects.⁷³ Direct Energy’s Witness Lacey concluded there was no demonstration of need.⁷⁴ Mr. White, testifying on behalf of IGS and IGS Solar, concluded that “by any standard, AEP has not established a need to require all customers to pay for 400 MW of solar generation.”⁷⁵ IEU’s Witness Mr. Murray determined there is no need for additional no need for additional electrical capacity within PJM or Ohio.⁷⁶ Ohio Coal Association Witness Medine likewise confirmed that AEP did not demonstrate a “need” for the projects.⁷⁷

Under R.C. 4928.143(B)(2)(c), AEP has not shown there is need for the renewable projects, based on resource planning projections. The PUCO should, consistent with its Turning Point decision, find there is no need for 900 MW of additional generation to be paid for by its captive customers. AEP’s proposal should be rejected as unnecessary and unfair to monopoly customers.

V. UNDER OHIO LAW, THE GENERATION NEEDS OF CUSTOMERS ARE BEING MET THROUGH THE COMPETITIVE MARKET; THEREFORE, AEP’S PROPOSAL IS NOT NEEDED AND SHOULD BE REJECTED

As discussed earlier, the PUCO has repeatedly ruled that before a utility can seek customer funding of monopoly megawatts under Ohio law, it must first look to the

⁷² OMAEG Ex. 16 at 16.

⁷³ Kroger Ex. 4 at 5.

⁷⁴ Direct Energy Ex. 2 at 14.

⁷⁵ IGS Ex. 11 at 13.

⁷⁶ IEU Ex. 1 at 5-6.

⁷⁷ OCA Ex. 3 at 3.

market to build the needed capacity. Only if the market has failed to meet the generation needs of customers can the utility own or operate generation facilities, including renewable power plants. Despite these clear rulings from the PUCO, AEP has failed to demonstrate that customers' renewable generation needs (or wants) cannot be met in the market. Instead the overwhelming evidence presented showed the contrary: The generation needs of customers for renewables are being reliably met through the competitive market.

Dr. Sioshansi testified that the competitive wholesale and retail markets in the PJM multi-state footprint, which includes Ohio, are currently efficiently delivering renewable energy to AEP customers that wish to procure such resources.⁷⁸ Dr. Sioshansi's conclusion was based on information provided by AEP itself as well as information from the PUCO Apples to Apples website.⁷⁹

Dr. Sioshansi reviewed the report prepared for AEP Ohio and filed at the PUCO as part of complying with the Joint Stipulation reached in Case No. 14-1693-EL-RDR.⁸⁰ The study listed as one of the "Key Takeaways" its conclusion that "Ohio currently has a thriving renewable energy market with a variety of different types of wind and solar companies." The study further characterized "Ohio's strong solar market" as being "driven by policy and incentives in the state of Ohio and the Northeast."⁸¹

⁷⁸ OCC Ex. 25 at 6.

⁷⁹ *Id.* at 15-16.

⁸⁰ *See* OCC Ex. 25, RS-Attachment 2.

⁸¹ *Id.* at 18; OCC Ex. 18 at 38, JAL Ex. 13 (Lesser).

Dr. Sioshansi analysis of Ohio's solar market also relied upon the PUCO Apples to Apples website. According to Dr. Sioshansi, as of December 5, 2018, there were 53 marketers in AEP's service territory with offers containing some renewable energy sourcing.⁸² Additionally, as of that date, there were 35 offers by marketers in AEP's service territory with 100% of their energy sourced from renewable resources.⁸³ AEP Energy, an affiliate of AEP Ohio that markets electricity to retail customers) is one of the marketers offering customers 100% renewable energy under a 12-month, fixed-price contract.⁸⁴ Dr. Sioshansi was not the only witness to rely on the PUCO's data from Apples to Apples to show the capability of the market to respond to customers' need. OCC Witness Lesser, Staff Witness Benedict, and Direct Energy Witness Lacey all testified that the Apples to Apples data show numerous offers by marketers all attesting to the market responding to customers' needs for renewables.⁸⁵

Dr. Sioshansi concluded, based on his analysis of Ohio specific information, that shopping customers have numerous options available to them in the competitive retail market to serve some or all of their demands for renewable energy resources, if they so desire.⁸⁶ Dr. Sioshansi was not the only witness to assess the Ohio renewable energy market and conclude that the market is meeting customers' needs for renewables. There were many other witnesses who also came to the very same conclusion.

⁸² OCC Ex. 25 at 15.

⁸³ *Id.* at 15-16.

⁸⁴ OCC Ex. 18 at 74.

⁸⁵ OCC Ex. 18 at 74; Staff Ex. 1 at 10; Direct Energy Ex. 1 at 10. *Accord* IGS Ex. 11 at 15.

⁸⁶ *Id.* at 16.

For example, OCC Witness Dr. Lesser testified that there has been robust development of in-state solar and wind generation.⁸⁷ Dr. Lesser analyzed both historic and current information in reaching that conclusion. Over the past ten years, the Ohio Power Siting Board has approved a total of 2,650 MW in-state solar facilities.⁸⁸ During this same time frame the Siting Board has approved a total of 42 in-state wind generators.⁸⁹ IGS Witness White also testified that construction of solar facilities in Ohio has steadily increased since 2009.⁹⁰ And Mr. White pointed out that over 605 megawatts of solar have been certified as renewable energy facilities that are deliverable to Ohio.⁹¹

PUCO Staff Witness Benedict testified that customers' needs for renewables are being met in the market.⁹² Mr. Benedict testified that Ohio Power currently has over 1,500 customers who have chosen to install distributed generating facilities at their own premises.⁹³ Mr. Benedict also focused on the PUCO's Apples to Apples website and concluded that there are a multitude of CRES provider offerings that are in whole or in part, renewable projects.⁹⁴ And Mr. Benedict testified that, in addition to the marketplace offerings, there are government aggregations that are capable of sourcing renewable resources for their participants.⁹⁵

⁸⁷ OCC Ex. 18 at 38.

⁸⁸ *Id.* at 39.

⁸⁹ *Id.*

⁹⁰ IGS Ex. 11 at 11.

⁹¹ *Id.*

⁹² PUCO Staff Ex. 1 at 10:

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

IEU Witness Mr. Murray testified that there are 101,393.4 MW of capacity in PJM's interconnection queues, with 25,753.4 MW of solar projects.⁹⁶ Although there is no guarantee that resources in the PJM que will be built, Dr. Lesser testified that developers do not enter into the PJM ques lightly, due to the significant cost associated with completing the required studies.⁹⁷ IEU Witness Murray estimated that based on historic data, 11.9% of the generation in the queues become commercially operational.⁹⁸ Applying this rate to MW currently in the interconnection queue, would mean that 12,017.7 MW of new renewable generation will become commercially operational.⁹⁹

Market forces are working effectively to deliver renewable energy from project developers that are willing and able to assume the business and financial risks and rewards associated with the projects. The PUCO should allow the competitive market to continue delivering these low cost generation resources to customers in an unfettered manner, without interference from AEP Ohio. Customers have choices for renewable power and those choices come from the multitude of marketer offers. As Staff Witness Benedict noted, AEP provides "insufficient evidence that customer preferences are not being adequately met, even as these preferences increase and change over time."¹⁰⁰

⁹⁶ IEU Ex. 1 at 5, Ex. KMM-3.

⁹⁷ OCC Ex. 18 at 41.

⁹⁸ IEU Ex. 1 at 6.

⁹⁹ *Id.*

¹⁰⁰ PUCO Staff Ex. 1 at 9-10.

VI. THE PUCO SHOULD NOT APPROVE AEP'S PROPOSAL TO CIRCUMVENT THE LAW'S DEFINITION OF CUSTOMER NEED

AEP has played fast and loose with its interpretation of Ohio law, ignoring the plain language of the statute, R.C. 4928.143(B)(2)(c). AEP's definition of need also ignores the PUCO precedent that narrowly defined need in a prior AEP case. The PUCO should reject AEP's attempt to substitute its own standard for Ohio law. Instead, the PUCO should enforce Ohio law and find that AEP has not shown need for the solar projects based on its own resource planning projections.

A. AEP "is conflating customer preferences with customer needs," contrary to Ohio law.

PUCO Staff Witness Benedict testified that AEP "is conflating customer preferences with customer needs."¹⁰¹ Direct Energy Witness Lacey correctly recognized that instead of demonstrating "need," AEP Ohio has presented a case based on consumer "wants."¹⁰² AEP alleges that if its customers want renewable power, then there is a need for AEP to provide it.¹⁰³ While customers opinions are important, customers desires do not reflect a resource "need" under Ohio law.¹⁰⁴ And the PUCO must apply the law as written. The PUCO (and AEP) cannot rewrite the law. *See, e.g., In the Matter of the 2010 Long Term Forecast Report of the Ohio Power Company*, Case No. 10-501-EL-FOR, Opinion and Order at 27 (PUCO found no need for the project, despite the "considerable public testimony and written correspondence").

¹⁰¹ Staff Ex. 1 at 9.

¹⁰² Direct Energy Ex. 2 at 15.

¹⁰³ AEP Ex. 3 at 9; Tr. I at 187(Allen).

¹⁰⁴ *See* Direct Energy Ex. 2 at 15 (Lacey); OMAEG Ex. 16 at 12 (Seryak).

Moreover, AEP's premise that its customers "want" much more renewable power than the market is producing and are willing to pay for it, is based on a deeply flawed customer survey.¹⁰⁵ The results of the survey should not be used as a basis to determine if Ohio customers indeed support renewable energy and are willing to pay the full cost of renewable energy if offered.¹⁰⁶ Ironically, AEP is not even proposing that its proposed renewable energy would be dedicated for sale to Ohio customers. Instead, it would be sold into the PJM regional market.

Ohio law already provides a solution for those customers that desire more renewable power. That solution is the competitive electric market.¹⁰⁷ The competitive electric market is producing many offers for customers to procure part or all of their electricity needs through renewables, as the PUCO Staff and others testified.¹⁰⁸ Any customer want can and should be met through the competitive market, consistent with the Ohio General Assembly's 2008 Energy law.¹⁰⁹

As pointed out by Dr. Lesser, nothing prevents AEP Ohio's affiliate company, AEP Energy, from contracting with the developers of the solar plants in the competitive market and then marketing the output to all Ohio retail customers.¹¹⁰ Similarly, nothing

¹⁰⁵ See OCC Ex. 24 at 4 (Dr. Dormady concluding that the survey is poorly designed, biased, and unlikely to accurately represent AEP Ohio customers' true attitudes, preferences, and especially willingness to pay); OCC Ex. 18 at 79-92 (Dr. Lesser characterizing the survey as a "feel good survey" with non-response bias, not statistically representative of AEP's customers, and with a flawed willingness to pay questions).

¹⁰⁶ OCC Ex. 18 at 88 (Dr. Lesser); OCC Ex. 24 at 4 (Dr. Dormady).

¹⁰⁷ See, e.g., OCC Ex. 25 at 15-16 (Dr. Sioshansi testifying that there are market-based solutions that can meet the "needs" of utility customers for renewable energy).

¹⁰⁸ See, e.g., AEP Ex. 21; IEU Ex. 5, 6.

¹⁰⁹ OMAEG Ex. 16 at 12 (Seryak); PUCO Staff Ex. 2 at 10-11 (Benedict).

¹¹⁰ OCC Ex. 18 at 90.

prevents AEP Renewables, another AEP subsidiary that has developed solar generating plants in California, Nevada, and Utah, from developing solar generating plants in Ohio. Unlike AEP's proposal in this case for monopoly megawatts subsidized by captive customers, such development would be consistent with Ohio law.

B. Under Ohio law, the alleged economics of the solar projects do not create a need for AEP's proposed monopoly megawatts.

As part of AEP's definition of need in this proceeding, AEP alleges, among other things, that the renewable energy projects will benefit AEP's customers by producing energy cost savings for AEP Ohio customers.¹¹¹ AEP, however, will not guarantee any of these costs savings or offer to cap rates to customers for the power produced by the solar facilities.¹¹² Apart from the lack of guaranteed savings, there is still the issue of Ohio law that prohibits what AEP is trying to do. Ohio law prohibits AEP from owning or operating generation unless, *inter alia*, that generation is needed to serve Ohioans. And as discussed above, there is no need under Ohio law for the generation based on resource planning projections. Ohio law relies on the market instead to produce energy cost savings for Ohioans.

And if the projects are as economical as AEP believes them to be, then market forces should be sufficient to see these or other renewable energy projects through development.¹¹³ An economical project does not need cost recovery from captive customers. Additionally, as pointed out by Direct Energy Witness Lacey, if AEP believes

¹¹¹ AEP Ex. 14 at 6 (Torpey).

¹¹² Tr. V at 1424 (Torpey).

¹¹³ OMAEG Ex. 16 at 10 (Seryak).

it makes economic sense to invest in 900 MW of renewable generation, it is free to make that investment with shareholder funds, just like any other project developer.¹¹⁴ AEP's allegation, that without captive customer funding these projects will not go forward, tells the PUCO everything it needs to know –that there is no market that supports such development and hence, no need for the facilities. Direct Energy Ex. 2 at 25; *but cf.* OCC Ex. 18 at 91 (Dr. Lesser testifying that if Navigant's survey results accurately reflect a desire for renewables, then AEP should have no difficulty enrolling customers for the renewables and shouldn't need to force captive customers to fund the projects through a non-bypassable charge.)

Another reason AEP's economic argument should fail is that if there is no need for the power (and there is no need under Ohio law), then any dollar spent is not least cost. In other words, spending money on a solution, in search of a problem, is not economically justifiable.

Dr. Lesser, and others, critiqued the modelling conducted by AEP that purports to show customer benefits from entering into solar renewable energy purchase agreements, based on 650 MW of solar and wind projects. Dr. Lesser concluded that AEP has not credibly demonstrated that there are economic benefits to customers from the two renewable energy projects.¹¹⁵

Dr. Lesser testified that the assumptions AEP made in AEP's 2018 integrated resource plan that underlie the alleged economic benefits to customers are "outdated and

¹¹⁴ Direct Energy Ex. 2 at 24.

¹¹⁵ OCC Ex. 18 at 42.

unrealistic.”¹¹⁶ Dr. Lesser testified that Mr. Torpey used outdated gas forecast prices from almost two years ago, instead of the gas price data from January 2018.¹¹⁷ By doing so, Mr. Torpey overstated the gas prices, leading to overstated economic benefits for customers under AEP’s analysis. Dr. Lesser also testified that AEP’s analysis overstated the alleged economic benefits to customers because AEP excluded costs associated with “firming” inherently interruptible solar power (through back-up power or battery storage).¹¹⁸

Mr. Torpey also improperly inflated the alleged economic benefits to customers because AEP assumed carbon taxes of \$15/ton beginning in 2028, with a five percent escalation each year.¹¹⁹ This assumption provided a very significant part¹²⁰ of the customer benefits calculated by AEP. But Congress has not enacted a carbon tax.¹²¹ Dr. Lesser testified that AEP’s assumption of a carbon tax is “pure speculation” and should not be used to demonstrate that the solar projects are cost effective or will provide future benefits to customers.¹²²

Dr. Lesser also testified that Mr. Torpey overstated the benefits to customers because he did not include non-performance penalties the projects could incur under PJM’s capacity performance rules in effect beginning June 1, 2020. *Id.* Under AEP’s

¹¹⁶ OCC Ex. 18 at 42, 43-62.

¹¹⁷ *Id.* at 43-46.

¹¹⁸ OCC Ex. 18 at 42.

¹¹⁹ *Id.* at 46-47.

¹²⁰ The exact percent is considered confidential and is contained in OCC Ex. 18A at 48.

¹²¹ *Id.* at 48.

¹²² *Id.* at 49.

proposal, if the sun doesn't shine, consumers (not AEP) would pay the capacity performance penalty.

And Dr. Lesser took issue with AEP's analysis that assumed it would be able to offer all of the solar capacity from the projects into the PJM market. According to Dr. Lesser, this assumption disregards the uncertainty that currently exists due to proposals at FERC that may prevent subsidized resources from participating in the regional capacity market.¹²³

Dr. Lesser further testified that the economic benefits AEP estimates for customer are overstated as well because AEP used unrealistic capacity prices under its fundamentals forecast.¹²⁴ In this regard AEP assumed that market capacity prices would increase at a rate of 14.65 per cent per year, topping out at over \$500/MW day in 2048.¹²⁵ Dr. Lesser observed that AEP fails to explain how it developed its forecast of PJM capacity market prices.¹²⁶ And AEP's assumed rapid increase in capacity prices is not consistent with past behavior of the PJM capacity market, according to Dr. Lesser.¹²⁷ Historically PJM capacity prices have increased at an average annual rate of growth of 3.8 per cent.¹²⁸

Dr. Lesser also characterized AEP's capacity forecast as being inconsistent with basic economic principles of supply and demand. If the capacity prices increased as

¹²³ OCC Ex. 18 at 50.

¹²⁴ OCC Ex. 18 at 50-58.

¹²⁵ OCC Ex. 18 at 51.

¹²⁶ *Id.* at 52.

¹²⁷ OCC Ex. 18 at 52-58.

¹²⁸ *Id.* at 54.

rapidly as AEP projects, it would incent significant quantities of new capacity resources, leading to lower, not higher market prices.¹²⁹ Dr. Lesser also testified that AEP's capacity market revenue forecasts did not assume that the amount of capacity from the solar units would change.¹³⁰ With decreasing energy output (as assumed by AEP) there must also be decreases to capacity over time. *Id.* Dr. Lesser concluded that AEP's unrealistic capacity price forecast inflates the capacity revenue benefits to AEP Ohio's customers.¹³¹

Under these numerous faulty assumptions, AEP has been able to artificially inflate the alleged economic benefits it estimates for customers for the solar projects. The PUCO should not be fooled by the utility's facile presentation. Instead the PUCO should follow Ohio law, and find no need for the facilities, based on resource planning projections. The PUCO should rule that economics of projects that produce energy and capacity that is not needed to serve Ohio customers are beside the point. And even if considered in this proceeding (which they should not be), such alleged economics cannot be counted on to produce savings for AEP's customers.

C. Under Ohio law, so-called energy independence does not create a need for the AEP proposed monopoly megawatts.

AEP Witness Allen testified that the PUCO, when reviewing the need for renewable projects, should consider the fact that Ohio has been a net importer of energy for the past several years, with a continuing trend in that direction.¹³² Mr. Allen admits

¹²⁹ *Id.* at 56-58.

¹³⁰ OCC Ex. 18 at 59.

¹³¹ *Id.* at 55.

¹³² AEP Ex. 3 at 9.

that the “past several years” encompasses the years of 2001 through 2017, with one exception.¹³³

This is another attempt by AEP to read into the law something that is just not there. No words can be found in the law (R.C. 4928.143 (B)(2)(c) that back up AEP’s recommendation to the PUCO. Alleged energy independence, like the other arguments proposed by AEP, has no connection to need based on resource planning projections. It has no connection to Ohio law. It’s not even tethered to the 21st-century reality of a regional market.

OCC Witness Dr. Lesser resoundingly debunks Mr. Allen’s energy independence argument. Dr. Lesser recognizes this argument for what it is – a “silly economic concept” that is not a reasonable or sound basis for developing in-state power plants through non-bypassable charges to AEP customers.¹³⁴

Dr. Lesser explained that energy independence is not a useful economic concept because of a fundamental economic concept known as “comparative advantage.” Dr. Lesser testifies that rather than being self-sufficient in everything, it makes more economic sense to specialize in what we do most efficiently.¹³⁵

Ohioans benefit from AEP Ohio participating in PJM, which is a multi-state entity.¹³⁶ Because PJM coordinates generation and transmission in 13 states and the District of Columbia, PJM members (and their customers) enjoy improved efficiency, reliability, and lower overall costs than could otherwise be achieved on a single state basis

¹³³ *Id.*

¹³⁴ OCC Ex. 18 at 32-33.

¹³⁵ OCC Ex. 18 at 33.

¹³⁶ OCC Ex. 18 at 34.

with one utility providing electric service. *Id.* This is the reason power pools like PJM were first formed. By having a larger group of integrated resources, the risk of outages is reduced, thus increasing reliability to customers. Similarly, the ability to rely on a multi-state pool of generating resources means that the lowest-cost generating resources are far more likely to be available to dispatch by PJM, thus reducing costs to consumers. *Id.*

To suggest, as Mr. Allen does, that these in-state projects are needed to address an energy imbalance between Ohio and other neighboring states makes no sense given Ohio's participation in PJM. The market administered by PJM is working to bring customers innovations and reasonable prices for electricity. The PUCO should reject AEP's self-serving arguments, which ignore the realities of how electric markets function in the 21st century.

D. Under Ohio law, AEP's standard service obligations do not create a need for monopoly megawatts to be funded by customers through a non-bypassable charge.

AEP alleges, in its amendment to its forecast, that there is a need for it to "continue to satisfy its SSO obligation through an ESP that includes at least 900 MW of in-state renewable energy projects." AEP Ex. 2 at 4. This notion that the need under Ohio law has to do with AEP's obligation for a standard service offer is meritless. *See, e.g.,* OMAEG Ex. 16 at 12 (Seryak); IGS Ex. 11 at 16 (White).

AEP is not altering its SSO supply procurement to accommodate renewable generation. Its competitively bid standard service auctions will not include the energy and capacity coming from the solar projects. Instead, the energy and capacity that is produced by the proposed plants will be sold in the PJM regional market. OCC Ex. 25 at 7 (Dr. Sioshansi). AEP customers will not actually be supplied with electricity from the

renewable generation facilities (contrary to what might be inferred from how AEP presents its proposal). IGS Ex. 11 at 16.

E. Contrary to Ohio law, AEP has failed to dedicate the energy and capacity from the projects to Ohio customers.

As the arrangement is structured, AEP also fails to meet the precondition under Ohio law that the energy, capacity and rate from the facilities owned or operated by the utility be dedicated to serving the electricity needs of Ohio customers. R.C.

4928.143(B)(2)(c); 4928.143(C)(1) (if an application contains a surcharge approved under (B)(2)(b) or (c) the PUCO “shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.”)

This is another reason the PUCO should not allow AEP to go forward with its plans to charge all customers for at least 400 MW of solar generation.

VII. AEP’S BROAD DEFINITION OF NEED SHOULD NOT BE ADOPTED, BECAUSE, IN ADDITION TO VIOLATING OHIO LAW, IT WOULD HARM THE COMPETITIVE MARKETS THAT CUSTOMERS DEPEND ON FOR RELIABLE AND REASONABLY PRICED ELECTRIC SERVICE

In order to make its case for a need for at least 900 MW of renewables, AEP must convince the PUCO to construe R.C. 4928.143(B)(2) to mean something different than what it says (and to mean something different than what the PUCO said it means in the *Turning Point* decision). Under AEP’s interpretation of R.C. 4928.143(B)(2)(c), “need” for the facility covers the waterfront: customers’ wants, the economics of the potential project, the need for energy independence for Ohio, and the potential economic development benefits the project can bring. *See* AEP Ex. 3 (Allen).

But, under the rules of reasonable statutory construction, the PUCO must achieve, among other things, a just and reasonable result. *See, e.g.*, R.C. 1.47(C). Under AEP's plan renewable energy resources will be developed outside the competitive market, with captive customers bearing the financial and operational risk of these solar projects. That's a subsidy. OCC Ex. 18 at 37. It's an anti-competitive subsidy that conflicts with the state policy that seeks to avoid (not create) such subsidies. *See* R.C. 4928.02(H); IGS Ex. 9 at 4 (Witness Rever testifying that AEP's proposal would provide special compensation that is not available to competitive solar developers in Ohio and thus is an anti-competitive subsidy).

If AEP succeeds in imposing a non-bypassable charge for developing in-state renewable generation, then unsubsidized competitors will be at a competitive disadvantage and will be less likely to develop (make investment in) renewable generation in Ohio. *Id.*; OCC Ex. 25 at 12-13 (Dr. Sioshansi); IGS Ex. 12 at 3. In other words, competitors who lack the guaranteed captive customer funding that AEP will be afforded may decide not to build renewables in this state. OCC Ex. 25 at 13 (Dr. Sioshansi); OCA Ex. 2 at 26 (Brown).

The net in-state renewable capacity and generation from the two proposed solar projects may not increase at all. The renewable energy projects proposed by AEP and paid by AEP customers are likely to crowd out competitive in-state renewable energy projects owned and operated by other suppliers who do not benefit from subsidies paid for by captive utility customers. OCC Ex. 18 at 37 (Dr. Lesser).

According to Direct Energy Witness Lacey developing energy resources outside the competitive market construct could also "push the price of renewable energy below a

price that would be otherwise signaled by the competitive market.” Direct Energy Ex. 2 at 22 (Lacey); IGS Ex. 9 at 5 (Rever). Project developers who expected to receive a market price for renewable energy will receive something less. Mr. Lacey testified that the rational economic response for these developers is to develop projects where they can earn a true market price for renewable energy, rather than a below market, customer-subsidized price under AEP’s proposal. *Id.* Developers are likely to leave the state. According to Mr. Lacey, from a policy perspective forcing non-utility suppliers out of the renewable energy market goes against the principle of competition. *Id.*

IGS Witness White testified that “adopting utility schemes to subsidize generation assets is not a wise step forward for Ohio customers and Ohio electric markets.” IGS Ex. 11 at 23. OCC agrees. There can be no just and reasonable result for customers when the competitive market that customers depend upon for innovation and reasonable electric prices is undermined, and Ohioans are left with less, not more renewable generation. The PUCO should decline to construe the statute as urged by AEP. In fact, the PUCO already declined to adopt AEP’s position, in the *Turning Point* decision.

VIII. IN ADDITION TO AEP’S PROPOSAL BEING AGAINST OHIO LAW, THE PUCO IS WITHOUT JURISDICTION TO AUTHORIZE A CHARGE UNDER THE RENEWABLE GENERATION RIDER BECAUSE ITS JURISDICTION IS PREEMPTED BY THE FEDERAL POWER ACT

The PUCO’s jurisdiction to authorize a charge on customers under AEP’s Renewable Generation Rider is preempted by the Federal Power Act (“FPA”), 16 U.S.C. § 824 *et seq.* Under the Supremacy Clause, federal law “shall be the supreme Law of the Land” and “and the Judges in every State shall be bound thereby, any Thing in the

Constitution or Laws of any State to the Contrary notwithstanding.”¹³⁷ Federal law preempts state legislation and regulating authority (1) if Congress, in enacting a federal statute, has expressed a clear intent to preempt state law; (2) if it is clear, despite the absence of explicit preemptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has left no room for the states to supplement the federal law; and (3) if compliance with both state and federal law is impossible or when compliance with state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal policies embodied in the laws at issue.¹³⁸

A. The Federal Energy Regulatory Commission has exclusive jurisdiction over wholesale energy transactions as a matter of federal law.

The Federal Power Act vests the Federal Energy Regulatory Commission (“FERC”) with exclusive jurisdiction over the “transmission of electric energy in interstate commerce” and the “sale of electric energy at wholesale in interstate commerce.”¹³⁹ Under the Federal Power Act, a wholesale sale is simply a sale for resale.¹⁴⁰ Rather than directly setting rates, FERC has chosen to achieve its regulatory

¹³⁷ U.S. Const. Art. VI.

¹³⁸ *Marketing Research Services, Inc. v. Pub. Util. Comm’n of Ohio*, 34 Ohio St.3d 52, 54 (1987).

¹³⁹ 16 U.S.C. § 824(b)(1); *Nantahola Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986).

¹⁴⁰ 16 U.S.C. § 824(d).

aims by “protecting the integrity of interstate markets.”¹⁴¹ To do so, FERC has authorized the creation of regional transmission organizations to oversee certain multistate markets – including PJM.¹⁴² PJM operates energy and capacity markets.¹⁴³ Both markets “are designed to efficiently allocate supply and demand, a function which has the collateral benefit of incenting the retirement of old inefficient power plants and the construction of new efficient power plants when necessary[.]” via price signals.¹⁴⁴ They represent “a comprehensive program of regulation that is quite sensitive to external tampering.”¹⁴⁵

“A wealth of case law confirms FERC’s exclusive power to regulate wholesale sales of energy in interstate commerce, . . .”¹⁴⁶ The FPA “leaves no room either for direct state regulation of the prices of interstate wholesales of [energy], or for state regulations which would indirectly achieve the same result.”¹⁴⁷ States cannot “rely on mere formal distinction in an attempt to evade preemption and regulate matters within FERC’s exclusive jurisdiction.”¹⁴⁸

¹⁴¹ *PPL EnergyPlus v. Nazarian*, 753 F.3d 467, 472 (4th Cir. 2014); *see also PPL EnergyPlus v. Solomon*, 766 F.3d 241, 248 (3rd Cir. 2014) (“FERC favors using market mechanisms to produce competitive rates for interstate sales and transmissions of energy.”)

¹⁴² *Nazarian*, 753 F.3d at 472.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 475 (citations omitted).

¹⁴⁷ *Id.* (citations omitted).

¹⁴⁸ *Id.* at 476 (internal quotations omitted).

Accordingly, a state program under which a participant in PJM receives a state-determined fixed sum for capacity and energy that clears the PJM market is preempted, *even if the state program does not fix the rate paid by PJM to the market participant*.¹⁴⁹ So is preempted a state program under which a PJM market participant receives the rate paid by PJM to the market participant plus an additional amount.¹⁵⁰ “The fact that [a state program] does not formally upset the terms of a federal transaction is no defense, since the functional results are precisely the same.”¹⁵¹ Nor is a state program saved where it incorporates, rather than repudiates, PJM clearing prices.¹⁵²

Where, as here, federal law vests exclusive jurisdiction over matters in another body, the state is without subject matter jurisdiction.¹⁵³ A ruling made without subject matter jurisdiction is void.¹⁵⁴

B. The United States Supreme Court held that a state program like the Renewable Generation Rider is preempted.

In *Hughes v. Talen Energy Marketing LLC*,¹⁵⁵ the United States Supreme Court affirmed a lower court decision finding that a state commission’s order guaranteeing a “cost-based” wholesale price is preempted by the Federal Power Act. In *Talen*, the Maryland Public Service Commission (“Maryland Commission”) had required the

¹⁴⁹ *See id.* at 476-77.

¹⁵⁰ *See Solomon*, 766 F.3d at 254.

¹⁵¹ *Nazarian*, 753 F.3d at 477.

¹⁵² *Solomon*, 766 F.3d at 254.

¹⁵³ *See, e.g., Longshoremen’s Ass’n v. Davis*, 476 U.S. 380-88 (1986); *Shawnee Twp. V. Allen County Budget Comm’n*, 58 Ohio St.3d 14, 15 (1991); *H.R. Options v. Zaino* 100 Ohio St.3d 373, 374 (2004).

¹⁵⁴ *See, e.g., State v. Blair*, 2010 Ohio 6310, para. 13 (Hamilton 2010).

¹⁵⁵ 136 S.Ct. 1288 (2016).

incumbent distribution utilities to enter into 20-year contracts with a generation company proposing to construct a new plant in the state.¹⁵⁶ The contract guaranteed that the generator would receive the contract price for capacity and not the wholesale price.¹⁵⁷ It provided that if the wholesale price “[fell] below the price guaranteed in the contract,” the utilities would pay the generator the difference and then “pass the costs of these required payments along to Maryland consumers in the form of higher retail prices.”¹⁵⁸ And it provided that if the wholesale capacity price “exceed[ed] the price guaranteed in the contract,” the generator would pay the utilities the difference and the utilities would “then pass the savings along to consumers in the form of lower retail prices.”¹⁵⁹

The United States Supreme Court (Court) found that the contract “guarantees [the generator] a rate distinct from the clearing price [in the PJM capacity auction] for its interstate sales of capacity to PJM” and thus concluded that the Maryland Commission had “set[] an interstate wholesale rate.”¹⁶⁰ The Court also found relevant that the contract for differences at issue in the Maryland program operated inside the PJM auction structure, rather than outside that structure as would a traditional bilateral sale of capacity between two parties.¹⁶¹ The Court reasoned that “[d]oubting FERC’s judgment, Maryland — through the contract for differences — requires CPV to participate in the PJM capacity auction, but guarantees CPV a rate distinct from the clearing price for its interstate sales

¹⁵⁶ *Talen*, 136 S.Ct. at 1294-95.

¹⁵⁷ *Id.* at 1295.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1297.

¹⁶¹ *Id.* at 1299.

of capacity to PJM.”¹⁶² The Court found in no uncertain terms that “[b]y adjusting an interstate wholesale rate, Maryland's program invades FERC's regulatory turf.”¹⁶³

Because the Maryland Commission had set the wholesale rate, the Court affirmed the lower court decisions finding that the Maryland Commission’s order was preempted by the Federal Power Act. Congress had intended, by legislating comprehensively, to occupy an entire field of regulation and left no room for the states to supplement the federal law. “States interfere with FERC’s authority by disregarding interstate wholesale rates FERC has deemed just and unreasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation.”¹⁶⁴

C. The PUCO’s jurisdiction to allow the Renewable Generation Rider is preempted because the Rider sets the revenue for wholesale capacity and energy that AEP receives.

The Court in *Talen* provided guidelines for determining whether future state action fell within the prohibited sphere of authority left exclusively to FERC, ruling that “[n]othing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures “untethered to a generator's wholesale market participation,” so long as “a State does not condition payment of funds on capacity clearing the auction”¹⁶⁵ AEP’s proposal before the PUCO falls far short of state action the court would find permissible. Like the *Talen* “contract for differences” that the United States Supreme Court held was preempted by

¹⁶² *Id.*

¹⁶³ *Id.* at 1297.

¹⁶⁴ *Id.* at 1299.

¹⁶⁵ *Id.* at 1299.

the Federal Power Act, the Renewable Generation Rider operates inside the PJM capacity auction, adjusting AEP's revenue by charging consumers the difference between the full cost of the power plants' under the contract between AEP and the solar producer, and the wholesale revenues earned for bidding that capacity into the PJM markets.¹⁶⁶ In years in which the power plants' costs exceed the PJM revenue, the Renewable Generation Rider would impose a retail charge on all of AEP's captive distribution customers and increase AEP's compensation for its share of the power plants' wholesale capacity and energy that clears PJM.¹⁶⁷ In years in which the power plants' costs are less than the PJM revenue, the Renewable Generation Rider would be a non-bypassable retail credit and decrease AEP's compensation.¹⁶⁸

The Supreme Court of Ohio has already recognized that the Power Purchase Agreement Rider, which operates exactly as the Renewable Generation Rider, sets the price received by AEP for selling the power onto the federally regulated wholesale markets. "If the revenue generated from sales to the PJM market is lower than the costs of the power, Ohio Power's customers would pay a surcharge to Ohio Power through the PPA Rider to make up the difference. But if the PJM market rates are higher than the power costs, customers would receive a credit through the PPA Rider."¹⁶⁹

¹⁶⁶ See AEP Ex. 2 at 7 (Allen); see also, *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, PUCO Case NO. 16-1852-EL-SSO, Opinion and Order (April 25, 2018) at 20-21.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *In re Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement*, 2018-Ohio-4698 at ¶4.

By setting the revenue for wholesale capacity and energy that AEP receives for its interest in the power plants, the revenue that AEP receives through the Renewable Generation Rider should be considered unlawfully “tethered” to the wholesale rate.¹⁷⁰ As a result, the PUCO in allowing the Renewable Generation Rider has interfered with and invaded a field that is within the exclusive authority of FERC. Its jurisdiction to do so is preempted.

Federal law cannot be sidestepped even though the Renewable Generation Rider would not affect the REPA’s contractual costs or alter the prices paid by PJM to AEP. As in *Talen*, the retail revenue that would be charged customers under the Renewable Generation Rider adjusts the stream of revenue AEP receives from PJM for the power plants’ generation, thus guaranteeing a rate (intended to cover all REPA-related costs) distinct from the clearing price in the PJM markets. “The [Federal Power Act] leaves no room either for direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result.”¹⁷¹ Nor can federal law be sidestepped based on the alleged positive effects of the operation of the power plants. The PUCO may not disregard the rates established by FERC and supplement them with above-market revenue collected from AEP’s captive distribution customers.¹⁷²

That AEP and not the PUCO initiated the supplemental payment program at the state level is also of no import. AEP’s proposed program cannot be put into place absent approval from the PUCO. Any PUCO order sanctioning a program premised on the sale

¹⁷⁰ *Talen*, 136 S.Ct. at 1299.

¹⁷¹ *Talen*, 136 S.Ct. at 1297 (citation omitted).

¹⁷² *Talen*, 136 S.Ct. at 1298.

of the solar capacity into the PJM market and the displacement of the PJM market clearing price with a price more to state's liking would have the same fundamentally flawed result as the Maryland program found to be unlawful in *Talen*. In both situations, state action results in displacement of the PJM capacity market clearing price. Both the Maryland program found pre-empted in *Talen* and the AEP proposal operate within the PJM capacity auction to displace the wholesale capacity market clearing price approved by FERC for the PJM markets.

In addition to AEP's proposal being contrary to Ohio law, the PUCO's jurisdiction to allow the Renewable Generation Rider is preempted by federal law. The PUCO lacks authority to approve any rider to collect costs associated with its proposed solar projects. Therefore, AEP's proposal should be rejected.

IX. THE PUCO SHOULD REVERSE CERTAIN ERRONEOUS ATTORNEY EXAMINER RULINGS

The Attorney Examiners made at least three rulings that should be reversed. First, the Attorney Examiners wrongfully allowed AEP to introduce irrelevant, non-probative evidence regarding the proposed generation plants by denying parties' ¹⁷³ Motion in *Limine*. ¹⁷⁴ Second, the Attorney Examiners erred when they found that AEP had presented sufficient evidence to withstand parties' Motion for a Directed Verdict. ¹⁷⁵ Third, the Attorney Examiners erred when they ruled that evidence regarding all of the

¹⁷³ The moving parties were OCC, OMA, Kroger, OCA, IGS, and IGS Solar. See Motion in *Limine* (January 7, 2019).

¹⁷⁴ See Entry (January 14, 2019).

¹⁷⁵ The moving parties were IEU-Ohio, IGS, IGS Solar, OCA, OMA, OCC, and Kroger. See Tr. VI at 1275-1279.

required elements for a charge under R.C. 4928.143(B)(2)(c) could not be presented at the first phase of this proceeding.¹⁷⁶

Ohio Adm. Code 4901-1-15(F) allows a party to seek reversal of an Attorney Examiner's ruling by "discussing the matter as a distinct issue in its initial brief" Accordingly, OCC seeks reversal of these rulings.

- A. The Attorney Examiners should have granted the parties' Motion in *Limine*.**
 - 1. Under Ohio law, AEP must show need based on resource planning projections.**

As pointed out in the Motion in *Limine*, AEP here is taking the first step toward government approval of consumer subsidies for 400 MW (and eventually at least 900 MW) of monopoly-sourced generation. And AEP is doing so despite the General Assembly's explicit directive that power plants in Ohio should be deregulated, and generation resource needs should be met through the competitive market.¹⁷⁷ AEP relies on an exception to Ohio law allowing utilities to own or operate generation facilities under very limited conditions – R.C. 4928.143(B)(2)(c).¹⁷⁸

The statute provides that utilities cannot charge consumers for generation facilities unless a number of conditions are met, including that: 1) the facilities will be "owned or operated" by the utility, 2) the PUCO determines that there is a "need" for the facilities based on resource planning projections submitted by the utility, and 3) the utility

¹⁷⁶ See Entry (January 14, 2019).

¹⁷⁷ See Memorandum in Support of Motion in *Limine* at 1.

¹⁷⁸ See *id.*

dedicates the capacity and energy from the generation facilities to Ohio consumers.¹⁷⁹

The PUCO has also ruled that the utility must show that its “generation needs cannot be met though the competitive market.”¹⁸⁰ These conditions under which captive customers can be charged for monopoly megawatts are independent of one another. All must be satisfied or a utility’s request to charge captive customers for monopoly megawatts must fail.

At this stage, AEP must show that there is a need for the proposed power plants according to “resource planning projections.” The plain language of R.C. 4928.143(B)(2)(c) controls here. Under the statute, “no surcharge shall be authorized unless the commission first determines in the proceeding that *there is a need for the facility based on resource planning projections* submitted by the electric distribution utility.”¹⁸¹ Resource planning projections consider whether the projected supply meets the projected demands of customers.¹⁸² And resource planning looks at whether there is excess capacity available above and beyond the expected peak demand of customers.¹⁸³ In this regard, in the multi-state PJM region (which Ohio is part of), the “reserve margin” for extra generation available to serve customers (if

¹⁷⁹ R.C. 4928.143(B)(2)(c).

¹⁸⁰ *In re Long-Term Forecast Report of Ohio Power Co. and Related Matters*, Case No. 10-501-EL-FOR, Opinion & Order at 26 (January 9, 2013).

¹⁸¹ R.C. 4928.143(B)(2)(c) (emphasis added).

¹⁸² See R.C. 4935.04(C)(1) (referring to the “resource planning projections to meet demand”); Ohio Adm. Code 4901:5-5-01(L); *Vectren Energy Delivery of Ohio, Inc. v. PUCO*, 113 Ohio St.3d 180, 183 (2007) (“The purpose of a long-term forecast report is to project customers’ future demands for [commodity] and to determine how to acquire sufficient commodity ... to meet demand”).

¹⁸³ See R.C. 4935.04(C) (requiring long-term forecast report to include a year-by-year, ten-year forecast of annual peak load as well as month-by-month forecast of peak load for electric utilities).

needed) is well above the PJM target reserve margin. *See, e.g.*, OCC Ex. 18 at AL-7, “Draft 2018 PJM Reserve Requirement Study,” October 10, 2018 (“PJM 20-18 IRM Study”).

In AEP’s previous request concerning the need for renewable generation facilities (the Turning Point plant), the PUCO appropriately relied upon the plain words of the statute and narrowly defined “need.”¹⁸⁴ The PUCO tied need to resource planning projections submitted by the utility during the long-term forecast period.¹⁸⁵ The PUCO specifically declined to broadly define “need” based on economic impacts that the power plants would have on the state.¹⁸⁶ The PUCO should follow the precedent established earlier in the Turning Point case.¹⁸⁷

2. AEP’s testimony was, by its own admission, not aimed at showing need based on resource planning projections under Ohio law.

Evidence not relevant to and probative of need, as defined under the statute and interpreted by the PUCO, should not have been entertained at the hearing. AEP admitted that its evidence was not relevant to and not probative of need, as defined under the statute and interpreted by the PUCO. AEP admitted that that the “wholesale markets are adequately supplying capacity and energy to the AEP Ohio load zone.”¹⁸⁸ It also admitted

In re Long-Term Forecast Report of Ohio Power Co. and Related Matters, Case No. 10-501-EL-FOR, Opinion & Order (January 9, 2013).¹⁸⁴

¹⁸⁵ *Id.*

¹⁸⁶ *In the Matter of the Long-Term Forecast of Ohio Power Company and Related Matters*, Cas Nos. 10-501-EL-FOR *et seq.*, Opinion and Order at 25-27 (Jan. 9, 2013).

¹⁸⁷ *See In re Duke Energy Ohio, Inc.*, 150 Ohio St.3d 437, 443 (2017) (“We have instructed the commission to respect its own precedents in its decisions to assure the predictability which is essential in all areas of law, including administrative law. If the commission departs from precedent, it must explain why.”) (citations and quotations omitted).

¹⁸⁸ AEP Ex. 2 at 3.

that it is not “proposing through this filing that it has a traditional integrated resource planning (IRP) need for generation.”¹⁸⁹ AEP Witness Allen conceded that AEP is not seeking a determination that there is a capacity need for the proposed facilities.¹⁹⁰

3. The Attorney Examiners should have granted parties’ Motion in *Limine* to exclude AEP’s irrelevant, non-probative testimony.

Because AEP admits that there is no need for the monopoly megawatts according to resource planning projections, its testimony is irrelevant. Thus, parties moved the PUCO to issue an order to exclude AEP’s testimony that described need based on economic impacts or customer wants or desires (e.g., surveys).¹⁹¹ Excluding such testimony would have furthered the interests of administrative economy by focusing the hearing on relevant evidence to help the PUCO determine whether AEP’s proposal complies with the law and is consistent with PUCO precedent.¹⁹² This would have assisted the PUCO by creating a manageable, relevant record that could have aided it and facilitated a timely decision in these important matters.¹⁹³

Denying the Motion in *Limine*, the Attorney Examiners ruled that AEP has the burden of proof to demonstrate need and that the PUCO must decide whether AEP has

¹⁸⁹ *Id.*

¹⁹⁰ AEP Ex. 3 at 8 (Allen).

¹⁹¹ *See generally* Motion in *Limine*. The testimony sought to be excluded through the Motion in *Limine* included the entirety of the testimony of AEP witnesses Fry, Horner, Lafayette, and Buser, and the following portions of the testimony of William Allen filed in Case No. 18-501-EL-FOR: (a) page 4, line 7, the words “economically beneficial”, (b) page 5, lines 7-12, (c) page 9, line 8 through page 16, line 5. *See id.*

¹⁹² *See id.*

¹⁹³ *See id.*

met that burden..¹⁹⁴ The Attorney Examiners did not address whether the evidence sought to be excluded was admissible, as the parties had requested them to do in their Motion in *Limine*. The ruling is wrong and should be reversed.

No doubt, AEP has the burden of proof here. R.C. 4928.143(B)(2)(C)(1) (the burden of proof in electric security plan cases is on the utility). But it can meet that burden based only on admissible evidence. Under Rule 401 of Ohio Rules of Evidence, relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. Under Rule 402 evidence that is not relevant is not admissible. The Supreme Court of Ohio has noted that motions *in limine* are “to avoid injection into trial of matters which are irrelevant, inadmissible, and prejudicial”¹⁹⁵ So has the PUCO.¹⁹⁶

In ruling on the Motion in *Limine*, the Attorney Examiners did not address the admissibility of the evidence sought to be excluded. They should have, as irrelevant evidence such as AEP’s is not admissible. AEP’s evidence – as AEP admits – does not go

¹⁹⁴ See Entry at 8 (January 14, 2019).

¹⁹⁵ *State v. Gibb*, 28 Ohio St.3d 199, 200 (1986); see also Ohio Rule of Evidence 401 (“Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.”); Ohio Rule of Evidence 402 (evidence that is not relevant is not admissible).

¹⁹⁶ *In the Matter of the Establishment of a Permanent Rate for the Sale of Energy from Montgomery County’s Energy-From-Waste Facility to The Dayton Power and Light Company*, Case No. 88-359-EL-UNC (“Montgomery County”), Entry (July 6, 1988). Motions in *limine* have also been used in administrative contexts in other jurisdictions. See, e.g., *In re Review of Florida Power Corporation’s earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light*, 2003 Fla. PUC Lexis 458 (2003); *In the Matter of Aylin, Inc., et al.*, 2016 EPA ALJ Lexis 23 (U.S. EPA 2016).

to the need for the proposed monopoly megawatts based on resource planning projections. Because the Attorney Examiners did not address the admissibility of the evidence sought to be excluded their ruling should be reversed. The testimony identified in the Motion in *Limine* should be stricken from the record.

B. The Attorney Examiners should have granted the parties' Motion for a Directed Verdict.

At the close of AEP's case-in-chief, parties moved for a directed verdict. A motion for a directed verdict should be granted when, after construing the evidence most strongly in favor of the party against whom the motion is directed, reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party.¹⁹⁷

Consistent with the record, IEU's Counsel in the motion for directed verdict argued that "[t]he company has failed to demonstrate on the record that the – that there is a need for these facilities."¹⁹⁸ The law requires that AEP show a need for its proposed generation based on resource planning projections.¹⁹⁹ AEP admits that the wholesale

¹⁹⁷ Civ. R. 50(A)(4).

¹⁹⁸ See Tr. VI at 1275.

¹⁹⁹ As described earlier, resource planning projections consider whether the projected supply meets projected demands of customers and whether there is excess capacity available above and beyond the expected peak demand of customers. See R.C. 4935.04(C)(1) (referring to the "resource planning projections to meet demand"); Ohio Adm. Code 4901:5-5-01(L); *Vectren Energy Delivery of Ohio, Inc. v. PUCO*, 113 Ohio St.3d 180, 183 (2007) ("The purpose of a long-term forecast report is to project customers' future demands for [commodity] and to determine how to acquire sufficient commodity ... to meet demand"); R.C. 4935.04(C) (requiring long-term forecast report to include a year-by-year, ten-year forecast of annual peak load as well as month-by-month forecast of peak load for electric utilities). The PUCO affirmed this in appropriately citing to the legislature's words in R.C. 4928.143(B)(2)(c) and narrowly defining "need" in the case involving the Turning Point plant. The PUCO tied need to resource planning projections submitted by the utility during the long-term forecast period and specifically declined to broadly define "need" based on economic impacts that the power

markets are adequately supplying capacity and energy to the AEP Ohio load zone.²⁰⁰ Thus, there is no traditional integrated resource planning (IRP) need for the proposed generation,²⁰¹ and AEP is not even seeking a determination that there is a capacity need for the proposed facilities.²⁰² Accordingly, construing the evidence in AEP's favor, reasonable minds could come to but one conclusion based on the record evidence— there is no need for the proposed generation facilities. It was error for the Attorney Examiners to deny parties' Motion for a Directed Verdict. Their decision should be reversed, and a verdict entered against AEP.

C. The Attorney Examiners should have allowed evidence regarding all of the required elements under R.C. 4928.143(B)(2)(c) to be presented at the first phase of this proceeding.

AEP moved to strike or defer certain intervenor testimony to phase two of these proceedings.²⁰³ AEP asserted that the testimony sought to be stricken or deferred deals with substantive analysis regarding the request for proposals that led to the execution of the renewable energy purchase agreements, the specific terms and conditions and associated costs of the agreements, the cost recovery proposals, and other matters.²⁰⁴ The Attorney Examiners granted AEP's motion to defer the testimony to phase two.²⁰⁵

plants would have on the state. *In the Matter of the Long-Term Forecast of Ohio Power Company and Related Matters*, Cas Nos. 10-501-EL-FOR *et seq.*, Opinion and Order at 25-27 (Jan. 9, 2013).

²⁰⁰ AEP Ex. 2 at 3.

²⁰¹ *Id.*

²⁰² AEP Ex. 3 at 8 (Allen).

²⁰³ *See* Entry at 6 (January 14, 2019).

²⁰⁴ *See id.*

²⁰⁵ *See id.* at 7.

Further, the Attorney Examiners declined OCC's request to expand the scope of phase one to include *all* of the elements required in the law, not just need.²⁰⁶ The Attorney Examiners' ruling is wrong and should be reversed. These proceedings should be reopened to allow testimony on the matters deferred and expanded to include *all* of the elements of R.C. 4928.143(B)(2)(c).

1. These proceedings should be reopened to allow testimony on the matters deferred.

To be clear, OCC does not agree with AEP's attempt to extend the definition of need beyond the statute and into the alleged economic benefits of its proposal. In fact, there are many parties, including the PUCO Staff, that disagree with how AEP has defined need.²⁰⁷ AEP's framing of the need issue, however, is fair game for parties to address in filed testimony. OCC responded to AEP's erroneous need arguments on a number of fronts, including that if economics are a part of establishing need (and they are not), the economics of the specific projects must be reviewed. In other words, the PUCO must consider not only modelled generic costs that AEP presented as part of Phase I, but the specific costs that captive customers will pay for renewable energy coming from specific projects.

This is part of the reason that OCC offered the testimony of Dr. Lesser. Dr. Lesser's testimony is directly related to the likely actual costs that customers would pay under AEP's proposed specific projects. Dr. Lesser explains how, if the actual 400 MW projects cost are considered, AEP's generalized claim that renewable projects are economically "beneficial" and "low cost" (equaling need according to AEP) is

²⁰⁶ See Entry at 6 (January 14, 2019).

²⁰⁷ See PUCO Staff Ex. 2 (Benedict).

misleading. Dr. Lesser’s testimony contradicts the leap AEP makes when it claims that a generalized need for renewable resources (as established though modelling 650 MW of generic renewable projects) establishes a specific need for the Willowbrook and Highland solar projects.

The Attorney Examiners had previously ruled that AEP could present testimony in phase one regarding “economically beneficial” renewable energy, lower energy costs, and customers’ desires for renewable energy.²⁰⁸ If AEP is permitted to address the purported economic benefits of its proposal, fundamental fairness necessitates that other parties be permitted to offer evidence regarding the specific cost of AEP’s two proposed projects. OCC Witness Dr. Lesser’s testimony (and other witnesses’ similar testimony) should not have been deferred to phase two.

2. The scope of these proceedings should have been expanded to include all of the elements of R.C. 4928.143(B)(2)(c).

The Attorney Examiners should not have declined OCC’s request to expand the scope of phase one to include *all* of the elements in R.C. 4928.143(B)(2)(c).²⁰⁹ The statute provides that utilities cannot charge consumers for generation facilities unless, among other things 1) the facilities will be “owned or operated” by the utility, 2) the PUCO determines that there is a “need” for the facilities based on resource planning projections submitted by the utility, and 3) the utility dedicates the capacity and energy from the generation facilities to Ohio consumers.²¹⁰ The PUCO has also ruled that the

²⁰⁸ *See id.* at 5.

²⁰⁹ *See* Entry at 6 (January 14, 2019).

²¹⁰ R.C. 4928.143(B)(2)(c).

utility must show that its “generation needs cannot be met though the competitive market.”²¹¹ These elements are independent of one another. AEP must prove all of them or its proposal must be rejected. If any of the statutory elements are not met, phase two of these proceedings, to address the specific terms of AEP’s proposal, cannot go forward.

The statute itself makes this clear. The elements are a condition precedent to “[t]he establishment” of a non-bypassable surcharge to subsidize the generation facility.²¹² For the Attorney Examiners to limit phase one of these proceedings to only need, while excluding evidence regarding the other statutory factors that are a condition precedent to establishing the surcharge in the first instance, is error. The Attorney Examiners’ ruling should be reversed. These proceedings should be reopened to allow parties to provide evidence in phase one regarding each of the statutory elements.

X. CONCLUSION

Ohio law provides Ohioans with the protection that generating plants (including renewable projects) are to be developed in the marketplace, without the involvement of monopoly utilities and subsidy charges for their captive customers to pay. While there is a limited opportunity under the law for a utility to own or operate a generating plant, that opportunity exists only if, *inter alia*, there is a demonstrated need for that power to serve customers.

As the PUCO Staff testified, AEP has failed to demonstrate that its customers need that power. In fact, AEP is not even proposing that the power be dedicated to its

²¹¹ *In re Long-Term Forecast Report of Ohio Power Co. and Related Matters*, Case No. 10-501-EL-FOR, Opinion & Order at 26 (January 9, 2013).

²¹² R.C. 4928.143(B)(2)(c).

customers; rather, the power would be sold into the PJM regional market. Indeed, several witnesses testified that Ohio's competitive market is already providing customers in AEP's service area with many (dozens) of offers for purchasing renewable energy.

The PUCO previously rejected AEP's similar claims in the *Turning Point* case. The PUCO must apply the law as written for consumer protection, not evade the law as AEP requests.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Maureen R. Willis

Maureen R. Willis, Counsel of Record
Senior Counsel (0020847)
William J. Michael (0070921)
Christopher Healey (0086027)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor
Columbus, Ohio 43215
Telephone [Willis]: (614) 466-9567
Telephone [Michael]: (614) 466-1291
Telephone [Healey]: (614) 466-9571

Maureen.willis@occ.ohio.gov

William.michael@occ.ohio.gov

Christopher.healey@occ.ohio.gov

(Willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Initial Brief was served on the persons stated below via electronic transmission this 6th day of March 2019.

/s/ Maureen R. Willis

Maureen R. Willis

Senior Counsel

SERVICE LIST

Thomas.mcnamee@ohioattorneygeneral.gov

kboehm@BKLawfirm.com

jkylercohn@BKLawfirm.com

mpritchard@mwncmh.com

fdarr@mwncmh.com

paul@carpenterlipps.com

Bojko@carpenterlipps.com

Dressel@carpenterlipps.com

mleppla@theOEC.org

jstock@beneschlaw.com

jrego@beneschlaw.com

dparram@bricker.com

mdortch@kravitzllc.com

cpirik@dickinsonwright.com

todonnell@dickinsonwright.com

wworys@dickinsonwright.com

cluse@dickinsonwright.com

msilberman@beneschlaw.com

stnourse@aep.com

cblend@aep.com

tony.mendoza@sierraclub.org

rsahli@columbus.rr.com

cmooney@ohiopartners.org

mnugent@igsenergy.com

joliker@igsenergy.com

rdove@keglerbrown.com

whitt@whitt-sturtevant.com

glover@whitt-sturtevant.com

callwein@opae.org

mjsettineri@vorys.com

glpetrucci@vorys.com

ktreadway@oneenergylc.com

dborchers@bricker.com

tdougherty@theoec.org

ctavenor@theoec.org

Attorney Examiners

Sarah.parrot@puc.oh.us.gov

Greta.see@puc.oh.us.gov

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