BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters	)))	Case No. 18-501-EL-FOR
In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into Renewable Energy Purchase Agreements for Inclusion in the Renewable Generation Rider	)))))	Case No. 18-1392-EL-RDR
In the Matter of the Application of Ohio Power Company to Amend its Tariffs	))	Case No. 18-1393-EL-ATA

INITIAL POST-HEARING BRIEF OF THE KROGER CO.

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I. INTRODUCTION.

The Kroger Co. ("Kroger") has a long-standing and significant commitment to the development and use of renewable energy. Kroger's deployment of renewable energy is a "pillar of progress and improvement."[1] For example, Kroger: (i) hosts a wind turbine project and purchases all the wind energy produced by those turbines; (ii) implemented roof-top solar systems at several stores; (iii) "installed the first commercial application of the PowerParasol," a solar energy parking lot system; (iv) added additional "Affordable Solar Energy" parking lot systems at several stores; and (v) installed photovoltaic systems at several distribution centers.[2] In 2017, "these wind and solar installations produced more than 14.5 million kWh of renewable power."[3] Nor can anyone dispute that Kroger has agreements with Competitive Retail Electric Service ("CRES") providers to purchase renewable energy when it wants.[4] Thus, Kroger's commitment and support of renewable energy is undeniable and any implication otherwise in these proceedings is improper and false.

In light of the foregoing, if the Ohio Power Company ("AEP Ohio") had sought to recover costs for the at least 900 MW of renewable generation projects at issue here on either a bypassable or voluntary (Green Tariff) basis, Kroger would have had no objection. Instead, in an attempt to thwart the competitive generation market, AEP Ohio is seeking to charge, on a **non-bypassable** basis, its 1.5 million captive customers, regardless of whether those customers shop and purchase generation through a CRES provider, for the development of at least 900 MW of renewable generation projects. Specifically, in this consolidated proceeding, AEP Ohio seeks a finding of

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1 Kroger Ex. 3, Sustainability Report at 97.

2 *Id*.

3 *Id*.

4 Tr. Vol. VIII at 2159.

need for at least 900 MW of renewable generation projects, as well as for two specific renewable projects known as Highland Solar and Willowbrook Solar.[5] R.C. 4928.143(B)(2)(c) requires a threshold showing that "there is need for the facility **based on resource planning projections** submitted by the electric distribution utility" (emphasis added). Resource planning projections consider whether the projected supply meets the projected demand of customers.[6]

However, AEP Ohio **admits** that it is not "proposing through this filing that it has a traditional integrated resource planning (IRP) need for generation."[7] Further, AEP Ohio **admits** that the "wholesale markets are adequately supplying capacity and energy to the AEP Ohio load zone."[8] Moreover, the record of the 11-day evidentiary hearing in this matter is replete with admissions and acknowledgments by AEP Ohio and the supporting intervenors[9] that AEP Ohio

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[5] See *In the Matter of the 2018 Long-Term Forecast Report on Behalf of Ohio Power Company and Related Matters*, Case No. 18-501-EL-FOR ("Forecast Case"), Amendment to the 2018 Long-Term Forecast Report of Ohio Power Company (September 19, 2018); *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into Renewable Energy Purchase Agreements for Inclusion in the Renewable Generation Rider, et al.*, Case No. 18-1392-EL-RDR, et al. ("Tariff Cases"), Application at 1-2 (September 27, 2018).

[6] *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").

[7] *See* Forecast Case, Amendment to the 2018 Long-Term Forecast Report of Ohio Power Company at 3 (September 19, 2018) ("Amended LTFR").

[8] *Id*.

[9] The intervenors supporting AEP Ohio's Amended LTFR in the Forecast Case are the environmental groups (Sierra Club, Ohio Environmental Council ("OEC"), and Natural Resources Defense Council ("NRDC")), Mid-Atlantic Renewable Energy Coalition ("MAREC"), and Ohio Partners for Affordable Energy ("OPAE").

Whereas, the intervenors opposing AEP Ohio's Amended LTFR represent the industrial, commercial, and residential customers of AEP Ohio, as well as competitive suppliers and marketers: Industrial Energy Users-Ohio ("IEU"), Ohio Manufacturers' Association Energy Group ("OMAEG"), Kroger, Office of the Ohio Consumers' Counsel ("OCC"), IGS Energy and IGS Solar, LLC (collectively "IGS"), Direct Energy, LP ("Direct"), Retail Energy Supply Association ("RESA"), and Ohio Coal Association ("OCA"). In addition, Staff also opposes the Amended LTFR and contends that AEP Ohio did not show "need" based upon resource planning projections as required by R.C. 4928.143(B)(2)(c).

cannot, as a matter of law and undisputed fact, show a "need for the facility based on resource planning projections[.]"[10] For example:

- AEP Ohio Witness Allen: "**Q: Is the company seeking a determination that there is a capacity need in this filing? A: No**. This filing is being made to demonstrate that there is a need for in-state economically beneficial renewable energy to benefit and meet the needs and requirements of the Company's current and future customers."[11]

- AEP Ohio Witness Allen: "Q: Do you agree and concede, I think, that the 13-state PJM region has adequate generation reserves and that PJM doesn't need more capacity; is that correct? A: **What we know is that PJM has sufficient capacity three years out.** We don't know about the capacity availability in PJM beyond that period. Q: **Would you agree the PJM market is designed to always provide adequate supply** by increasing the price to consumers and the price that the generators receive if the reserves are inadequate? A: **That's generally the PJM market construct**."[12]

- AEP Ohio Witness Allen: "In this filing, and we made it clear in my testimony, **we're not addressing a capacity need**."[13]

- AEP Ohio Witness Allen: "Q: But you do not know, based on your regulatory experience, whether the statute requires a finding of need on a generic basis for, say, a specific project basis; is that correct? A: I think that would require a legal conclusion, but **what the statute requires is that the -- at least the way it reads -- is that the Commission must first determine in the proceeding that there is a need for the facility, based on resource planning projections submitted by the electric distribution utility**."[14]

- AEP Ohio Witness Ali: "Q: Mr. Ali, isn't it true that the renewable resources that you evaluated aren't needed to meet the energy demand for consumers in the PJM market including the State of Ohio? A: **Yes, these resources are not needed to meet any sort of [re]liability criteria violation that is out there. These resources are purely helping reduce the energy prices**…"[15]

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[10] R.C. 4928.143(B)(2)(c).

[11] *See* Company Ex. 3, Allen Direct Testimony in Forecast Case at 8 (emphasis added).

[12] *See* Tr. Vol. I at 70 (emphasis added).

[13] *Id.* at 71 (emphasis added).

[14] *Id.* at 131(emphasis added).

[15] *See* Tr. Vol. II at 428 (emphasis added).

- AEP Ohio Witness Ali: "Q: And **you are not evaluating in your testimony whether there was a capacity need** for the 650 megawatts of renewable generation that you modeled, correct? A: **That is correct**."[16]

- AEP Ohio Witness Horner: "Q: So **you have no opinion whether your testimony supports a conclusion that the statutory definition of need has been met** in this case? A: **No**. Our role was to focus on the opinions of AEP Ohio's customers."[17]

- AEP Ohio Witness Horner: "Q. But my question, Ms. Horner, is you did not ask whether the customers needed any renewable energy; isn't that true? A: **The survey did not include the question about whether customers need renewable energy**. It asked about their support for and expectations for renewable energy."[18]

- AEP Ohio Witness Torpey: "Q: And I believe you've mentioned this a couple of times, but I think **your testimony here today is that you would agree with me that AEP does not have a capacity need, correct**? A: **AEP Ohio does not have a capacity obligation**."[19]

- Sierra Club Witness Goggin: "Q: Mr. Goggin, you're not offering an opinion whether the AEP proposal is needed from a resource planning perspective, right? A: No, **I am not an expert in need as defined in Ohio law**."[20]

- NRDC Witness Stebbins: "Q: Did you identify whether those 190 megawatts were sufficient to meet customer needs as it relates to reliability? A: That was provided at the outset that **the PJM market is providing those opportunities**. ******* Q: Thank you. And staying with those 190 megawatts that we've been discussing, those 190 megawatts are not provided by AEP Ohio at present, correct? A: **They are provided by multiple different sources**."[21]

- MAREC Witness Burcat: "Q: You would agree with me that **AEP Ohio has no capacity need, correct?** A: **Correct.** Q: And that **there's no specific energy need that the projects would satisfy, correct?** A: **I would say so, yes.**"[22]

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16 *Id.* at 462 (emphasis added).

17 *See* Tr. Vol III at 566-567 (emphasis added).

18 *Id.* at 641 (emphasis added).

19 *See* Tr. Vol. V at 1382 (emphasis added).

20 *See* Tr. Vol. IV at 920 (emphasis added).

21 *Id.* at 1022-1024 (emphasis added).

22 *See* Tr. Vol. VIII at 2045 (emphasis added).

In sum, AEP Ohio's witnesses and the witnesses of the supporting intervenors either admit that there is no "need for the facility based on resource planning projections" or that they are not offering any support or testimony on the issue of "need."

Significantly, the Staff of the Public Utilities Commission of Ohio ("Commission") agrees no such showing has been made here:

> Having 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.**[23]

Kroger witness Bieber likewise came to the same conclusion as Staff: there has been no showing of the threshold requirement of "need" as mandated by R.C. 4928.143(B)(2)(c).

> [D]emand for electricity in Ohio is already being adequately met with existing resources, and, therefore, no need for the specified facilities (or a general need for 900 MW of renewable generation) exists.
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> [W]ithout a demonstration in the LTFR that the two specific projects are necessary to meet demand, peak load, or reserves, the requisite need showing cannot be satisfied. Second, in its resource planning projections, AEP Ohio has failed to demonstrate that at least 900 MW of economical renewable generation is needed to meet demand, peak load, or reserves as required for the authorization of a non-bypassable surcharge under R.C. 4928.143(B)(2).[24]

Thus, it is undisputed, and indeed, indisputable, that AEP Ohio made no showing that projected supply cannot meet the projected demand. As such, there is no "need" based on resource planning projections for the at least 900 MW of renewable generation projects, as well as for the two specific renewable projects known as Highland Solar and Willowbrook Solar, as required by

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[23] Staff Ex. 2, Benedict Direct Testimony at 8 (emphasis added).

[24] Kroger Ex. 4, Bieber Direct Testimony at 5, 12-13.

R.C. 4928.143(B)(2)(c). The inquiry in this proceeding should end there as a matter of law and undisputed fact. The Attorney Examiners should have granted the oral motion for directed verdict, denying AEP Ohio's Amended LTFR in the Forecast Case consistent with Commission precedent in the *Turning Point* case.[25] However, the Attorney Examiners unlawfully and unreasonably, and without good cause or any stated rationale, denied the motion for directed verdict.

Unable to show "need" as required by law and Commission precedent,[26] AEP Ohio asks the Commission to re-write the statutory language and expand the definition of "need." However, that is not within the purview of the Commission's authority. If AEP Ohio wants a change in the statutory language, that should be taken up with the General Assembly, not the Commission. The Commission must apply the statutes as written, giving plain and ordinary meaning to the words.[27] In doing so, consistent with the Staff's position, the Commission would have to conclude that there is no statutory "need" for at least 900 MW of renewable generation projects, as well as for two specific renewable projects known as Highland Solar and Willowbrook Solar.

Notwithstanding the foregoing, AEP Ohio dedicated the evidentiary hearing to presenting purported evidence of various alleged economic benefits and impacts, as well as alleged customers' desires for in-state renewable energy, as justifications of need. Staff agreed with Kroger (and other opposing intervenors) that such benefits do not relate to "need:"

> Staff believes that the purported benefits associated with the proposed projects do not relate to need as Staff would define them.[28]

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[25] *In the Matter of the Long-Term Forecast of Ohio Power Company and Related Matters ("Turning Point")*, Case Nos. 10-501-EL-FOR, et al., Opinion and Order (January 9, 2013).

[26] *See* R.C. 4928.143(B)(2)(c); *see also Turning Point,* Opinion and Order at 25-27 (January 9, 2013).

[27] *See Columbus S. Power Co. v. Pub. Util Comm'n*, 67 Ohio St.3d 535, 537, 620 N.E.2d 835 (1993) ("It is axiomatic that the PUCO, as a creature of statute, may exercise only that jurisdiction conferred upon it by the General Assembly.") (internal citations omitted).

[28] Staff Ex. 2, Benedict Direct Testimony at 11.

Likewise, Staff concluded that customer desires or wants have no bearing upon the determination of "need" under R.C. 4928.143(B)(2)(c):

> Staff believes that Ohio Power is conflating customer preferences with customer needs. The Company provides insufficient evidence that customer preferences are not being adequately met, even as these preferences increase and change over time.[29]

Such irrelevant allegations served only to muddy the record as a result of numerous erroneous evidentiary rulings by the Attorney Examiners that effectively allowed a one-sided presentation of these assertions that are of no moment to the determination of "need" under the law.

Accordingly, Kroger opposes AEP Ohio's request to turn a blind eye to the clear statutory language and Commission precedent in an attempt to have all of AEP Ohio's customers foot the bill for generation resources that could, and should, be procured in the competitive market. The Commission should reject AEP Ohio's Amended LTFR inasmuch as it violates the letter and spirit of the General Assembly's prohibition on distribution utility-owned generation.

II. PROCEDURAL HISTORY.

On April 16, 2018, AEP Ohio filed its Long-Term Forecast Report ("LTFR") with the Commission in the Forecast Case,[30] and supplemented its LTFR on June 26, 2018.[31] Thereafter, on September 19, 2018, AEP Ohio filed its Amended LTFR and testimony from six witnesses supporting the assertions made, and relief sought, in its Forecast Case.[32] Therein, AEP Ohio asked

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[29] *Id*. at 9-10; *see also* Kroger Ex. 4, Bieber Direct Testimony at 5 (factors such as "customer interest" and the claimed economic benefits serve only to obscure the fact that demand is being adequately met with existing resources).

[30] *See* Company Ex. 1, Forecast Case, In the Matter of the 2018 Long-Term Forecast Report on behalf of AEP Ohio (or Ohio Power), pursuant to Section 4935.04, Ohio Revised Code (April 16, 2018).

[31] *See* Forecast Case, Ohio Power Company's Supplemental Long-Term Forecast Report Filing (69 kV facilities) (June 26, 2018).

[32] *See* Company Ex. 2, Amended LTFR; *see also* Direct Testimony of William A. Allen, Karl R. Bletzacker, Kamran Ali, John F. Torpey, Trina Horner, and Nicole Fry in the Forecast Case (September 19, 2018).

the Commission to find that there was a need for the development of at least 900 MW of renewable generation and for the Commission to grant AEP Ohio authority to develop that generation.[33]

Through its testimony, AEP Ohio suggested that it intended for this proceeding surrounding the proposed Amended LTFR to be consolidated with a then-forthcoming proceeding regarding specific renewable projects.[34] Thereafter, on September 27, 2018, AEP Ohio filed an application to enter into Renewable Energy Purchase Agreements ("REPAs") and for authority to amend its tariffs in the Tariff Cases.[35] Along with that Tariff Cases Application, AEP Ohio filed the testimony of additional witnesses, as well as additional testimony from Messrs. Allen and Torpey in support of the Tariff Cases Application, and a Motion to Consolidate the Tariff Cases with the Forecast Case.[36]

In opposition to the Motion to Consolidate, intervenors argued that Ohio law unequivocally requires a threshold determination of general need for renewable projects before seeking recovery for specific projects under R.C. 4928.143(B)(2)(b) and (c).[37] Nonetheless, on October 22, 2018, the Commission granted AEP Ohio's Motion to Consolidate.[38] In granting the Motion to Consolidate, however, the Commission also determined that the proceeding would be bifurcated such that the Commission would address the consolidated cases in two phases. Phase I would address the threshold determination of whether there is a resource planning need for AEP Ohio's proposed generation facilities, and then, if a resource planning need is found, the Commission

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33 *See* Company Ex. 2, Amended LTFR.

34 *See* Company Ex. 3, Allen Direct Testimony in the Forecast Case at 4.

35 *See* Application, Case Nos. 18-1392-EL-RDR, et al. (September 27, 2018) ("Tariff Cases Application").

36 *See* Tariff Cases, Direct Testimony of Daniel R. Bradley, Stephen Buser, Steven M. Fetter, Joseph A. Karrasch, Bill LaFayette, Jon F. Williams, William A. Allen, and John F. Torpey (September 27, 2018); Motion to Consolidate (September 27, 2018).

37 OMAEG Memo Contra Consolidation at 4.

38 *See* Entry at 15 (October 22, 2018).

would proceed to Phase II, which would consider cost recovery for specific projects in the Tariff Cases Application.[39] Kroger and other intervenors filed an Interlocutory Appeal regarding the Attorney Examiner's granting of the Motion to Consolidate and ordering bifurcation (in part).[40] The Interlocutory Appeal was denied on November 13, 2018.[41]

After the bifurcation, AEP Ohio filed notice that it would be offering the testimony of two additional witnesses in Phase I who only filed testimony in the Tariff Cases to address the need determination.[42] Specifically, AEP Ohio stated that it:

> wishes to bring one additional **issue** from the *Tariff Cases* forward into the need hearing: the economic impact study performed by The Ohio State University (OSU) Professor Stephen Buser and co-authored by Regionomics LLC's Bill LaFayette. . . The economic impact study, **as a supplement** to the Long-Term Forecast Report Amendment and supporting testimony filed on September 27, 2018 in the LTFR Case, will provide additional evidence of the need for renewable projects being addressed in these consolidated cases and will assist the Commission in developing a complete record to decide that issue.[43]

Kroger and other intervenors objected to the inclusion of the testimony of these two witnesses that address the purposed economic impact and benefits of the specific Highland Solar and Willowbrook Solar projects as irrelevant to the determination of whether "there is need for the facility based on resource planning projections" as required by R.C. 4928.143(B)(2)(c).[44] The

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39 *See id*. at 11-12.

40 *See* Interlocutory Appeal Request for Certification to Full Commission and Application for Review Regarding a Fair Process for AEP's Customers and Memorandum in Support by OCC, OMAEG, and Kroger (October 29, 2018) ("Interlocutory Appeal").

41 See Entry at 10-15 (November 13, 2018).

42 *See* Ohio Power Company's Notice of Additional Witnesses (October 26, 2018); Ohio Power Company's Amended Notice of Additional Witnesses (November 1, 2018).

43 *Id*. at 1 (emphasis added) (citations omitted).

44 *See* Objection to Ohio Power Company's Notice to Present Additional Witnesses by OCC, OMAEG, and Kroger (November 5, 2018).

intervenors requested that the Commission prohibit AEP Ohio from expanding the definition of need and requested the Commission limit Phase I of the hearing to a "need" tied to resource planning projections as delineated in the statute and as interpreted by prior Commission precedent.[45] The Attorney Examiners never ruled upon that request, effectively denying it by allowing AEP Ohio to present the testimony of these two witnesses solely related to the specific Highland Solar and Willowbrook Solar projects. The Attorney Examiners allowed this specific projects testimony despite expressly and unambiguously stating at the outset of the hearing that testimony about the specific projects would not be allowed in Phase I and instead would be the subject of Phase II, if necessary.[46]

Therefore, on January 2, 2019, pursuant to the procedural schedule established by the November 13, 2018 Entry, many parties, including Kroger, filed testimony for Phase I of the consolidated proceedings responding to the testimony filed by AEP Ohio in the Forecast Case, including the two additional pieces of testimony from the Tariff Cases that AEP Ohio noticed would also be presented in this phase of the proceeding.[47] Specifically, Kroger filed the testimony of Justin Bieber to address the issue of need and AEP Ohio's reliance upon alleged economic benefits and impacts as justifications for need.[48] On January 7, 2019, after the Attorney Examiners' directive at the prehearing conference, AEP Ohio filed a Motion to Strike or Defer portions of Mr. Bieber's testimony, as well as the testimony of other intervenor witnesses, as

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45 *Id*. at 3.

46 Tr. Vol. I at 62.

47 Entry at 14-15 (November 13, 2018).

48 *See* Kroger Ex. 4, Bieber Direct Testimony.

allegedly beyond the scope of Phase I of the hearing.[49] Likewise, on January 7, 2019, Kroger, along with several other intervenors, filed a Motion in Limine to exclude evidence purporting to show "need" based on economic impacts and customer surveys.[50] On January 14, 2019, an unlawful, unreasonable and prejudicial Entry was issued: (i) denying the Motion in Limine, thereby allowing AEP Ohio to present purported evidence of economic benefits and customer surveys as justification for "need" notwithstanding the controlling statutory language of R.C. 4928.143(B)(2)(c); and (ii) granting AEP Ohio's Motion to Strike/Defer, specifically deferring the testimony at issue to Phase II of the proceeding.[51] In so ruling, the Attorney Examiners effectively allowed AEP Ohio to litter the record with irrelevant and prejudicial information about economic benefits and impacts, as well as customer wants and desires, while simultaneously prohibiting Kroger and other intervenors from challenging that irrelevant and prejudicial information. Such a one-sided presentation of the evidence is unlawful, unreasonable, unfair, and prejudicial. The evidentiary hearing on Phase I of the proceeding began on January 15, 2019[52] and concluded on February 8, 2019 with the presentation of AEP Ohio's improper rebuttal testimony.[53] At the conclusion of the Phase I hearing, the Attorney Examiners directed the parties to submit initial briefs by March 6, 2019 and reply briefs by March 27, 2019.[54]

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[49] *See* Motion of Ohio Power Company to Strike or Defer Certain Intervenor Testimony that is Beyond the Scope of the First-Phase Hearing Set by the Attorney Examiners' October 22, 2018 Procedural Entry (January 7, 2019) ("Motion to Strike/Defer").

[50] *See* Motion In Limine to Exclude Evidence Purporting to Show Need Based on Economic Impact and Customer Surveys or, in the Alternative, Motion to Strike Irrelevant Testimony of AEP Ohio Witnesses by OCC, OMAEG, Kroger, OCA, and IGS (January 7, 2019) ("Motion in Limine").

[51] *See* Entry at 8 (January 14, 2019).

[52] *See* Tr. Vol. I.

[53] *See* Tr. Vol. XII.

[54] Tr. Vol. XII at 2834.

III. APPLICABLE LAW.

As the Commission well knows, Ohio law has embraced a competitive market approach ever since the passage of Am.Sub.S.B. No. 3, 148 Ohio Laws, Part IV, 7962 ("S.B. 3") in 1999, which went into effect in January 2001. The cornerstone of S.B. 3 was the requirement that the three major components of electric service – generation, transmission, and distribution, be unbundled, allowing customers to evaluate offers from competitive generators.[55] Indeed, R.C. 4928.02(H) makes it is the official state policy to:

> **Ensure effective competition in the provision of retail electric service** by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.[56]

Because R.C. 4928.06 provides that the Commission "shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated," the Commission should not easily disregard the importance of the state's policy or construe limited exceptions to the general policy so as to allow the exceptions to renders the policy meaningless.

That said, the General Assembly carved out some narrow exceptions to this official state policy "[e]nsur[ing] effective competition" in our marketplace. One of these exceptions can be found in R.C. 4928.143(B)(2)(c), which provides:

> The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. **However, no**

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[55] *Migden-Ostrander v. Pub. Util. Comm.*. 102 Ohio St. 3d 451, 2004-Ohio-3924 at ¶¶ 3-4.

[56] R.C. 4928.02(H) (emphasis added).

> **surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility.** Additionally, if a surcharge is authorized for a facility pursuant to plan approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.[57]

In its Amended LTFR that is the subject of this proceeding, AEP Ohio submitted a proposal that would result in monopolized generation, hoping it can meet the General Assembly's exception set forth in R.C. 4928.143(B)(2)(c). In order to meet this narrow exception, however, and before the Commission can even consider cost recovery from customers for the development of its proposed renewable generation facilities, AEP Ohio must first demonstrate "that there is need for the facilit[ies] based on resource planning projections submitted by [AEP Ohio]." As set forth in detail below, AEP Ohio cannot satisfy as a matter of law and undisputed fact the threshold requirement of "need" based on resource planning projections.

IV. LAW AND ARGUMENT.

A. The Attorney Examiners Erred In Granting AEP Ohio's Motion To Consolidate And Then Bifurcating (In Part) The Proceedings, And Further Erred By Not Certifying Kroger's Interlocutory Appeal Of That Decision.

Pursuant to Ohio Adm. Code 4901-1-15(F), a party that is adversely impacted by a procedural ruling issued under Ohio Adm. Code 4901-1-14 that files an interlocutory appeal that is not certified by the attorney examiner may raise the propriety of such ruling as a distinct issue for the Commission's consideration in the party's initial brief. The Attorney Examiners' October

[57] R.C. 4928.143(B)(2)(c) (emphasis added).

22, 2018 Entry was unlawful and unreasonable, as well as being unfair and prejudicial.[58] As a result, Kroger, along with OCC and OMAEG, filed an Interlocutory Appeal of that decision on October 29, 2018.[59] The Attorney Examiners denied certification of Kroger's Interlocutory Appeal on November 13, 2018.[60] Accordingly, Kroger respectfully requests that the Commission find that the Attorney Examiners erred in granting consolidation of these proceedings and then bifurcating (in part) the proceedings in Phase I and Phase II, and, subsequently, erred in not certifying Kroger's Interlocutory Appeal of that decision.

Here, consolidation of these proceedings was inappropriate for several reasons. First, the Attorney Examiners consolidated the Forecast Case (where AEP Ohio tries to establish need for a generic 900 MW of renewable generation) with AEP Ohio's Tariff Cases (where AEP Ohio tries to receive cost recovery from customers for two specific renewable power plants, Highland Solar and Willowbrook Solar, totaling 400 MW). However, this consolidation conflicts with the Commission's directive[61] that whether a monopoly utility needs to build specific generation plants must be proven by the utility in a filing to receive cost recovery.

Second, the Attorney Examiner's consolidation decision conflicts with the statute, R.C. 4928.143(B)(2)(c). That law requires a monopoly utility to prove first there is a need based upon resource planning projections for each generating facility to be owned or operated by the utility,[62] before the Commission can approve a non-bypassable surcharge to customers as a provision in a

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58 *See* Entry (October 22, 2018).

59 *See* Interlocutory Appeal Request for Certification to Full Commission and Application for Review Regarding a Fair Process for AEP's Customers and Memorandum in Support by OCC, OMAEG, and Kroger (October 29, 2018) ("Interlocutory Appeal").

60 *See* Entry at 10-15 (November 13, 2018).

61 *In re Application of Ohio Power Co. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Elec. Security Plan*, Case No. 16-1852-EL-SSO, Opinion & Order ¶ 227 (Apr. 25, 2018); *see also id.*, Second Entry on Rehearing ¶ 227 (Aug. 1, 2018).

62 R.C. 4928.143(B)(2)(c).

utility's electric security plan. Whereas, the Commission's rules governing cost recovery for renewable generation owned or operated by an electric utility are contained in Ohio Adm. Code 4901:1-35-03. Specifically, Ohio Adm. Code 4901:1-35-03(C)(9)(b)(i) states that at the time an application is filed, "[t]he need for the proposed facility must have **already been reviewed and determined by the commission** through an integrated resource planning process filed pursuant to rule 4901:5-5-05 of the Administrative Code."[63] Indeed, the Commission's decisions related to AEP Ohio's Renewable Generation Rider ("Rider RGR") that is the subject of the Tariff Cases explicitly provide that any cost recovery for renewable projects will be considered by the Commission on a case-by-case basis.[64]

Third, pursuant to Ohio Adm. Code 4901:5-5-06(B), a utility must file its LTFR a year prior to any filing under R.C. 4928.143(B)(2)(b) or R.C. 4928.143(B)(2)(c). The Commission has previously determined that a utility cannot seek cost recovery for the construction of a new power plant under R.C. 4928.143(B)(2)(c) until the year following the year in which the utility's LTFR was filed.[65]

Fourth, consolidation is especially inappropriate given that AEP Ohio is not even seeking the same relief in these cases and is seeking relief for different renewable projects. AEP Ohio concedes in its Application in the Tariff Cases that it is seeking a determination from the Commission in the Forecast Case that a generic set of projects totaling at least 900 MW is necessary, but that in the Tariff Cases, it is only seeking cost recovery for two projects totaling

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63 Ohio Adm. Code 4901:1-35-03(C)(9)(b)(i) (emphasis added).

64 *See In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider, et al.*, Case Nos. 14-1693-EL-RDR, et al. ("AEP Ohio PPA Case"), Second Entry on Rehearing at 57 (November 3, 2016) and Fifth Entry on Rehearing at 32 (April 5, 2017).

65 *See Turning Point*, Opinion and Order at 20-21 (January 9, 2013).

400 MW.[66] Additionally, AEP Ohio's Tariff Cases request the creation of a "Green Tariff." Not only do the two cases seek approval of different levels and possibly types of renewable projects, but AEP Ohio also fails to acknowledge that the Commission's rules reject the proposition that these issues can be resolved simultaneously.

In short, the Forecast Case and Tariff Cases present completely distinct legal questions, and Ohio law and the Commission's rules dictate that the Forecast Case must be resolved before the Tariff Cases may proceed. While the Attorney Examiners attempted to overcome these legal hurdles to consolidation by bifurcating the proceedings into Phase I and Phase II, the Attorney Examiners immediately undermined that bifurcation order. Specifically, the Attorney Examiners allowed AEP Ohio to offer testimony from the Tariff Cases regarding the specific Highland Solar and Willowbrook Solar projects during Phase I, which was supposed to be limited to the threshold determination of whether "there is need for the facility based on resource planning projections" for the at least 900 MW of renewable generation projects.[67] "The attorney examiner notes that the bifurcation of the hearing process does not preclude AEP Ohio from offering its direct testimony, as submitted in support of the application in the *Tariff Cases*, at the hearing on the issue of need."[68]

Thus, the Attorney Examiners essentially blurred the lines of bifurcation (and continued to do so throughout the evidentiary hearing as set forth in detail below), thereby rendering its bifurcation directive an inadequate solution to the legal flaws with granting consolidation. As such, these cases should not have been consolidated. Doing so did not create efficiency and only added unnecessary complexity to the evidentiary hearing and opened the door to allow AEP Ohio to present a one-sided presentation of the purposed economic benefits and customer desires for the

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66 Tariff Cases Application at 6.

67 R.C. 4928.143(B)(2)(c).

68 Entry at 11-12 (October 22, 2018).

renewable projects in Phase I while requiring the opposing intervenors to wait until Phase II to challenge that presentation. Accordingly, Kroger asks that the Commission find that the Attorney Examiners erred in granting consolidation and then bifurcating, in part, the proceedings of the consolidated matters.

B. The Record In This Case Is Replete With Improper And Unduly Prejudicial Evidentiary Rulings That Resulted In An Unjust And Unreasonable One-Sided Presentation Of Evidence.

1. The Attorney Examiners Erred When They Denied The Motion In Limine And Allowed AEP Ohio To Present Purported Evidence Of Economic Impact And Customer Surveys As Justification Of Need.

As set forth above, applicable Ohio law prohibits monopolies (electric utilities) from owning power plants (and charging customers for those power plants) unless the utility can show that it meets the limited exception created under R.C. 4928.143(B)(2)(c). A threshold requirement to be considered for that limited exception mandates that the utility must show there is "a **need** for the facility **based on resource planning projections** submitted by the electric distribution utility."[69] The Commission has ruled that need is determined by measuring supply versus demand, consistent with the plain language of the statute. And, the Commission also ruled that need should not be broadly defined in terms of economic impacts that the power plants would have on the state.[70]

In light of the foregoing, on January 7, 2019, Kroger, and several other intervenors, filed the Motion In Limine seeking to exclude from Phase I of the proceeding testimony and evidence relating to purported economic impacts of the specific proposed projects and customer wants or desires (i.e., the customer survey) as irrelevant to the threshold determination of "need" in Phase

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[69] R.C. 4928.143(B)(2)(c) (emphasis added).

[70] *See Turning Point*, Opinion and Order at 25-27 (Jan. 9, 2013).

I. This Motion was made consistent with the Attorney Examiner's October 22, 2018 Entry that Phase I is limited to the determination of "need" under R.C. 4928.143(B)(2)(c).[71] 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 . . . ."[72] The Commission also has recognized motions in limine,[73] and granted them to narrow issues for hearing.[74]

Significantly, AEP Ohio repeatedly admitted and conceded that it does **not** have a traditional resource planning "need" for generation,[75] and that the "wholesale markets are adequately supplying capacity and energy to the AEP Ohio load zone."[76] Recognizing this fundamental deficiency, AEP Ohio made it clear that it intended to present evidence and testimony regarding purported economic impacts and customer desires. Such evidence and testimony, however, is irrelevant to the threshold issue of "need" before the Commission. For example, the fact that some customers might *want* something does not mean that they *need* it. Besides, the competitive market is providing ample opportunities for Ohioans to choose renewable energy for their everyday electricity needs.[77] So if customers want renewable energy, their wants can be

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71 *See* Entry at 11-12 (October 22, 2018).

72 *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).

73 *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, Entry (July 6, 1988). Motions in limine also have 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).

74 *See, e.g., In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. For Approval Pursuant to Revised Code Section 4929.11 of Tariffs to Recover Conservation Expenses*, Case No. 05-1444-GA-UNC, Hearing Transcript (February 28, 2007) at 72 (Attorney Examiner Lesser granting motion in limine limiting scope of proceeding).

75 *Id.*

76 Company Ex. 2, Amended LTFR at 3.

77 *See, e.g.,* IEU Exs. 4, 5, and 6, Apples to Apples Comparison Charts; *see also* Tr. Vol. IV at 919.

fulfilled -- right now -- without AEP Ohio's proposed power plant subsidies. Likewise, the study of the purported economic impact of two specific renewable projects, Highland Solar and Willowbrook Solar, are not relevant and indeed, have been rejected by the Commission in trying to establish "need" in another case.[78]

As such, the Motion In Limine was necessary to focus Phase I on the threshold determination of "need" pursuant to R.C. 4928.143(B)(2)(c). Despite the foregoing, the Attorney Examiners denied the Motion In Limine, allowing AEP Ohio to present irrelevant and prejudicial evidence that served only to confuse the issues. Thus, the Attorney Examiners erred in so ruling, particularly in light of their simultaneous ruling that prevented certain intervenors from presenting testimony challenging the very same evidence the Attorney Examiners allowed AEP Ohio to present by denying the Motion In Limine. At a minimum, in order to make the presentation of evidence just, reasonable, and not one-sided, the Attorney Examiners should have deferred the testimony of AEP Ohio witnesses Horner, Fry, Buser, and Lafayette to Phase II as they did with certain intervenor witnesses' testimony. However, the Attorney Examiners did not, thereby prejudicing Kroger and certain other intervenors.[79] Accordingly, Kroger requests that the Commission reconsider the Attorney Examiners' decision and hold such testimony in abeyance until Phase II.

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[78] *Turning Point*, Opinion and Order at 25-27 (January 9, 2013).

[79] *See also* the oral motions to strike made on the record for AEP Ohio witnesses Buser, LaFayette, Horner, and Fry, as well as motion to strike portions of the testimony of AEP Ohio witnesses Allen, Ali, Torpey, and Bletzacker; OPAE witness Rinebolt; and MAREC witness Burcat, all of which were denied by the Attorney Examiners.

2. The Attorney Examiners Erred When They Granted AEP Ohio's Motion To Strike/Defer Certain Intervenor Witness Testimony, Thereby Unjustly And Unreasonably Precluding Kroger From Challenging Completely AEP Ohio's Claimed Justification Of Need.

By way of its Motion To Strike/Defer, AEP Ohio essentially asked the Commission to "issue a finding of need for at least 900 MW of economically beneficial renewable energy projects"[80] relying upon purported "economic benefits," "lower energy costs," and "customer desires," without hearing or considering Kroger witness Bieber's or any other witnesses' challenges and rebuttals to those purported and inflated "economic benefits," "lower energy costs," or "customer desires." Such a one-sided presentation of evidence is unjust, unreasonable, and contrary to the law, as well as fundamentally unfair and prejudicial. Yet, the Attorney Examiners erroneously granted AEP Ohio's Motion, thereby providing a clear path to a one-sided presentation of evidence. Such a ruling was also unjust, unreasonable, prejudicial, and contrary to Ohio law.

It is well-established Ohio law that if a party presents evidence and testimony about particular issues that party has opened the door for opposing parties to present evidence and testimony in response.[81] Here, in the January 14, 2019 Entry, the Attorney Examiners acknowledged the "opened the door" arguments made by certain intervenors and did not find that those arguments were inapplicable or distinguishable.[82] Nor did the Attorney Examiners disagree that AEP Ohio "opened the door" to this testimony in response. Moreover, the Attorney Examiners failed to even specifically address or consider Kroger's arguments relating to Mr. Bieber's

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80 S*ee* Company Ex. 3, Allen Direct Testimony in Forecast Case at 4 (emphasis added).

81 *See, e.g., Sheets v. Norfolk S. Corp.*, 109 Ohio App.3d 278, 286 (3rd District 1996) (holding that based on the totality of the opening statement and trial testimony, "defendants clearly opened the door" to competing evidence and testimony); *see also State v. Johnson*, 2003-Ohio-3241, ¶ 33 (holding that "[h]aving opened the door, the defense waived any right to object to the admission of the witness' testimony regarding those photos on redirect.") (in criminal context).

82 Entry at 5-6 (January 14, 2019).

testimony.[83] Instead, without any stated rationale or good cause, the Attorney Examiners simply granted AEP Ohio's Motion To Strike/Defer, deferring portions of Mr. Bieber's testimony, as well as the testimony of certain other witnesses, to Phase II of the proceeding.[84]

Yet, by denying the Motion In Limine (as discussed above) and allowing AEP Ohio to present purported evidence of economic impact and customer surveys, the Attorney Examiners expressly allowed AEP Ohio to open the door to these issues by relying upon them to justify need. But then, that same Entry erroneously granted AEP Ohio's Motion To Strike/Defer, effectively shutting the door before opposing parties had the opportunity to rebut those justifications and offer their own contradictory testimony. Simply stated, Kroger, and the other parties, were entitled to challenge AEP Ohio's attempts to establish need through the consideration of these factors unrelated to the statutorily required "resource planning projections."[85]

Accordingly, by way of their January 14, 2019 Entry, the Attorney Examiners let AEP Ohio "have it both ways" – present its purported justifications of need beyond the express terms of the statute while preventing Kroger (and other parties) from fully challenging those justifications of need. As such, the Attorney Examiners erred in granting AEP Ohio's request to defer certain testimony to Phase II. At a minimum, in order to make the presentation of evidence just and reasonable, the Attorney Examiners should have deferred the testimony of AEP Ohio witnesses Horner, Fry, Buser, and Lafayette to Phase II as well. However, the Attorney Examiners did not, thereby prejudicing Kroger and certain other intervenors. Kroger, therefore, seeks reconsideration of the scope of the evidence admitted into the record.

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83 *Id*.

84 *Id*. at 8.

85 The ruling denying Kroger's oral motion for reconsideration regarding deferring portions of Mr. Bieber's testimony to Phase II made on the record at the hearing likewise was unjust, unreasonable, and prejudicial. *See* Tr. Vol. VIII at 2225-2236.

3. The Attorney Examiners Erred In Making Inconsistent Rulings And Modifying The Scope Of The Hearing Midway Through, Creating A Proceeding That Was Unjust, Unreasonable, Prejudicial, And Contrary To Ohio Law.

"In all cases before the Commission, whether they be Commission initiated investigations or based on an application or complaint, it is in the public interest for the Commission to base its decisions on as full and complete a record as possible."[86] Prejudicial evidentiary hearings constitute an abuse of discretion and are reversible error. "The record is inadequate in that it is one sided."[87] Yet, that is precisely what happened here. Far from being a full, complete and adequate record,[88] the evidentiary rulings were inconsistent and almost exclusively one-sided in favor of AEP Ohio. The evidentiary rulings were in error and should be reversed.

Specifically, as set forth above, an Entry was issued on January 14, 2019 in which AEP Ohio was allowed to present testimony and evidence regarding economic benefits and impacts, as well as customer wants or desires; however, opposing intervenors were simultaneously denied the opportunity to present all of their evidence challenging those benefits and impacts and the customer wants or desires.[89] Instead, the opposing evidence was deferred to Phase II, thereby

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[86] *In the Matter of the Application of Columbus & Southern Ohio Elec. Co. for Auth. to Amend & to Increase Certain of Its Rates & Charges for Elec. Serv.. in the Matter of the Application of Columbus & Southern Ohio Elec. Co. for Auth. to Amend & to Increase Certain of Its Rates & Charges for Elec. Serv. in Various Municipalities in Franklin Cty., Ohio.*, 1976 WL 408123, *2, Case No. 74-760-EL-AIR, Interim Order (May 27, 1976).

[87] *In the Matter of the Investigation of Supply of Nat. Gas Within the State of Ohio.*, 1974 WL 383956, *1, Case No. 71-757-G, Entry Pursuant To Section 4903.10 Revised Code (June 17, 1974); *see also State v. Pettit*, 4th Dist. Vinton No. 99CA529, 2000 WL 897993, *1 (Finding the trial court "abused its discretion and denied Defendant-Appellant her right to due process and a fair trial under U.S. Const. amend. XIV and Ohio Const. art. I, § 10 when it repeatedly made evidentiary rulings that were contrary to the Rules of Evidence, that were entirely one-sided in favor of the prosecution…"); *Jennings v. Thomas Mfg. Co.*, 4 Ohio Law Abs. 276 (Ohio 1925) (Holding that the trial court "erred in giving a onesided resume of the evidence in its charge.").

[88] Indeed, it appeared that the first time there was a concern about a full, complete and accurate record was in the context of allowing AEP Ohio to present improper rebuttal testimony over the objection of several intervenors. *See* Tr. Vol. X, at 2673; *see also* Section IV(B)(4) below.

[89] Entry at 8 (January 14, 2019).

precluding the opposing intervenors from fully challenging AEP Ohio's alleged justifications of need heard during the Phase I hearing.[90]

On January 15, 2019, the first day of the evidentiary hearing, the Attorney Examiners offered some clarity to their January 14, 2019 Entry:

> I think it would be helpful to everyone to provide a little bit of clarity of the ruling that was issued yesterday. To the extent that parties are seeking to question the Company's witnesses about the case and Mr. Torpey's testimony for the economic analysis that was presented there **with respect to a need for a generic 900 megawatts of unspecified projects, those questions will be permitted generally**, subject to other objections, of course.
>
> **To the extent you are trying to get at specific projects that have been proposed in the – that will be addressed in the second phase of this case as proposed by the Company, the intention there was to defer those issues to the second phase**.[91]

In other words, evidence and questioning about the generic 900 MW of unspecified projects were permitted, but evidence and questioning about the specific Highland Solar and Willowbrook Solar projects in the Tariff Cases were deferred to Phase II.

While Kroger contends that the January 14, 2019 Entry was unlawful, unjust, unreasonable, and prejudicial, the hearing continued largely consistent with this clarification for the first four days of hearing. Specifically:

- Opposing intervenors could **not** cross-examine AEP Ohio witness Allen regarding the overstated economic benefits, unrelated economic benefits, or the understated costs of the specific projects, Highland Solar and Willowbrook Solar;
- Opposing intervenors could **not** cross-examine AEP Ohio witness Ali regarding the overstated economic benefits, unrelated economic benefits, or the understated costs of the specific projects, Highland Solar and Willowbrook Solar;

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90 *Id*.

91 Tr. Vol. I at 62 (emphasis added).

- Opposing intervenors could **not** cross-examine AEP Ohio witness Horner regarding the overstated economic benefits, unrelated economic benefits, or the understated costs of the specific projects, Highland Solar and Willowbrook Solar;

- Opposing intervenors could **not** cross-examine AEP Ohio witness Fry regarding the overstated economic benefits, unrelated economic benefits, or the understated costs of the specific projects, Highland Solar and Willowbrook Solar;

- Opposing intervenors could **not** cross-examine AEP Ohio witness Bletzacker regarding the overstated economic benefits, unrelated economic benefits, or the understated costs of the specific projects, Highland Solar and Willowbrook Solar;

- Opposing intervenors could **not** cross-examine supporting intervenor Sierra Club witness Goggin regarding the overstated economic benefits, unrelated economic benefits, or the understated costs of the specific projects, Highland Solar and Willowbrook Solar; and

- Opposing intervenors could **not** cross-examine supporting intervenor NRDC witness Stebbins regarding the overstated economic benefits, unrelated economic benefits, or the understated costs of the specific projects, Highland Solar and Willowbrook Solar.

In total, seven witnesses testified under the clarification provided on January 15, 2019, and thus, no substantive questioning of the specific projects was allowed – even though several AEP Ohio witnesses conceded that their testimony was based, in part, on the specifics and assumptions related to the Highland Solar and Willowbrook Solar projects.[92]

Likewise, in opposing Kroger's motion to strike part of Sierra Club witness Goggin's testimony regarding the economic benefits, Sierra Club's counsel argued that Mr. Goggin is only testifying about the "generic benefits of economic development and not specific projects. You'll note there is no reference to any specific projects that have been proposed by the utility in this case; and so it's clearly something the Commission can consider . . ."[93]

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92 *See*, e.g., Tr. Vol. II at 440, 465, 475, 488-489; Tr. Vol. IV at 1064-1065, 1103-1104.

93 Tr. Vol. IV at 887; *see also* Tr. Vol. IV at 996 (Consistent with the Attorney Examiner's ruling, NRDC withdrew portions of Ms. Stebbins testimony related to the specific Highland Solar and Willowbrook Solar project and voluntarily deferred that testimony to Phase II).

Then, the hearing came to AEP Ohio's final two witnesses, Drs. Buser and LaFayette. The direct testimonies of Drs. Buser and LaFayette were filed in the Tariff Cases, not in the Forecast Case, and thus, should clearly have been part of Phase II.[94] Moreover, Dr. Buser conceded that his testimony was based upon the specific projects deferred to Phase II:

> The purpose of my testimony is to provide a summary of an economic impact study ("the Study") that I co-authored with Bill LaFayette. The primary focus of the Study is the potential economic impact for plans to construct and maintain **two sources of alternative energy that are referred to, respectively, as Highland Solar and Willowbrook Solar**.[95]

Dr. LaFayette made a similar concession:

> The purpose of my testimony is to provide a summary of the model and data analysis employed in the economic impact study (the Study) developed to address the potential economic impacts of the **two renewable energy projects proposed by AEP Ohio in this filing**.[96]

Even the Study that Drs. Buser and LaFayette developed was limited to the specific projects at issue in the Tariff Cases at specific locations in Ohio:

> AEP Ohio has been pursuing that goal and currently has a proposal for **approval of two solar energy projects that have resulted from competitive RFPs**. These plants are proposed for installation in two rural locations in Southern Ohio . . . These projects [Highland Solar and Willowbrook Solar] would begin delivering power at the end of 2021.
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> The **purpose of this report is to document the construction and operation impacts of these two projects on the Ohio economy**.[97]

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94 *See*, e.g., Company Ex. 12, Buser Direct Testimony in Tariff Cases; Company Ex. 13, LaFayette Direct Testimony in Tariff Cases.

95 Company Ex. 12, Buser Direct Testimony in Tariff Cases at 2 (emphasis added).

96 Company Ex. 13, LaFayette Direct Testimony in Tariff Cases at 2 (emphasis added).

97 AEP Ohio Exs. 12 and 13 at Ex. SB/BL-1 at 6 (emphasis added).

Clearly, it is undisputed that the testimony of Drs. Buser and LaFayette relate to the specific projects at specific locations. To be consistent with the January 14, 2019 Entry, the Attorney Examiners' clarification of that Entry on the first day of hearing, and the law of the case, the testimonies of Drs. Buser and LaFayette, as well as their Study, should have been deferred to Phase II.

Over the objection of intervenors, without justification and in direct contravention of the law of the case thus far, the Attorney Examiners reversed course and allowed AEP Ohio to present the testimony of these two witnesses regarding the specific Highland Solar and Willowbrook Solar projects:

> After a great deal of discussion and some debate, considering all the arguments of the parties, the Bench has determined that your motion to strike the testimony of Mr. Buser and Mr. LaFayette are denied based primarily on the arguments raised by AEP Ohio and consistent with the January 14 Entry.[98]

However, that ruling was not consistent with the January 14 Entry and the clarification of that Entry provided on the first day of hearing. As to the arguments by AEP Ohio, it primarily argued that Drs. Buser and LaFayette were not testifying about the specific terms of the REPAs for the specific projects, and thus it was allowed.[99]

The inconsistent and erroneous rulings did not end there. Because the Attorney Examiners relied upon AEP Ohio's argument that Drs. Buser and LaFayette were not testifying about the specific terms of the REPAs in allowing their testimony in Phase I, Kroger and others moved to strike page 5, lines 13 through 23 of Dr. LaFayette's direct testimony in which he testified about a **specific contractual provision in the Hecate (Highland) Solar REPA relating to an additional**

[98] Tr. Vol. IV at 1077-1078.

[99] Tr. Vol. IV at 1071-1074.

commitment for full-time permanent jobs.[100] Notwithstanding that this clearly should have been deferred to Phase II under both of the rulings regarding the scope of the hearing, including the most recent iteration, it was not. Instead, Kroger's motion to strike was unreasonably denied, and Dr. LaFayette's testimony about specific terms of the REPAs was allowed.[101]

The inconsistent evidentiary rulings violate the well-established law-of-the-case doctrine under Ohio law applied to promote "consistent decision-making within a case."[102] Thus, the evidentiary rulings were in error and should be reversed. Indeed, the prejudice to the opposing intervenors cannot be understated. As argued at the hearing:

> [T]he testimony that's being submitted by the Company here is purporting to create a record on the benefits of these specific projects to the State of Ohio. OCC and other intervenors sought to include testimony about the costs of those exact same projects, so we're getting a one-sided record where all the benefits that the Company is claiming are in the record, and the various costs that would offset some of those benefits that all the other parties are trying to put in, we're getting told no, no, that comes in Phase II.[103]
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> * * * *
>
> Your Honor, this goes to my issue of prejudice. We are now, again, inserting evidence that there are benefits from the REPAs specifically not from a generic economic development perspective. Ms. Blend just said we [AEP Ohio] want to put in the record there are additional benefits from these specific Willowbrook and Highland REPAs. I have not been allowed to put into evidence the cost of those REPAs . . . It is prejudicial to the ruling this Bench has

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[100] Tr. Vol. IV at 1129-1133.

[101] *Id*. at 1133. In addition, the Attorney Examiners erred in allowing supporting intervenor OPAE witness Rinebolt to testify about the purported benefits of the specific projects, but not allowing the opposing intervenors to develop a record on the actual costs and overstated benefits of the specific projects. *See* Tr. Vol. V, at 1432-1434.

[102] *See State ex rel. Cleveland v. Astrab*, 139 Ohio St.3d 445, 2014-Ohio-2380, 12 N.E.3d 1197, ¶ 21 (2014), citing *Nolan v. Nolan,* 11 Ohio St.3d 1, 3–4, 462 N.E.2d 410 (1984) (citations omitted). While this longstanding doctrine is usually cited in the context of a remand to a trial court from the appellate court, there is nothing precluding its application to the rulings within an administrative hearing. "The doctrine is necessary to ensure consistency of results in a case . . ." *Id*.

[103] Tr. Vol. IV at 1076.

> already made, telling OCC and other intervenors that they have to reserve that portion of their testimony to Phase II.[104]

The one-sided presentation of evidence and the inconsistent rulings are unjust, unreasonable, prejudicial and contrary to Ohio law. As such, the Commission should find the Attorney Examiners erred in these evidentiary rulings, and as a result, the Commission should not consider the testimony of AEP Ohio witnesses Horner, Fry, Buser and LaFayette in rendering its decision in Phase I.

4. The Attorney Examiners Erred In Granting AEP Ohio's Request To File And Present Rebuttal Testimony.

On September 19, 2018, AEP Ohio filed the direct testimony of Kamran Ali.[105] On January 16, 2019, Mr. Ali then testified during Phase I of the hearing, at which time he was cross-examined on his direct testimony by Ohio Energy Group; OCC; IGS; OMAEG; Kroger; OCA; and IEU.[106] But then, on February 1, 2019, more than two weeks later, AEP Ohio requested to file rebuttal testimony for Mr. Ali "on the narrow issue of whether Dr.[sic] Ali's generic LMP analysis performed in May 2018 is affected or changes as a result of the specific Highland solar farm project now interconnecting to the Dayton Power & Light Stuart-Clinton 345 kV line."[107] As AEP Ohio affirmatively conceded in its request, it was aware of the deficiency in Mr. Ali's testimony (at least) as of October 2018 (and should have been aware before submitting Mr. Ali's testimony in September 2018), but chose not to supplement his direct testimony until after Mr. Ali had been cross-examined by the opposing Intervenors.[108] After brief oral arguments by some of the

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104 *Id*. at 1131-32.

105 *See* Company Ex. 5, AEP Ohio witness Ali Direct Testimony.

106 Tr. Vol. II at 402-528.

107 Tr. Vol. X at 2660.

108 *Id.* at 2660-2661.

parties,[109] AEP Ohio's request for rebuttal testimony was granted.[110] This oral ruling made at hearing is appropriate for inclusion in the initial brief under Ohio Adm. Code 4901-1-15(F).

The evidentiary ruling granting this request was in error. Indeed, AEP Ohio admitted at the hearing that it was aware of Mr. Ali's error months before he took the stand on January 16, 2019, but AEP Ohio simply chose not to correct it, presumably hoping that the opposing intervenors would overlook the error until it became clear from the cross-examination of Mr. Ali that the error in his testimony did not go undetected. Mr. Ali confirmed this again when he re-took the stand on February 8, 2019, acknowledging "most certainly" that he had been aware, "since sometime in October" that one of his assumptions was incorrect as the interconnection of the solar project would be on the Stuart-Clinton 345 kV line on Dayton Power and Light Company's system, not AEP Ohio's system.[111] Nevertheless, Mr. Ali chose not to make any changes to his direct testimony when he testified on January 16, 2019.[112]

AEP Ohio's request is inconsistent with the purpose of presenting pre-filed testimony. Here, there is no dispute that (a) Mr. Ali filed direct testimony; (b) Mr. Ali then realized his direct testimony was no longer accurate; (c) Mr. Ali decided not to correct his direct testimony; and then (d) opposing intervenors recognized the inaccuracies of his testimony and assumptions when he had the opportunity to do so and cross-examined him on it. To the extent Mr. Ali's testimony was undermined on cross-examination, AEP Ohio must live with that result, as it had the chance to present re-direct testimony on January 16, 2019. AEP Ohio should not be given a second bite at the apple because they were exposed by opposing counsel, if for no other reason than the disastrous

[109] *Id*. at 2660-75.

[110] *Id*. at 2675-76.

[111] Tr. Vol. XII at 2757.

[112] Tr. Vol. II at 403-404.

precedent such a ruling would create. If the evidentiary ruling is permitted to stand, any party will know that, in the event of damaging cross-examination, they will be permitted to file rebuttal testimony to clean up their damaged testimony, no matter how avoidable the damaging testimony was. Such a process would not only be wildly inefficient, it also would be patently prejudicial to the opposing parties in that proceeding, effectively mooting the purpose and usefulness of cross-examination.

The fact is, AEP Ohio sought a do-over, not a rebuttal, and reversing the evidentiary ruling will serve justice in this case and preserve the integrity of rebuttal testimony and the Commission's process. As the Supreme Court of Ohio has explained, rebuttal evidence is "given to explain, refute, or disprove **new facts introduced into evidence by the adverse party**; **it becomes relevant only to challenge the evidence offered by the opponent**, and its scope is limited by such evidence."[113] By AEP Ohio and Mr. Ali's own admissions, the requested testimony was not proper rebuttal evidence: it was not a "new fact[] introduced into evidence by the adverse party," it was something of which Mr. Ali had been aware since October 2018. AEP Ohio should be permitted to challenge new evidence offered by the opposing intervenors, but it should not be given additional opportunities to clear the record after damaging cross-examinations by opposing intervenors. Needless to say, no other parties were given similar do-overs during Phase I of the hearing; all of the other witnesses had to live with their testimony. As such, Kroger requests that the Commission find that the evidentiary ruling granting "rebuttal" testimony was in error and that the Commission not consider Mr. Ali's February 1, 2019 filed "rebuttal" testimony or Mr. Ali's February 8, 2019 live "rebuttal" testimony in rendering its decision in this proceeding.

[113] *State v. McNeill*, 83 Ohio St.3d 438, 1998-Ohio-293, 700 N.E.2d 596 (1998) (emphasis added).

C. AEP Ohio Cannot As A Matter Of Law And Undisputed Fact Establish "Need" For Renewable Generation Projects As Required By R.C. 4928.143(B)(2)(c) To Overcome The Mandate Against Utility-Owned Generation.

On October 22, 2018, the Commission limited the scope of this Phase I hearing to a determination of AEP Ohio's "need" under R.C. 4928.143(B)(2)(c), noting that "[t]he Commission's rules…contemplate that the need for a proposed generating facility should generally be heard first as a distinct issue."[114] In doing so, the Commission set forth a clear legal roadmap for the parties, as the Commission recently addressed this exact issue for AEP Ohio in a factually analogous case, *In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters*, Case Nos. 10-501-EL-FOR et seq., known herein as the *Turning Point* case. In that case, the Commission narrowly defined "need" under R.C. 4928.143(B)(2)(c), tying it to resource planning projections submitted by AEP Ohio during the long-term forecast planning period. Simply put, if AEP Ohio could show that the projected supply was insufficient for the projected demand, then it had met its evidentiary showing for "need" under R.C. 4928.143(B)(2)(c). This was true in *Turning Point*, and it is true now.

Unfortunately, however, AEP Ohio wholly failed to meet this standard during the Phase I hearing, and in fact, admitted at the outset in its Amended LTFR that it could not meet this traditional standard for "need."[115] Because of those admissions, AEP Ohio spent the entirety of the hearing attempting to obfuscate the matter and prove "need" in unprecedented, and unlawful, ways. In a transparent effort to distract from the sole, straightforward purpose of Phase I of the hearing, AEP Ohio provided no evidence that the projected supply is insufficient for the projected

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[114] *See* Entry at 12 (October 22, 2018).

[115] *See* Company Ex. 2, Amended LTFR at 3 (AEP Ohio acknowledges that it is not "proposing through this filing that it has a traditional integrated resource planning (IRP) need for generation" and that the "wholesale markets are adequately supplying capacity and energy to the AEP Ohio load zone.").

demand, and instead overwhelmed the record with irrelevant and unrelated evidence regarding customer surveys and purported economic benefits and impacts. Because the Commission limited the scope of the Phase I hearing to the narrow issue of "need," and AEP Ohio failed to satisfy its burden, this proceeding should end here as a matter of law.

1. R.C. 4928.143(B)(2)(c) Is A Plain And Unambiguous Statute That Must Be Applied And Interpreted As Written.

Because AEP Ohio has put R.C. 4928.143(B)(2)(c) under scrutiny, the first place for the Commission to look in its analysis is the language of the statute. As the Supreme Court of Ohio has stated time and again, "[w]hen construing a statute, we first look to its plain language."[116] Additionally, "[w]e apply a statute as it is written when its meaning is unambiguous and definite."[117]

Such is the case here, as the General Assembly's direction in R.C. 4928.143(B)(2)(c) is unambiguous and definite: "no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility." The General Assembly further made it clear that those resource planning projections contained in the integrated resource plan must "give[] appropriate consideration to supply- and demand-side resources and transmission or distribution investments for meeting the person's projected demand and energy requirements."[118]

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[116] *In re Black Fork Wind Energy, L.L.C.*, 2018-Ohio-5206 at ¶ 17, citing *State v. Thomas*, 148 Ohio St.3d 248, 2016-Ohio-5567, 70 N.E.3d 496, ¶ 7.

[117] *Portage Cty. Bd. of Commrs. v. Akron,* 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 52, citing *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545, 660 N.E.2d 463.

[118] Ohio Adm. Code 4901:5-5-01(L).

In the absence of a definition of a word or phrase used in a statute, words are to be given their common, ordinary, and accepted meaning.[119] While the General Assembly's direction in R.C. 4928.143(B)(2)(c) is clear, it is true the word "need" is not defined within the statute. As a result, the word "need" is to be given its "common, ordinary, and accepted meaning." According to the Oxford Living English Dictionaries, the noun "need" has a straightforward definition: "[c]ircumstances in which something is necessary."[120] This definition is unsurprisingly consistent with the definition for the verb "need," which is: "[r]equire (something) because it is essential or very important rather than just desirable."[121] Of course, both of these definitions are materially different than the definition for "want," which is: "[h]ave a desire to possess or do (something)."[122]

Through this lens, it is clear what the General Assembly meant when they wrote "no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility." Applying the common, ordinary, and accepted meaning of "need," it is clear that the General Assembly intended to require utilities, like AEP Ohio, to submit resource planning projections to establish "circumstances in which something is necessary" – or, stated differently, utilities have to submit resource planning projections which would "require something because it is essential or very important rather than just desirable." In this instance, the "something" at issue is AEP Ohio's proposed generation facilities, which can be only "necessary" if the resource planning projections indicate as such (i.e., the projected supply is not sufficient to meet the

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[119] *State v. Black*, 142 Ohio St.3d 332, 2015-Ohio-513, 30 N.E.3d 918, ¶ 39 (2015), citing *Wachendorf v. Shaver,* 149 Ohio St. 231, 78 N.E.2d 370 (1948), paragraph five of the syllabus.

[120] *See Need*, Oxford Living Dictionaries, available at https://en.oxforddictionaries.com/definition/need (accessed March 4, 2019).

[121] *Id.*

[122] *See Want*, Oxford Living Dictionaries, available at https://en.oxforddictionaries.com/definition/want (accessed March 4, 2019).

projected demand). AEP Ohio admits that is not the case.[123] While there may be other factors to consider, such as customer preference and/or purported economic benefits, those factors are "just desirable," and therefore do not constitute a "need."

Despite what AEP Ohio may desire, the Commission "cannot ignore words of the statute, and **cannot supply words not included**."[124] The General Assembly chose not to insert any additional factors, including customer choice and purported economic benefits, into this threshold analysis, so the Commission may not add and consider them for AEP Ohio. Because the language of the statute is clear and unambiguous, the analysis need not go any further.[125] Here, in the LTFR that initiated this proceeding, AEP Ohio affirmatively conceded that "PJM wholesale markets are adequately supplying capacity and energy to the AEP Ohio load zone."[126]

2. This Case Falls Within The Four Corners Of Recent Commission Precedent, In Which The Commission Set Forth The Analysis For Determining "Need" Under R.C. 4928.143(B)(2)(c).

The sole legal issue underlying this hearing is not complicated, and it is not new. In fact, many of these same parties litigated what constitutes "need" under R.C. 4928.143(B)(2)(c) in *Turning Point* almost exactly six years ago. The Commission's approach was correct then, and there is no need to depart from its binding precedent now. While the Commission is capable of reversing its past precedent, the Supreme Court of Ohio has instructed the Commission to "respect its own precedents in its decisions to assure the predictability which is essential in all areas of the

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123 *See* Company Ex. 2, Amended LTFR at 3.

124 *E. Ohio Gas Co. v. Limbach*, 61 Ohio St.3d 363, 365, 575 N.E.2d 132, 134 (1991) (emphasis added).

125 Even if the Commission were tempted to review other authorities, it would find throughout Ohio law that resource planning projections consider whether the projected supply meets projected demands of customers. *See* R.C. 4935.04(C)(1) (referring to the "resource planning projections to meet demand"); Ohio Admin. 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").

126 Company Ex. 2, Amended LTFR at 3.

law, including administrative law."[127] There is no reason why the Commission should not heed the Ohio Supreme Court's instruction in this case.

In *Turning Point*, AEP Ohio's request concerned the "need" for renewable generating facilities (then, the Turning Point solar facility). For this determination, the Commission looked to the plain language of R.C. 4928.143(B)(2)(c):

> The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. **However, no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility.** Additionally, if a surcharge is authorized for a facility pursuant to plan approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.[128]

The Commission correctly held that "need" is to be determined by measuring supply versus demand, as reflected in the utility's resource planning projections.[129]

Now, only six years later, AEP Ohio has renewed its request from *Turning Point*, albeit for different renewable generating facilities (now, the Highland Solar and Willowbrook Solar projects

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[127] *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.,* 42 Ohio St.2d 403, 431, 330 N.E.2d 1 (1975), *superseded on other grounds by statute as recognized in Babbit v. Pub. Util. Comm.,* 59 Ohio St.2d 81, 89, 391 N.E.2d 1376 (1979); *see also Indus. Commission of Ohio v. Brown*, 92 Ohio St. 309, 311, 110 N.E. 744, 745 (1915) ("Administrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously, and is not to be disregarded and set aside unless judicial construction makes it imperative so to do.").

[128] *Id.* (emphasis added).

[129] *See Turning Point*, Opinion and Order at 25-27 (January 9, 2013).

and/or a generic 900 MW of renewable generation). The subject of the request has changed, but the law has not changed, and the Commission's interpretation of R.C. 4928.143(B)(2)(c) has not changed. As a result, the legal analysis is the same – there is no reason for the Commission to depart from the four corners of *Turning Point* when it analyzes AEP Ohio's more recent request.

Against this backdrop, AEP Ohio's goal for this Phase I hearing was quite simple: it had to demonstrate through its Amended LTFR that the projected supply was insufficient for the projected demand. However, none of AEP Ohio's eight witnesses submitted any such testimony. As Kroger witness Justin Bieber testified, "[g]iven that the Company has not demonstrated the requisite need based on resource planning projections or otherwise, the Commission should find that AEP Ohio has not demonstrated a need for at least 900 MW of renewable generation."[130] Specifically, Mr. Bieber testified that "demand for electricity in Ohio is already being adequately met with existing resources, and, therefore, no need for the specified facilities (or a general need for 900 MW of renewable generation) exists."[131] After reviewing AEP Ohio's Amended LTFR, Mr. Bieber confirmed that the LTFR "does not even seek a need finding for any specific projects … without a demonstration in the LTFR that the two specific projects are necessary to meet demand, peak load, or reserves, the requisite need showing cannot be satisfied."[132]

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130 *See* Kroger Ex. 4, Bieber Direct Testimony at 26.

131 *Id. at 5.*

132 *Id.* at 12.

Mr. Bieber was not alone in his convictions, as witness after witness confirmed that AEP Ohio's Amended LTFR failed to demonstrate "need."[133] Most notably, Staff witness Timothy Benedict testified, on cross examination and in his direct testimony, that Staff reviewed AEP Ohio's Amended LTRF and found, "based on a plain and ordinary reading of the statutory language," "that [AEP Ohio] has not demonstrated a need to construct any additional resources at this time."[134] Six years later, given the facts of AEP Ohio's newest request, Staff determined this case is not even as close as *Turning Point*, and is arguing that AEP Ohio has **not** demonstrated "need."

On the other hand, instead of offering testimony in support of "need," AEP Ohio's witnesses (and the witnesses of supporting intervenors) either focused on other irrelevant topics, *see infra*, or affirmatively conceded that there is no "need for the facility based on resource

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[133] *See* Kroger Ex. 4, Bieber Direct Testimony at 5 ("The Commission should find that AEP Ohio has not demonstrated that there is a general need for at least 900 MW of new, renewable generation in the state of Ohio…"); *see also* Staff Ex. 1, Siegfried Direct Testimony at 4 ("I am simply confirming the Company's conclusion that it does not need the additional 900 MWs of renewable projects to comply in the near term with Ohio's RPS."); Staff Ex. 2, Benedict Direct Testimony at 8 (AEP Ohio "has not demonstrated a need to construct any additional resources at this time."); OCC Ex. 18, Lesser Direct Testimony at 6 ("The PUCO should find that AEP Ohio has not demonstrated that its customers need their utility to build 900 MW of generation generally or renewable generation specifically."); OCC Ex. 25, Sioshansi Direct Testimony at 7 ("AEP Ohio has failed to demonstrate, in regard to its proposed projects, that customers' generation needs cannot be met in the competitive market."); OMAEG Ex. 16, Seryak Direct Testimony at 5 ("I conclude that AEP Ohio has not demonstrated a resource planning need, or any other need, that would satisfy Ohio law and justify establishing a cost and crediting mechanism via RGR for the proposed 900 MW of renewable energy projects in Ohio or for the two specific solar projects."); OCA Ex. 2, Brown Direct Testimony at 4 ("AEP Ohio does not need Hecate and Willowbrook based on resource planning projections. Therefore, the RGR does not meet the 'need' requirement of the Electric Security Plan statute."); OCA Ex. 3, Medine Direct Testimony at 3 ("AEP Ohio did not demonstrate a 'need' for these projects."); IGS Ex. 10, Haugen Direct Testimony at 2-3 ("The purpose of my testimony is to recommend that the Commission find that [AEP Ohio] has not demonstrated a need to own or operate 900 [MW] of renewable generation resources including the two solar power purchase agreements."); IGS Ex. 11, White Direct Testimony at 14 ("While AEP may want to have all customers cover its costs to build solar projects, by any standard, AEP has not established a need to require all customers to pay for 400 MW of solar generation."); Direct Energy Ex. 2, Lacey Direct Testimony at 15 ("Instead of demonstrating 'need,' AEP Ohio has presented a case based on consumer 'wants,' and its analysis supporting consumer 'wants' is very weak. AEP Ohio claims that customers 'need' low cost energy and that customers are 'demanding' renewable energy. These consumer desires do not reflect a resource 'need.'").

[134] *See* Tr. Vol. VIII at 2347; *see also* Staff Ex. 2, Benedict Direct Testimony at 8.

planning projections."[135] Of course, these witnesses could reach no other conclusion, as **AEP Ohio's Amended LTFR affirmatively concedes that "PJM wholesale markets are adequately supplying capacity and energy to the AEP Ohio load zone."**[136] Under the existing law and binding Commission precedent, this concession alone is fatal to AEP Ohio's legal position. If sufficient energy and capacity exists to meet customer demand, there is no "need." AEP Ohio failed to demonstrate "need" in *Turning Point*, and it failed to do so again here.

3. The Motion For A Directed Verdict At The Close Of AEP Ohio's Case-In-Chief Should Have Been Granted.

On January 23, 2019, AEP Ohio officially rested its case-in-chief.[137] Immediately thereafter, certain intervenors – including Kroger – moved for a directed verdict, on the basis that AEP Ohio "failed to demonstrate on the record that … there is a need for these facilities."[138] AEP Ohio opposed the motion, along with certain other intervenors. The motion was summarily denied without any explanation.[139] Based on the above law, combined with the undisputed factual record before the Commission, the denial constitutes reversible error.

Ohio Rule of Civil Procedure 50(A)(4) sets forth the standard for motions for directed verdict:

> When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is

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[135] *See* Company Ex. 3, Allen Direct Testimony in Forecast Case at 8; Tr. Vol. I at 70-71, 131; Tr. Vol. II at 428, 462; Tr. Vol. III at 566-567, 641; Tr. Vol. IV at 920, 1022-1024; Tr. Vol. V at 1382; Tr. Vol. VIII at 2045.

[136] *See* Company Ex. 2, Amended LTFR at 3 (emphasis added).

[137] *See* Tr. Vol. VI at 1577 ("Mr. Darr: At this point has the Company rested its case-in-chief? Mr. Nourse: Yes.")

[138] *Id.* at 1575-1581.

[139] *Id.*

> adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

The Supreme Court of Ohio has provided guidance on such motions:

> When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.[140]

Additionally, in *Wagner v. Roche Laboratories* (1996), 77 Ohio St.3d 116, 671 N.E.2d 252, the Supreme Court of Ohio stated, "'[w]hen a motion for a directed verdict is entered, what is being tested is a question of law, that is, the legal sufficiency of the evidence to take the case to the [factfinder]. This does not involve weighing the evidence or trying the credibility of witnesses.'"[141] Finally, "[b]ecause a motion for a directed verdict presents a question of law, appellate review of a trial court's decision on the motion is de novo."[142]

As set forth above, the sole question underlying the Phase I hearing was whether AEP Ohio could demonstrate "need," by demonstrating through its resource planning projections that the projected energy and capacity were insufficient to meet the projected demand, as required by R.C. 4928.143(B)(2)(c). For purposes of the intervenors' motion for directed verdict, the sole legal question was to test the legal sufficiency of AEP Ohio's evidence in support of the requisite "need." Because AEP Ohio produced zero testimony, and zero documentary evidence, that demonstrated that the projected energy and capacity were insufficient to meet the projected

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[140] *Wagner v. Midwestern Indem. Co.*, 83 Ohio St.3d 287, 1998-Ohio-111, 699 N.E.2d 507 (1998).

[141] *Id.* at 119, 671 N.E.2d at 255, quoting *Ruta v. Breckenridge–Remy Co.* (1982), 69 Ohio St.2d 66, 68–69, 23 O.O.3d 115, 116–117, 430 N.E.2d 935, 938.

[142] *Bennett v. Admir., Ohio Bur. of Workers' Comp.*, 134 Ohio St.3d 329, 2012-Ohio-5639, 982 N.E.2d 666, ¶ 14 (2012).

demand – and in fact only produced witnesses and documentary evidence that demonstrated otherwise – it was clear error for the directed verdict motion to be denied. As such, the Commission should reverse this legal ruling and grant directed verdict for the opposing intervenors and Staff.

4. AEP Ohio's Purported Economic Benefits And Customer Desires Are Irrelevant And Fatally Flawed.

Of course, AEP Ohio did provide several witnesses and documentary evidence in support of its Amended LTFR, and will surely argue that these witnesses and evidence are factored into the R.C. 4928.143(B)(2)(c) analysis. However, because AEP Ohio did not produce any evidence demonstrating that the projected energy and capacity were insufficient to meet the projected demand, as required by R.C. 4928.143(B)(2)(c), that argument is unavailing. In rejecting this argument, the Commission simply needs to point back to *Turning Point*.

The *Turning Point* decision is important not only for its recognition that "need" is tied to resource planning projections, but also for its rejection of AEP Ohio's argument that other factors are to be considered. This is not the first time AEP Ohio has tried to distract the Commission from the statutory scheme that the General Assembly created in R.C. 4928.143(B)(2)(c). The Commission did not fall for AEP Ohio's arguments six years ago, however, and it should not fall for them now. Instead, the Commission should again confirm that in discussing "need," the General Assembly chose **only** to tie it to "resource planning projections submitted by the electric distribution utility." As Staff correctly recognized, AEP Ohio wants the Commission to conflate "needs" with "wants," but that is improper.[143]

[143] Staff Ex. 2, Benedict Direct Testimony at 9-10.

In *Turning Point*, the Commission rejected arguments by AEP Ohio and others that "need" involves consideration of factors such as job creation and economic investment, and in fact confirmed that those factors are **only** to be considered **after** "need" has been determined: "[n]either can we find that the Turning Point provision of the stipulation benefits ratepayers and the public interest, given that there has been no demonstration of need for the Turning Point project."[144] This conclusion is appropriate, because it does not depart from the plain language of R.C. 4928.143(B)(2)(c). As a result, where (as here) a utility fails to demonstrate statutory need, any discussions of the purported public benefits are moot.

That said, if the Commission is tempted to consider AEP Ohio's evidence regarding purported economic benefits and customer desires as indicative of "need" under R.C. 4928.143(B)(2)(c) – which it should not – the Commission should quickly recognize that AEP Ohio's evidence is fatally flawed.

First of all, as discussed herein, AEP Ohio's hypothesis that the purported economic benefits of proposed monopoly generation can be considered as part of the R.C. 4928.143(B)(2)(c) analysis is fundamentally flawed. Economic benefits plainly do not factor into a determination of whether there is a resource planning need for additional generation, just as economic detriments (which AEP Ohio conveniently overlooked throughout the entirety of the Phase I hearing and which the opposing intervenors were not allowed to present during the Phase I hearing) would not either. Nevertheless, AEP Ohio witnesses Buser and LaFayette sponsored economic impact analyses that AEP Ohio contends support its position that there is a "need" for its proposed monopoly generation.[145] Of course, their testimony was based on the two specific projects which

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144 *See Turning Point*, Opinion and Order at 27 (January 9, 2013).

145 *See* Company Ex. 13, LaFayette Direct Testimony in the Tariff Cases; Company Ex. 12, Buser Direct Testimony in the Tariff Cases.

the opposing intervenors' witnesses were not allowed to evaluate, but even beyond that injustice Drs. Buser and LaFayette's testimony is deeply flawed to the point of being completely unreliable.

For example, Dr. Buser's testimony strayed far beyond any mathematical or statistical analysis which may have been appropriate, and instead claimed – without any justification – that AEP Ohio's proposed renewable energy projects would (a) improve gender imbalance in the energy sector workforce; (b) improve the standard of living for all Ohio citizens; (c) improve the public health of all Ohio citizens; and (d) help in the fight against Ohio's ongoing opioid epidemic.[146] As a finance professor, Dr. Buser is not an expert in any of these topics, and eventually conceded that in reaching such conclusions, he relied on published studies and other information over which he had no input and had not verified.[147] Most critically, Dr. Buser admitted that the benefits he foresees from AEP Ohio's proposed specific projects are actually completely independent of whether AEP Ohio's proposed projects are completed and whether AEP Ohio develops the renewable resources, completely destroying any probative value his conclusions may otherwise have had for AEP Ohio.[148]

On the other hand, while Dr. LaFayette testified to various economic benefits which may be incidental to the construction of AEP Ohio's projects, he conceded that "[t]hey just last as long as the construction project lasts."[149] Stated differently, Dr. LaFayette confirmed that, once the projects are built and operational, those economic benefits will no longer exist. That would not be a problem, except Dr. LaFayette also confirmed that the long-term, more permanent benefits he

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146 *See* Company Ex. 12, Buser Direct Testimony in the Tariff Cases at 6-10.

147 Tr. Vol. IV at 1102-1115.

148 *Id.* at 1087-1088 ("Q: … you would agree that the economic impact from the projects that get built without AEP would be the same as the projects that you have projected, correct? A: I would probably have to deliberate it a little longer, but my first response would be yes, that sounds reasonable, but I would have to double-check all the inputs.").

149 *Id.* at 1147.

identified would be "significantly less."[150] Regardless, Dr. LaFayette – like Dr. Buser – confirmed that the more "significant" construction benefits he foresees are also completely independent of AEP Ohio's involvement, once again destroying any probative value his testimony may otherwise have had for AEP Ohio.[151] By resting its legally unsupported theory of "need" on two experts who agree that the economic impact does not depend on AEP Ohio, AEP Ohio has failed to produce any favorable or probative evidence to support AEP Ohio's flawed R.C. 4928.143(B)(2)(c) analysis.

Beyond the testimony regarding the purported economic benefits, AEP Ohio also spent much of the Phase I hearing attempting to argue that customers desire utility development of renewable generation. However, that argument is based on a flawed and completely unreliable customer survey conducted by Navigant Consulting, Inc. ("Navigant"). AEP Ohio witness Allen admitted that the survey formed the basis for his testimony on customer preference,[152] but several witnesses testified that the survey was wholly incapable of supporting a claim of "need."[153] In

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150 *Id.*

151 *Id.* at 1149 ("Q: Now, isn't it true that the construction jobs you cited will be created regardless of whether AEP Ohio is an investor in either solar project? A: Correct. *** Q: And that's irregardless of whether AEP Ohio is involved as an investor. A: Correct.").

152 Tr. Vol. I at 204-05.

153 *See*, e.g., Kroger Ex. 4, Bieber Direct Testimony at 15 ("While certain customers that were surveyed may have expressed a desire for renewable energy, the survey results do not demonstrate a need based on resource planning projections. The survey conclusions include caveats, including that customers are supportive of competitively-priced renewable energy."); Staff Ex. 3, Benedict Direct Testimony at 9-10 ("Staff recognizes that customers increasingly have preferences about the resources from which their electricity is sourced, both environmental and otherwise. . . However, Staff believes that Ohio Power is conflating customer preferences with customer needs. The Company provides insufficient evidence that customer preferences are not being adequately met, even as these preferences increase and change over time."); OCC Ex. 24, Dormady Direct Testimony at 13 ("The Survey clearly suffers from framing bias, hypothetical bias, and social desirability bias. And, it very likely suffers from selection bias. Accordingly, the Survey is unreliable."); OCC Ex. 18, Lesser Direct Testimony at 88 ("The result of the survey should not be used as a basis to determine if AEP Ohio's customers do indeed support renewable energy and are willing to pay the full costs of renewable energy if offered. The survey suffers from inherent bias based on self-selection of respondents and poorly-designed questions.").

fact, one of the witnesses supporting the survey testified that the survey did not even attempt to determine how customer desires feed into the issue of customer need.[154]

In support of the Navigant survey, AEP Ohio submitted testimony of Trina Horner and Nicole Fry.[155] Under cross-examination by Kroger, Ms. Horner testified that while she was tasked with supervising the survey, she did not have any significant prior experience designing or implementing customer surveys.[156] Not surprisingly given her complete lack of experience with such surveys, Ms. Horner's testimony revealed some of the various shortcomings of the survey, including the fact that she "did not have in mind a specific number" which constituted a "statistically significant" survey size.[157] In that vein, Ms. Horner conceded that the "Voice of the Customer" ("VOC") Report only contained responses from 0.6% of AEP Ohio's residential non-PIPP customers, and Navigant received similarly low response rates for PIPP customers and commercial and industrial customers.[158] AEP Ohio failed to demonstrate how such a small sample size was sufficient to support its position that customers across Ohio "need" development of renewable generation.

Beyond the inexcusably small sample size, Ms. Horner's lack of experience resulted in a survey so poorly designed that no reasonable conclusions can be gleaned from it. For example, OCC witness Dormady (who himself is an expert on the use of survey methods of economic measurement[159]) testified extensively about the various implicit and explicit biases which plagued the survey, resulting in a reverse-engineered conclusion that AEP Ohio wanted the survey to

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154 Tr. Vol. III at 641.

155 See Company Ex. 6, Horner Direct Testimony; Company Ex. 10, Fry Direct Testimony.

156 *Id.* at 627-631.

157 *Id.* at 700.

158 *Id.* at 635-637.

159 *See* OCC Ex. 24, Dormady Direct Testimony at 2.

find.[160] Even where the survey allowed customers to provide subjective feedback, the survey results were manipulated to conceal or misrepresent customer comments and positions. For example, AEP Ohio admitted a document containing comments in response to the survey as Company Exhibit 7.[161] On Company Exhibit 7, responses are grouped into different categories, with responses coded as "Supportive," "Mixed," "Neutral/Unclear," and "Negative."[162] A review of these responses demonstrates that the survey contained flagrant coding errors that mark neutral and negative responses as "Supportive" and responses that are clearly hostile to AEP Ohio's proposal as "Mixed" or "Neutral/Unclear." For instance, the following comments that are hostile to AEP Ohio's proposal were subjectively coded as "Mixed:"

- "The survey is screaming that you want to go in front of the energy commission to ask for an increase in utility costs based on the fact to promote clean energy / renewable energy. In so many words you are looking for an excuse to raise rates and at the same time really produce nothing and invest nothing into renewable energy. Just to make bigger profit without any real change on your part. I know you will use my words to bite me in the butt in the long run by playing up some big campaign to dupe the energy commission to raise my rates under the falsehood that you are bending to the people's will of wanting renewable energy. You will state that this doesn't come without costs and you need to raise the rates. Just another "emperor's new clothes" rate increase by you. I wish that one time you would actually do what you claim you will do without raising our rates. However, I can see the writing on the wall. You will use this to get your rate increase and then do nothing."[163]

- "I do not feel the customer should pay for it."[164]

- "In the past, utilities rammed every suitable river for hydroelectric power. This is now recognized as a mistake. Much of the current growth in 'renewable' power is in solar power is large solar farms that are following

[160] *Id.* at 10-28.

[161] *See* Company Ex. 7.

[162] *See id*.

[163] *Id*. at 64.

[164] *Id.* at 54.

the same philosophy. This is the same short sighted mistake and I don't support making it."[165]

- "You pay for it yourself. You have fleeced your customers enough as it is. How about you do the right thing and treat your customers as partners. Customers benefit by reducing their expenses, and you benefit because customers are happier. Don't worry, you will still make enough money to survive."[166]

- "The technology has been available for many years. AEP deliberately fights and charges people for using renewable energy. I live in poverty and get charged an arm and a leg for energy costs. I honestly don't believe AEP gives a [BLANK] what we think, other than [sic] how can they gain knowledge to destroy the renewable energy movement. [BLANK] OFF."[167]

- "AEP should not force its coustumers [sic] to pay for its upgrades and investments. [BLANK] AEP CORP."[168]

Meanwhile, the comments below were subjectively coded as "Neutral/Unclear," despite expressing apparent opposition to AEP Ohio's proposal:

- "Please use my money more wisely."[169]

- "I am not in favor of anything that would increase my bill."[170]

- "Don't want to pay more."[171]

- "Do not invest in renewable energy unless it will reduce costs to consumers. I do not want to pay more for your renewable energy investment. Keep costs affordable for the poor."[172]

- "DON'T RAISE PRICES TO DO IT."[173]

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165 *Id.* at 58.

166 *Id.* at 70.

167 *Id.* at 73.

168 *Id.*

169 *Id.* at 89.

170 *Id.*

171 *Id.* at 91.

172 *Id.* at 92.

173 *Id.* at 95.

Finally, comments such as the ones below were coded as "Supportive" despite not appearing to support AEP Ohio's proposal or, at the very least, speaking to subjects that are unrelated to the proposal:

- "I'm sure it will cost me money, everything AEP does cost [sic] the customer money."[174]
- "Buy local is not just a slogan for the grocery store. Americans are looking at a lot of their purchases and asking: what is made here?"[175]
- "We're seeing catastrophic global events due to climate change. It's imperative we not kill ourselves. That is all."[176]
- "If you're going to create local jobs make it fair in the education of and hiring procedures for all races."[177]
- "Keep the public informed."[178]

In sum, the Phase I testimony confirmed that every decision behind the design and implementation of the Navigant survey was calculated to ensure the results AEP Ohio wanted, instead of presenting an accurate picture of how AEP Ohio's customers feel about certain topics. And, AEP Ohio customers caught onto this gamesmanship:

- "To the average AEP distribution customer, this survey conflates the role of the AEP utility with the (competitive) AEP power supplier. Is the provision of renewable energy only limited to the standard service offer, or would there be some mechanism at the utility level, such as a rider, which would apply to customers taking power through a competitive supplier? This survey does not feel "right" and is potentially misleading."[179]

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[174] *Id.* at 33.

[175] *Id.* at 38.

[176] *Id.* at 101.

[177] *Id.*

[178] *Id.*

[179] *Id*. at 87.

Of course, this was always AEP Ohio's intention, as AEP Ohio filed its LTFR in April 2018 before realizing that it would need to manufacture some documentation of "need" to support availing itself of the cost-recovery mechanism approved by the Commission in the ESP IV case.[180] As a result, it was not until mid-August of 2018 – four months later – that AEP Ohio began conducting the Navigant survey.[181] AEP Ohio filed its Amended LTFR one month later, having manipulated a phony survey in an attempt to bolster its case with regard to the statutory need that the Commission is required to determine under R.C. 4928.143(B)(2)(c).[182]

For these reasons, even if it were appropriate to consider such factors in the R.C. 4928.143(B)(2)(c) analysis – which it is not under the plain language of the statute and Commission precedent – it is clear that AEP Ohio has failed to provide any viable evidence in support.

5. Market Forces Will Continue To Increase The Positive Trajectory Of Renewable Generation In Ohio.

In its *Turning Point* decision, the Commission confirmed it was not against the development of renewable energy, and that there are appropriate ways for utilities to pursue projects like these:

> The Commission emphasizes that our decision is not intended to diminish the merits of the Turning Point project, or the importance of the RPS requirements of Section 4928.64, Revised Code. **We also stress that our finding that the signatory parties have not demonstrated a need for the Turning Point project does not preclude AEP-Ohio from pursuing the project through other appropriate means**, such as a long-term purchase power agreement. Considerable public testimony and written correspondence in support of the Turning Point project has been offered in these proceedings, and the Commission recognizes that

[180] *See* Tr. Vol. V at 1371.

[181] *See* Tr. Vol. III at 656.

[182] *See* Company Ex. 6, Horner Direct Testimony at Exhibit TH-1 at 5.

> the project may potentially provide numerous benefits, particularly for the project region, and that it is a worthwhile endeavor that AEP-Ohio should pursue. The Commission fully expects that AEP-Ohio will continue to develop the Turning Point project, and we encourage the Company to engage in efforts with EDUs, CRES providers, or other entities in the industry to enter into arrangements for the SRECs generated from the project.[183]

The same is still true here. As stated in the Introduction, *supra*, Kroger takes no issue with AEP Ohio's efforts to support the development and use of renewable energy in Ohio – to the contrary, Kroger encourages such efforts. But only when those efforts are lawful. As discussed, if AEP Ohio had simply sought to recover costs for the 900 MW of renewable generation projects at issue here on either a bypassable or voluntary basis, Kroger would have had no objection. Instead, in an attempt to thwart the competitive generation market, AEP Ohio sought to charge, on a **non-bypassable** basis, its 1.5 million captive customers, regardless of whether those customers shop and purchase generation through a CRES provider, for the development of at least 900 MW of renewable generation projects. Because this is directly contrary to Ohio policy, Ohio law, and Commission precedent, Kroger is compelled to object.

In the meantime, the Commission can rest assured that any "need" supposedly justified by demand will be met through means other than AEP Ohio's proposed charge to customers for the development of monopoly generation. Despite AEP Ohio's assumption that its speculative "needs" could not be met by the market, the reality remains that market forces will continue to increase the trajectory of renewable generation in Ohio.[184]

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[183] *See Turning Point*, Opinion and Order at 27 (January 9, 2013) (emphasis added).

[184] In fact, businesses are buying more renewable energy now than ever before from the competitive market and/or are installing their own renewable generation. *See*, e.g., OCC Ex. 17, Bloomberg "Business Are Buying More Power Than Ever Before"; OCC Ex. 21, "JPMorgan Chase to be 100 Percent Reliant on Renewable Energy by 2020; Announces $200 Billion Clean Energy Financing Commitment; OCC Ex. 22, "Corporate Social Responsibility, 2017 Report, Fifth Third Bancorp"; OCC Ex. 23, "Nationwide, partner investing nearly $100M in solar projects; Kroger Ex. 3, Sustainability Report.

In concluding that "[i]t is neither reasonable nor prudent to introduce a new generation cost obligation that customers will owe AEP Ohio[,]"[185] Kroger witness Bieber concluded that competitive forces will yield lower prices for customers:

> Competition among renewable developers in the market can yield lower prices for customers that chose to procure the renewable resources they desire to satisfy their energy needs through a CRES provider.
>
> It is particularly unreasonable and inappropriate to impose such a financial obligation on shopping customers, who have demonstrated their preference to procure their generation supplies through a competitive supplier other than AEP Ohio.[186]

Likewise, other witnesses testified that AEP Ohio's reliance upon purported economic benefits as justification of "need" actually provides no justification at all. The competitive market favors projects that are economically beneficial, so if these projects are as beneficial as AEP Ohio claims, the competitive market should support them or similar projects.[187] So, under AEP Ohio's own purported justification, there are two possible outcomes with regard to the alleged economic benefits of this proceeding, both of which support allowing the markets to operate without the type of interference AEP Ohio proposes: (1) the projects actually carry an economic benefit and would thus be favored by the competitive market without a non-bypassable charge to customers; or (2) the projects do not actually provide the benefits that AEP Ohio suggests, in which case there is no need for the projects under AEP Ohio's own argument for need.[188] If the proposed projects are truly economically beneficial for customers as AEP Ohio contends, then there should be no need to recover the costs through a non-bypassable rider.

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185 Kroger Ex. 4, Bieber Direct Testimony at 16.

186 *Id*.

187 OMAEG Ex. 16, Seryak Direct Testimony at 10.

188 *Id*. at 10-11.

Ample evidence in this case demonstrates that markets have already been acting to increase the amount of renewable generation in Ohio. On cross-examination, NRDC witness Stebbins admitted that, in her experience people who desire to obtain power through renewable generation have been able to purchase such generation from the market.[189] Ms. Stebbins further testified that Ohio has seen significant growth in the amount of wind and solar generation in the state's generation mix, even seeing a 40-percent increase between 2015 and 2017.[190] Moreover, there are already significant amounts of renewable generation that have either been approved by the Ohio Power Siting Board or are pending before that body.[191] Just in the past month, the Ohio Power Siting Board has approved a 125.1 MW wind farm in Paulding County, Ohio[192] and an amendment to a previously-issued certificate that now allows for 200 MW of solar generation in Brown County, Ohio.[193] Ohio Coal Association ("OCA") Exhibit 5 shows that there are additional such projects that have either been approved or are pending before the Ohio Power Siting Board.

Additionally, on cross-examination, AEP Ohio witness Allen revealed another way in which the market is meeting the needs and desires of customers who would like to use renewable generation. Mr. Allen admitted that CRES providers already offer "green products" to both commercial and residential customers who desire to be served with renewable energy.[194] Specifically, Mr. Allen agreed that the Commission's Apples to Apples website provides

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189 Tr. Vol. IV at 1034-35.

190 *Id*. at 1036-37.

191 *Id*. at 1039.

192 *See In the Matter of the Application of Paulding Wind Farm IV LLC for a Certificate of Environmental Compatibility and Public Need to Construct a Wind-Powered Electric Generation Facility in Paulding County, Ohio*, Case No. 18-91-EL-BGN, Opinion, Order, and Certificate at ¶ 1 (February 21, 2019).

193 *See In the Matter of the Application of Hillcrest Solar I, LLC for an Amendment to Its Certificate Issued in Case No. 17-1152-EL-BGN,* Order on Certificate at ¶¶ 1-3 (February 21, 2019).

194 Tr. Vol. I at 201-02.

customers with information regarding "green products" that are available to customers.[195] This is yet another example of market solutions emerging to meet needs and desires of customers, without the use of a non-bypassable charge to customers by an electric distribution utility. Mr. Allen further conceded that competition in the market generally will lead to lower prices being paid by customers.[196]

With new renewable generation being constructed and entering the market in Ohio every year and the many renewable product offerings by CRES providers, the market appears to be functioning as expected with regard to renewable generation. Thus, the Commission can be assured that any "need" supposedly justified by economic benefits and customer desires will be met through means other than AEP Ohio's unlawful proposed charge to customers for the development of monopoly generation.

V. CONCLUSION.

While Kroger is a long-time supporter of the development and use of renewable energy, it cannot stand idly by when a monopoly utility attempts to thwart the competitive generation market established in Ohio by S.B. 3 in 1999. Specifically, Ohio law prohibits a monopoly utility from owning power plants (and charging customers for those power plants) unless that utility can show that it meets the limited exception created under R.C. 4928.143(B)(2)(c). Before that limited exception can be invoked, the utility must make a threshold showing that there is "a need for the facility based on resource planning projections submitted by the electric distribution utility." AEP Ohio cannot make such a requisite showing as a matter of law and undisputed fact. As such, AEP Ohio's Amended LTFR is unlawful, and the Commission should rebuke AEP Ohio's request to

[195] *Id*. at 202; *see also* IEU Exs. 4-6.

[196] *Id*. at 230.

turn a blind eye to the clear statutory language and Commission precedent in an attempt to have all of AEP Ohio's customers foot the bill for generation resources that could, and should, be procured in the competitive market.

For the foregoing reasons, Kroger respectfully requests that the Commission apply the clear and unambiguous statutory language and follow its precedent in *Turning Point* and find that AEP Ohio failed to make the threshold requisite showing of "need" based upon resource planning projections as required by R.C. 4928.143(B)(2)(c). Accordingly, the Commission should conclude that the contemplated Phase II of these proceedings is unnecessary, thereby rejecting AEP Ohio's Amended LTFR, as well as the consolidated AEP Ohio's Tariff Cases Application because there can be no cost recovery for specific projects when there has been no demonstration of need as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all parties of record via electronic mail on March 6, 2019.

/s/ Angela Paul Whitfield_____
Angela Paul Whitfield

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Summary: Brief Initial Post-Hearing Brief Of The Kroger Co. electronically filed by Mrs. Angela Whitfield on behalf of The Kroger Co.