



## Table of Contents

|     |  |           |
|-----|--|-----------|
| I.  | INTRODUCTION .....   | 1         |
| II. | ARGUMENT .....   | 3         |
| A.  | <b>AEP Ohio’s Claim That the Determination of Need Under R.C. 4928.143(B)(2)(c) Does Not Require a Traditional Analysis of Need is Unsupported by Ohio Law, Commission Rules and Decisions, and the Industry Understanding of the IRP Process .....</b>  | <b>3</b>  |
| 1.  | To support a finding of need under the plain meaning of R.C. 4928.143(B)(2)(c) and as required by Commission rules, an EDU must demonstrate that a facility is needed based on resource planning projections .....   | 3         |
| 2.  | The Commission should reject the various arguments designed redefine “need” in R.C. 4928.143(B)(2)(c) since each is inconsistent with the plain meaning of the statute and is not supported by a sound reading of the applicable law .....   | 5         |
| a.  | <i>The plain meaning of “need based on resource planning projections” does not support the inclusion of desires of customers to secure renewable resources .....</i>   | <i>6</i>  |
| b.  | <i>The forced textual interpretations of R.C. 4935.04 and Rule 4902:5-5-06(B)(2) do not support the redefinition of “need” under R.C. 4928.143(B)(2)(c) to include desires of customers to secure renewable resources .....</i>  | <i>7</i>  |
| c.  | <i>The text of Rule 4901:5-5-06(B)(3) does not support the expansion of the definition of “need” under R.C. 4928.143(B)(2)(c) to include the desires of customers to secure renewable resources .....</i>  | <i>10</i> |
| d.  | <i>Additional rules of statutory construction and the limitations of what may be approved as a term of an ESP support a reading of “need based on resource planning projections” that does not include reference to customer interest in renewable generation urged by AEP Ohio and others .....</i> | <i>12</i> |
| e.  | <i>Policy considerations do not alter the legal requirement to find need based on resource planning projections .....</i>  | <i>15</i> |
| f.  | <i>Reliance on R.C. 4928.64 as a basis for redefining “need” is unwarranted since any charge associated with renewable resources under that section must be bypassable and the request in this case is not intended or needed to support state renewable energy requirements .....</i>               | <i>16</i> |

|             |   |           |
|-------------|---|-----------|
| <b>B.</b>   | <b>AEP Ohio Has Not Demonstrated a Need for 900 MWs of Renewable Generation Resources .....</b>   | <b>17</b> |
| 1.          | AEP Ohio concedes that the renewable resources for which it is seeking a finding of need are not needed to provide reliability or to meet renewable energy requirements.....  | 17        |
| 2.          | AEP Ohio's six claims regarding customer desires for and economic benefits of renewable generation do not demonstrate a need for 900 MWs of new facilities subsidized by AEP Ohio customers .....   | 18        |
| 3.          | AEP Ohio's attempt to shift or alter its burden of proof to demonstrate a need for 900 MWs of generation facilities based on resource planning projections is unlawful and unreasonable ...   | 20        |
| 4.          | AEP Ohio and the intervenors supporting the Amendment have not demonstrated that a market failure prevents customers from securing electricity with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs ..... | 22        |
| <b>C.</b>   | <b>The Commission should deny AEP Ohio's request to set a hearing for the second phase of these cases .....</b>   | <b>27</b> |
| <b>III.</b> | <b>CONCLUSION .....</b>   | <b>28</b> |

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

|                                       |   |                        |
|---------------------------------------|---|------------------------|
| In the Matter of the 2018 Long-Term   | ) |                        |
| Forecast Report of Ohio Power Company | ) | Case No. 18-501-EL-FOR |
| and Related Matters.                  | ) |                        |

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

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

---

**REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO**

---

**I. INTRODUCTION**

In these cases, Ohio Power Company ("AEP Ohio") is seeking authorization to begin collection of above-market costs for two renewable energy purchase power agreements with solar generation developers. The Public Utilities Commission of Ohio ("Commission") is reviewing these cases in two phases. In the first, the Commission is addressing the need for 900 MWs of generic renewable generation. If there is a finding of need, the second will address whether AEP Ohio can satisfy the detailed requirements for authorization of the recovery through a nonbypassable rider of the above-market purchased power costs of the solar projects under R.C. 4928.143(B)(2)(c). Entry at 12 (Oct. 22, 2018).

Under R.C. 4928.143(B)(2)(c), AEP Ohio must demonstrate need for the additional generation facility through resource planning projections. Contrary to statutory requirements, however, AEP Ohio has elected to support its claim of need based on

evidence it says shows that customers want renewable energy and that the generic resources will provide electricity, over the 20-year terms of purchase power agreements, at a lower cost than comparable generation priced at market.<sup>1</sup> The initial briefs demonstrate that AEP Ohio's alternative theory is not legally sound or supported by the record.<sup>2</sup>

Although most of the legal and factual claims raised by AEP Ohio in its initial brief are addressed by the opposing parties in great detail in their briefs, AEP Ohio expands on both its legal theory and its factual claims beyond what it presented in the Amendment, AEP Ohio Ex. 2, and its supporting testimony. In its legal argument, it advances the theory that the Commission can bend the forecasting statute and rules to do tricks for which they are not designed. In regard to its factual claims, AEP Ohio asserts that markets, despite substantial and credible evidence to the contrary, will fail to respond to customer interest in renewable generation. The Commission should reject both claims.<sup>3</sup>

---

<sup>1</sup> Initial Post-Hearing Brief of Ohio Power Company Regarding its Amended Long-Term Forecast Report and the Issue of Need (Mar. 6, 2019) ("AEP Ohio Brief"). Several parties adopted positions in support of AEP Ohio. Post-Hearing Brief of the Ohio Energy Group (Mar. 6, 2019) ("OEG Brief"); Initial Brief of Natural Resources Defense Council, Ohio Environmental Council, and Sierra Club (Mar. 6, 2019) ("Sierra Brief"); Initial Post-Hearing Brief of Ohio Partners for Affordable Energy (Mar. 6, 2019) ("OPAE Brief"); and Initial Brief of Mid-Atlantic Renewable Energy Coalition (Mar. 6, 2019) ("MAREC Brief").

<sup>2</sup> Initial Brief of Industrial Energy Users-Ohio (Mar. 6, 2019) ("IEU-Ohio Brief"); Initial Brief of Direct Energy, LP (Mar. 6, 2019) ("Direct Brief"); Initial Brief of Interstate Gas Supply, Inc. and IGS Solar, LLC (Mar. 6, 2019) ("IGS Brief"); Initial Post-Hearing Brief of The Kroger Co. (Mar. 6, 2019) ("Kroger Brief"); Initial Brief of Intervenor Ohio Coal Association (Mar. 6, 2019) ("OCA Brief"); Post-Hearing Brief of the Ohio Manufacturers' Association Energy Group (Mar. 6, 2019) ("OMAEG Brief"); Initial Brief of the Office of the Ohio Consumers' Counsel (Mar. 6, 2019) ("OCC Brief"); Initial Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (Mar. 6, 2019) ("Staff Brief").

<sup>3</sup> Further, it should reject AEP Ohio's request to set a schedule to address the remaining issues that have been deferred for future review.

## II. ARGUMENT

### A. **AEP Ohio's Claim That the Determination of Need Under R.C. 4928.143(B)(2)(c) Does Not Require a Traditional Analysis of Need is Unsupported by Ohio Law, Commission Rules and Decisions, and the Industry Understanding of the IRP Process**

With the support of several intervenors, AEP Ohio seeks a finding of need based on a purported demonstration that customers want renewable generation resources. To make this evidence relevant, AEP Ohio seeks to redefine what is meant by “need” under R.C. 4928.143(B)(2)(c). This attempt, however, does not conform with the plain meaning of R.C. 4928.143(B)(2)(c) or the Commission’s rules implementing that provision.

1. To support a finding of need under the plain meaning of R.C. 4928.143(B)(2)(c) and as required by Commission rules, an EDU must demonstrate that a facility is needed based on resource planning projections

To reach the result they desire, AEP Ohio and several parties argue that the requirement in R.C. 4928.143(B)(2)(c) to demonstrate need is ambiguous and therefore the Commission has discretion to interpret the provision. See, e.g., AEP Ohio Brief at 11-19. As the Staff of the Commission correctly explains, however, there is nothing ambiguous about the operation of the statute: the Commission is to determine need based on resource planning projections. Staff Brief at 3. The purpose of using a forecasting case in which resource planning projections are considered is “about assuring that there [are] sufficient resource[s] available to meet anticipated demand.” *Id.* at 4.

The lack of ambiguity regarding a determination of need is confirmed by the relevant rules implementing R.C. 4928.143(B)(2)(c). These rules separate the determination of need from the determination of whether the plan to meet that need is reasonable. Rule 4901:5-5-06(B)(2) and (3). To establish need, the EDU shall

describe the procedure followed in determining the need for additional electricity resource options. All major factors shall be discussed, including but not limited to:

- (a) System load profile.
- (b) Maintenance requirements of existing and planned units.
- (c) Number of units, unit size, and availability of existing and planned units.
- (d) Forecast uncertainty.
- (e) Electricity resource option uncertainty with respect to cost, availability, commercial in-service dates, and performance.
- (f) Lead times for construction or implementation of planned electricity resource options.
- (g) Power interchange with other electric systems, including consideration of the ability to buy and sell power.
- (h) Price-responsive demand and price elasticity due to the implementation of time-differentiated pricing options and assessments of the value of lost load.
- (i) Regulatory climate.
- (j) Reliability criteria, including a discussion and analysis of the reporting person's reliability criteria and factors influencing their selection, including, but not limited to:
  - (i) Reliability measures used and factors including the selection.
  - (ii) Engineering analysis performed.
  - (iii) Economic analysis performed.
  - (iv) Any judgments applied.

Rule 4901:5-5-06(B)(2). Separately, the EDU is to provide an integrated resource plan that is to address “the electric utility’s projected mix of resource options to meet the base case projection of peak demand and total energy requirements.” Rule 4901:5-5-06(B)(3). As part of the plan, the EDU is directed to discuss a variety of factors including system reliability, system and fuel adequacy, cost-effectiveness, and rate and other economic impacts. *Id.* As the rule makes abundantly clear, the determination of need, *i.e.*, the base case projection of peak demand and total energy requirements, is separate from the determination of whether the resource plan to address that need is reasonable.

The lawful and reasonable operation of the statute and rules is not ambiguous. Under R.C. 4928.143(B)(2)(c), the Commission is without authority to impose a nonbypassable charge for the life of a new facility owned and operated by the utility unless

the EDU demonstrates need for the facility based on resource planning projections. R.C. 4928.143(B)(2)(c). Under Commission rules, need is to be established by comparing the system load profile to the available resources.

Application of the statute and rules also leads to an unambiguous result. Based on evidence provided by AEP Ohio, available and projected resources are more than adequate to satisfy load. AEP Ohio Ex. 1; AEP Ohio Ex. 2 at 3. See, *also*, IEU-Ohio Ex. 1 at 5. As OEG confirms, “There is no credible scenario under which PJM would not have an adequate capacity reserve.” OEG Brief at 8. Accordingly, the Commission should deny AEP Ohio’s request for a finding of need for 900 MWs of generic solar generation.

2. The Commission should reject the various arguments designed to redefine “need” in R.C. 4928.143(B)(2)(c) since each is inconsistent with the plain meaning of the statute and is not supported by a sound reading of the applicable law

These cases advance to the second phase addressing the detailed requirements of R.C. 4928.143(B)(2)(c) only if the Commission adopts AEP Ohio’s redefinition of “need.” To avoid the termination because there is no demonstration of need based on resource planning projections, AEP Ohio argues that the statute and administrative rules may be interpreted to incorporate its redefinition of “need” to include customer desires. AEP Ohio Brief at 13.<sup>4</sup> To support the redefinition, AEP Ohio and its supporters present several alternative justifications based on forced textual interpretations of Ohio law and

---

<sup>4</sup> It further argues that the Commission’s *Turning Point* decision, which rejected a similar attempt by AEP Ohio to redefine “need” under R.C. 4928.143(B)(2)(c), is not controlling. *Id.* at 19-20, citing *In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters*, Case Nos. 10-501-EL-FOR, et al. (“*Turning Point*”).



the Commission's rules on integrated resource plans and rely on references to state policy.

The textual arguments fall into three categories. Some parties argue that the Commission can look to R.C. 4935.04 to provide guidance as to what the General Assembly intended regarding a showing of need under R.C. 4928.143(B)(2)(c). See, e.g., AEP Ohio Brief at 13; Sierra Brief at 6. Some argue that the Commission should expand the "factors" under Rule 4901:5-5-06(B)(2), the part of the rule designed to address need, to encompass AEP Ohio's case based on customer desires and alleged economic benefits. See, e.g., Sierra Brief at 5. Finally, several parties argue that the review process for addressing need for additional generation resources should be combined with the evidence that would support an integrated resource plan if need were shown. See, e.g., AEP Ohio Brief at 11-12; Sierra Brief at 5 and 7; OPAE Brief at 5-6.

The policy argument on which AEP seeks to redefine "need" is more straightforward; AEP Ohio argues that the State Energy Policy supports the development of renewable resources. AEP Ohio Brief at 20-21.

For various reasons, the Commission should reject each of these arguments.

- a. *The plain meaning of "need based on resource planning projections" does not support the inclusion of desires of customers to secure renewable resources*

The textual and policy arguments advanced by AEP Ohio and others are premised, either explicitly or implicitly, on the claim that the applicable law is ambiguous. AEP Ohio at 13; OEG Brief at 4; Sierra Brief at 4. "If the meaning of a statute is unambiguous, [however], we must apply it as written without further interpretation." *In re Black Fork Wind Energy, LLC*, 2018-Ohio-5206, ¶ 17. The phrase "need based on resource planning projections" is not ambiguous. Need is to be shown through resource planning

projections, a review of load and supply to meet that load. Because the plain meaning of the statute is controlling, the Commission can and must reject each of the textual and policy arguments designed to “interpret” need to include reference to customer preferences.

*b. The forced textual interpretations of R.C. 4935.04 and Rule 4902:5-5-06(B)(2) do not support the redefinition of “need” under R.C. 4928.143(B)(2)(c) to include desires of customers to secure renewable resources*

In support of their theory of the case, AEP Ohio and Sierra argue that the Commission should redefine “need” based on R.C. 4935.04 and Rule 4901:5-5-06. For example, AEP Ohio states, “R.C. 4935.04, which describes the scope of a hearing on a long-term forecast report, ... does not require a restrictive reading of ‘need.’ That statute says such hearing ‘shall include, *but not be limited to*,’ information on ‘projected loads and energy requirements for each year of the [forecast] period.’” AEP Ohio Brief at 13 (emphasis in original). Pointing to Rule 4901:5-5-06(B)(2), Sierra similarly argues that the Commission can consider something other than resource planning projections in its determination of need because the second sentence of that subdivision states that “[a]ll major factors shall be discussed, including but not limited to” the detailed list of load and supply information that the EDU is to file to support a finding of need. Sierra Brief at 5. The Commission should reject both claims because neither is supported by careful readings of the statute and rule based on standard interpretive rules of construction.

Initially, R.C. 4935.04 addresses the long-term forecast generally. It does not address the finding of need necessary to support a nonbypassable rider, which is set out specifically in R.C. 4928.143(B)(2)(c). Thus, the attempt to bootstrap an interpretation of one to the other because the Commission conducts a determination of need in a long-

term forecast hearing assumes too much. The determination of need is a subset of the broader review of a long-term forecast. As the Commission understood when it adopted rules implementing R.C. 4928.143(B)(2)(c), the narrower determination of need is to be based on a review of load and supply to meet the load.<sup>5</sup>

Additionally, the argument presented by AEP Ohio and Sierra attributes more meaning to the phrase “but not limited to” in R.C. 4935.04 and Rule 4901:5-5-06(B)(2) than it can support. In a forecast review, a person owning or operating a major utility facility is to provide an annual report which is then reviewed by the Commission to determine its reasonableness. As part of that report, the filing person is to provide a ten-year forecast of demand, load, reserves and “a general description of the resource planning projections to meet demand.” R.C. 4935.04(C)(1). Based on that report and the evidence taken at hearing, the Commission is required to determine several things. The central determination is the reasonableness of the “utility company forecasts of loads and resources ... in relation to population growth estimates made by state and federal agencies, transportation, and economic development plans and forecasts, and make recommendations where possible for necessary and reasonable alternatives to meet forecasted electric power demand.” R.C. 4935.04(F)(5). To support that finding, the Commission is to determine, among other things, if the information provided in the long-term forecast is accurate, whether the forecasting methods properly model the relationship of price and consumption, and whether demand reductions are identified and considered. R.C. 4935.04(F)(1)-(4) and (6). In the context of the review of the forecast,

---

<sup>5</sup> To the extent that this interpretation may imply some conflict between R.C. 4928.143(B)(2)(c) and 4935.04 (and there is no indication that there is one), the specific requirement would control over the more general. R.C. 1.51. Thus, the general evidentiary statement contained in R.C. 4935.04(E)(2) does not alter the specific findings that must be made under R.C. 4928.143(B)(2)(c).

“[t]he hearing shall include, but not be limited to, a review of: (a) The projected loads and energy requirements for each year of the period; (b) The estimated installed capacity and supplies to meet the projected load requirements.” R.C. 4925.04(E)(2). The statute further sets out the scope of the hearing that is “limited to issues relating to forecasting.” R.C. 4925.04(E)(1).

Under a well-understood interpretive rule for determining legislative intent, the stated lists of what is to be considered in a forecast hearing confine what may be added under the term “but not limited to” under R.C. 4935.04(E). “[W]here in a statute terms are first used which are confined to a particular class of objects having well-known and definite features and characteristics, and then afterwards a term is conjoined having perhaps a broader signification, *such latter term is, as indicative of legislative intent, to be considered as embracing only things of a similar character as those comprehended by the preceding limited and confined terms.*” *State v. Aspell*, 10 Ohio St. 2d 1, 4 (1967) (emphasis added). Because the statute provides a list of specific matters that shall be considered in the hearing (in R.C. 4935.04(E)(2), projected load and capacity and supplies to meet the projected load requirements) followed by a more general descriptor (in this statute, “but not limited to” operates as a general descriptor), what may be included must relate to forecasts of supply and load. Based on this reasonable reading of R.C. 4935.04(E)(2), customer desires or questionable economic studies are not relevant to the determination of need.

Context is also important to a proper understanding of the statute. “[W]here the meaning of a word is unclear, a court will look at the surrounding words to ascertain the doubtful word’s meaning.” *Ashland Chemical Co. v. Jones*, 92 Ohio St. 3d 234, 237

(2001). In this instance, R.C. 4935.04(E)(1) and (F) provide the direction that the Commission is to determine the reasonableness of the load forecast, not explore unrelated matters such as customer desires. Because the determination of the reasonableness of the forecast is the function of a forecast case, the provision for consideration of things “not limited to” the listed items is not an invitation to expand the record with matters that do not go to the reasonableness of the forecast such as customer interest in renewables.

Similar textual considerations apply to the use of “but not limited to” in Rule 4901:5-5-06(B)(2). In that rule, the Commission directs the EDU to describe the procedure followed in determining the need for additional electricity resource options. All major factors including but not limited to load and resources and the basis for the estimates are to be provided. Again, the items previously listed and the context of the proceeding dictate that additional relevant considerations consist of those facts and assumptions that demonstrate how the major factors were determined. These relevant considerations do not include extended discussions of poorly designed customer surveys of customer interest in renewable generation.<sup>6</sup>

- c. *The text of Rule 4901:5-5-06(B)(3) does not support the expansion of the definition of “need” under R.C. 4928.143(B)(2)(c) to include the desires of customers to secure renewable resources*

As noted previously, several parties also conflate the review process for addressing need for an additional generation facility with the evidence that would support

---

<sup>6</sup> Based on the lack of relevance, IEU-Ohio and others have urged the Commission to reverse rulings permitting the admission of evidence concerning the Navigant study and the economic impact studies. See, e.g., IEU-Ohio Brief at 33-37; Kroger Brief at 17-20; OCC Brief at 47-53.

an integrated resource plan. See, e.g., AEP Ohio Brief at 11-12; Sierra Brief at 5 and 7; OPAE Brief at 5-6.<sup>7</sup> This conflation is based on a misreading of Rule 4901:5-5-06(B)(3).

Initially, nothing in that division contemplates the use of customer surveys to support an integrated resource plan. As in the case of the forecast statute and the Rule 4901:5-5-06(B)(2), the list of relevant items to be addressed must be confined to the reasonableness of the plan to match supply and demand. Based on the textual considerations discussed previously, therefore, Rule 4901:5-5-06(B)(3) is not a lawful basis for bootstrapping the Navigant surveys into a finding of need.

Additionally, the conflation ignores the logical process embedded in the Commission's rules concerning a determination for the authorization of a nonbypassable rider under R.C. 4928.143(B)(2)(c). As explained by the Staff, the process for making a determination of need for a resource consists of two steps. The first addresses need. The second addresses the best means to address that need. Staff Ex. 2 at 3. This logical progression is set out in the Commission's rules implementing R.C. 4928.143(B)(2)(c).

Under the rule implementing the filing requirements for an ESP term for a nonbypassable charge under R.C. 4928.143(B)(2)(c), need is to be determined in the forecast proceeding. Rule 4901:1-35-03(C)(9)(b)(i) and (iv). Costs and rate impacts of the nonbypassable charge are to be addressed in the ESP proceeding. Rule 4901:1-35-03(C)(9)(b)(iv). In the ESP proceeding, the Commission also addresses the proposed terms for capacity, energy, and associated rates for the life of the facility. Rule 4901:1-35-03(C)(9)(b)(v).

---

<sup>7</sup> OEG seems to take a similar position. OEG Brief at 5 (Commission rules permit a broad swath of information for Commission review).

A separation of the requirement to demonstrate need and the plan to address it is carried into the forecast rule. In Rule 4901:5-5-06(B)(2), the EDU must demonstrate need by providing load and resource information. Under Rule 4901:5-5-06(B)(3), the EDU is to provide an integrated resource plan that addresses the load requirements.

Under the forecast and ESP rules, therefore, the Commission separates the need finding from the balance of the determination of whether it is lawful and reasonable to authorize the EDU to begin billing a nonbypassable charge. Accordingly, conflating the finding of need with the reasonableness of the plan to meet that need is logically and textually unsupported.

Conflating the rules concerning the demonstration of need and the reasonableness of the resource plan also makes no sense when the administrative function of the Commission in this proceeding is considered. As was evident in the hearing in this case, the long digressions into customer surveys and economic benefits are irrelevant to the determination of need (and at least in the case of the surveys are of doubtful relevance to a second phase if need were established). To avoid turning hearings regarding need into administrative quagmires, the Commission should reject the arguments that conflate the rules concerning need and the plan to address need.

- d. *Additional rules of statutory construction and the limitations of what may be approved as a term of an ESP support a reading of “need based on resource planning projections” that does not include reference to customer interest in renewable generation urged by AEP Ohio and others*

To the extent there is some ambiguity in what is to be addressed in a determination of need, the ambiguity is to be resolved by the object to be obtained, the consequences of the construction, and the administrative construction of the statute. R.C. 1.49.

In this instance, the object of the forecast case is a determination of the reasonableness of the forecast, not a review of customer desires. The object of the determination of need is to assure reliability of the electric supply, not explore customer preferences without relation to reliability.

The consequences of not abiding with a definition of need based on resource planning projections are evident in this hearing: AEP Ohio presented several claims regarding customer desires and the economic benefits of renewable generation, even though it has conceded that electric generation service for its retail customers is and will be reliable. This digression resulted in several costly days of unnecessary hearing.

Finally, the administrative construction as evidenced by Rule 4901:5-5-06(B)(2) and (3), the Commission's prior decision in the *Turning Point* case, and Staff testimony demonstrates that the exploration of customer desires and economic impacts are irrelevant to the determination of need. *Turning Point*, Opinion and Order at 25-27 (Jan. 9, 2013); Staff Brief at 3 (concerning the application of the forecasting requirements to a determination of need).

One consequence of the lawful and reasonable application of the need requirement in R.C. 4928.143(B)(2)(c) would not be, as AEP Ohio argues, to make it impossible to demonstrate need. AEP Ohio Brief at 14. In essence, AEP Ohio is arguing that current conditions cannot change. While such a change is unlikely, new generation resources might be needed to assure service reliability and the market could fail to address that need. Accordingly, the argument that requiring a showing of need based on a resource shortage would render the provision a nullity should be rejected.



In determining the scope of R.C. 4928.143(B)(2)(c), the Commission also may not add to or subtract terms of the statute. *East Ohio Gas Co. v. Limbach*, 61 Ohio St. 3d 363, 365 (1991). In this instance, AEP Ohio is seeking to add bases besides resource planning projections to the proof that would be relevant to support need. As a matter of statutory interpretation, those additions would not be proper.

As the record in this case demonstrates, industry understanding of “need based on resource planning projections” also supports a narrow reading of the statute. Within the utility industry, there is nothing unclear about what is meant by demonstrations of need in the context of integrated resource planning: it requires a showing that supply is not available to meet demand. Direct Ex. 2 at 9; OCC Ex. 18 at 23. See Kroger Brief at 32-34 and citations in support. Because “[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly,” R.C. 1.42, the technical understanding of resource planning based on load forecasts is relevant and does not support AEP Ohio’s attempt to redefine “need” to mean customer interest in renewable generation.

Adopting the interpretive approach preferred by AEP Ohio and others also would expand recovery beyond the terms and conditions that may be approved in an ESP, a result the Ohio Supreme Court has already rejected in AEP Ohio’s first ESP case. In that case, the Commission approved a term of the ESP that was not authorized under any of the provisions contained in R.C. 4928.143(B)(2) under the theory that the division permitted approval of additional terms “without limitation.” On appeal, the Court reversed the Commission’s order, stating, “[T]he appellees’ interpretation would remove any substantive limit to what an electric security plan may contain, a result we do not believe

the General Assembly intended.” *In re Application of Columbus Southern Power Co.*, 128 Ohio St. 3d 512, 520 (2011). Similarly, AEP Ohio and the intervenors’ attempt in this case to redefine “need” based on a reference to the phrase “but not limited to” in a different statute or rule would extend Commission discretion to authorize ESP terms in ways not permitted by R.C. 4928.143(B)(2).

e. *Policy considerations do not alter the legal requirement to find need based on resource planning projections*

As part of their attempt to redefine what the Commission should consider when it addresses need, several parties also point to the State Energy Policy, set out in R.C. 4928.02, as a basis for their claim that customer desires and economic studies should guide the finding. AEP Ohio Brief at 20-21; MAREC Brief at 4 and 10-13; OEG Brief at 12-15; OPAE Brief at 7-8 and 10.<sup>8</sup> The Commission, however, cannot write out a provision of the law by reliance on the policy provisions contained in R.C. 4928.02.

While the Commission is directed to effectuate the state energy policies in implementing provisions of Chapter 4928, R.C. 4928.06(A), specific provisions govern general statements of law. R.C. 1.51. Moreover, because “[t]he Public Utilities Commission of Ohio is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute,” *Ohio Public Interest Action Group v. Pub. Utils. Comm’n of Ohio*, 43 Ohio St. 2d 175, 184 (1975), it may not unlawfully augment its authority. Accordingly, the Commission cannot approve a charge as a part of an ESP that is not provided by the list of mandatory or discretionary terms that may be included in a plan. *In re Application of Columbus Southern Power Co.*, 128 Ohio St. 3d at 520.

---

<sup>8</sup> OPAE goes so far as to suggest that “parties may define need,” a statement that the Commission should not take literally. OPAE Brief at 19-20.

Likewise, it may not authorize recovery for the costs of a generation facility except in compliance with Ohio law. *Industrial Energy Users-Ohio v. Pub. Utils. Comm's of Ohio*, 117 Ohio St. 3d 486 (2007). Nor may it redefine “need based on resource planning projections” as argued by AEP Ohio, Sierra, and others. To do so would “remove any substantive limit to what an electric security plan may contain.” *In re Application of Columbus Southern Power Co.*, 128 Ohio St. 3d at 520.

- f. Reliance on R.C. 4928.64 as a basis for redefining “need” is unwarranted since any charge associated with renewable resources under that section must be bypassable and the request in this case is not intended or needed to support state renewable energy requirements*

AEP Ohio concludes its argument for the expansion of the definition of need with a reference to a provision applicable to state renewable energy requirements, R.C. 4928.64(B)(1), and argues that state law does not prevent it from securing additional renewable resources beyond that required to meet state mandates. This curious reference offers no support for its claim that need based on resource planning projections means something it does not.

First, reference to the requirements of R.C. 4928.64 does not provide an independent basis for a showing of need. AEP Ohio has itself stated that it does not “need” the generic resources to meet its renewable requirements. AEP Ohio Ex. 3 at 13. In fact, there are sufficient renewable energy credits available from Ohio facilities to meet state requirements several times over. IEU-Ohio Ex. 1 at 9.

Second, the reference to R.C. 4928.64 is incomplete and misleading. Under that section, any recovery for renewable resources must be bypassable. R.C. 4928.64(E). The suggestion that this section affords some basis for a finding needed to support a nonbypassable rider is patently wrong.

**B. AEP Ohio Has Not Demonstrated a Need for 900 MWs of Renewable Generation Resources**

AEP Ohio concedes that the 900 MWs of generation resources for which it is seeking a finding of need are not required to supply power for its retail load or to satisfy state renewable energy requirements. Instead of attempting to demonstrate need based on resource planning projections, AEP Ohio makes six claims it says demonstrate a need for 900 MWs of renewable generation. AEP Ohio Brief at 26-27. The first is that customers want renewable generation. *Id.* at 27-33 and 40-45. The remaining five present claims concerning the alleged benefits of approving a subsidy for 900 MWs of renewable generation. The second, third, and fourth repeat AEP Ohio's claims that its economic studies show that customers would benefit from lower energy prices and the economic benefits associated with investing in renewable generation; the fifth repeats the claim that the subsidies will fill an alleged generation gap; and the sixth claims that the subsidies will promote fuel diversity and reduce carbon emissions. *Id.* at 27, 45-60 and 62-68. It completes its argument by expanding on a claim advanced primarily by other parties that market solutions to address customer interest in renewable generation are inadequate due to market failure. *Id.* at 60-61 and 68-79.

1. AEP Ohio concedes that the renewable resources for which it is seeking a finding of need are not needed to provide reliability or to meet renewable energy requirements

As it has now admitted in its Amendment, supporting testimony, and its brief, AEP Ohio concedes that it is not seeking a finding of need because there are insufficient resources available to support its standard service offer obligation. *Id.* at 14 (PJM is responsible for assuring resource adequacy); AEP Ex. 2 at 3; AEP Ex. 3 at 8. Moreover, the evidence is overwhelming that reliability of retail electric service is not at risk due to

lack of capacity, not now or in the forecast period. IEU-Ohio Ex. 1 at 5-8; Staff Ex. 2 at 7. Moreover, resource diversity does not present a current or future issue for reliability. AEP Ohio Ex. 19. When the issue of need is properly framed, it is undisputed that there is no need for 900 MWs of renewable generation resources, generic or otherwise.

Likewise, there is no need for 900 MWs of renewable generation resources so that AEP Ohio can meet its renewable energy requirement under R.C. 4928.64. AEP Ohio again concedes as much. AEP Ohio Brief at 20; AEP Ohio Ex. 3 at 9. In fact, the available Ohio-certified renewable resources are nearly 36 times the state renewable requirements, with more coming on line. IEU-Ohio Ex. 1 at 8-9.<sup>9</sup>

2. AEP Ohio's six claims regarding customer desires for and economic benefits of renewable generation do not demonstrate a need for 900 MWs of new facilities subsidized by AEP Ohio customers

Instead of relying on resource planning projections to show need, AEP Ohio offers six claims to support its request. The six claims have already been addressed at length in the initial briefs, and the briefs demonstrate that AEP Ohio's claims are irrelevant to a finding of need and factually unsound.

- AEP Ohio's first claim that AEP Ohio customers want renewable generation is irrelevant to a determination of need and an after-the-fact justification to support its prior commitment to attempt to develop 900 MWs of renewable generation. Additionally, the Navigant study on which AEP Ohio relies does not identify any customer that has been denied access to the many different sources of renewable generation, has not calculated any undersupply, and is so methodologically unsound as to be useless in determining customer desires. In fact, Navigant disclaims that it is measuring customer needs and, in regard to larger commercial customers, states that it is not providing statistically significant information. IEU-Ohio Brief at 18-23; OCC Brief at 29; IGS Brief at 18-22; OCA Brief at 47-49; Direct Brief at 9-10; Kroger Brief at 43-47; OMAEG Brief at 31-34; Staff Brief at 9.

---

<sup>9</sup> Additionally, AEP Ohio apparently has decided that its prior attempt to redefine "need" based on renewable energy requirements is no longer viable. In its brief, AEP Ohio indicates that the Commission decision in AEP Ohio's 2010 forecast case regarding the proposed Turning Point facility is distinguishable. AEP Ohio Brief at 18-20, referencing *Turning Point*. That may be the case, but the Commission need not decide that issue since AEP Ohio is not seeking a finding of need based on renewable requirements.

- AEP Ohio's second and third claims that energy prices will decline as a result of the construction and subsidization of 900 MWs of renewable generation is based on unreliable transmission studies and an equally unreliable fundamentals forecast. The transmission studies are unreliable because they did not consider the correct interconnection point for the solar facility (the first version) or the unavailability of the facility during the study period (the second version). Further, the fundamentals forecast is unreliable because it suffers from the same problems that have affected prior AEP Ohio forecasts: they are uniformly biased to show what the EDU wants to show. For example, the fundamentals forecast ignores the market prices for natural gas and the effect of excess capacity reserves on capacity prices.<sup>10</sup> Additionally, the fundamentals forecast assumes carbon burden costs that are counterfactual. Also, the impact study did not account for costs that would be triggered by its proposal. IEU-Ohio Brief at 23-28; OCC Brief at 31-34; IGS Brief at 23-33; OCA Brief at 14 and 24-47; Direct Brief at 8-12.
- AEP Ohio's fourth claim that construction of 900 MWs of renewable generation will provide economic benefits to the region in which they are constructed and Ohio more generally rests on a study that assumes rather than confirms the sourcing in Ohio of plant components, fails to consider the costs imposed by AEP Ohio's proposal, and is largely irrelevant since the same benefits would result from the construction of the resources without the backstop of a customer subsidy. IEU-Ohio Brief at 28-30; IGS Brief at 34-44; OCA Brief at 50-52; Direct Brief at 10-12; Kroger Brief at 42-43.
- AEP Ohio's fifth claim that construction of subsidized renewable generation facilities will reduce a generation gap is a solution looking for a problem. Reliability is not at issue and forcing customers to subsidize new construction that is not needed, by definition, makes no economic sense. IEU-Ohio Brief at 30-33; OCC Brief at 34-36. Moreover, AEP Ohio's claim that the projects will serve as a hedge on retail prices is nonsensical since customers will not be securing renewable generation from AEP Ohio under the proposed wholesale contracts with generation project developers. IEU-Ohio Brief at 30-33; IGS Brief at 48-49.
- AEP Ohio's sixth claim that a finding of need will promote fuel diversity is also a solution looking for a problem. Fuel diversity is not a problem in the PJM system, and customer actions are already helping to reduce carbon emissions. IEU-Ohio Brief at 12-13; see discussion below on market penetration of renewable generation.

In summary, the claims advanced by AEP Ohio are based on biased and poorly executed studies and address the wrong question. They do not provide a coherent,

---

<sup>10</sup> Ignoring the market price for natural gas is a new twist. In other cases, it has pointed to market prices as an indicator of the appropriate price to assign to future natural gas prices. Tr. Vol. 3 at 845.

reasoned, or lawful basis on which the Commission may make a finding of need for 900 MWs of renewable generation.

3. AEP Ohio's attempt to shift or alter its burden of proof to demonstrate a need for 900 MWs of generation facilities based on resource planning projections is unlawful and unreasonable

Throughout its initial brief, AEP Ohio repeatedly asserts that other parties have not provided studies to refute claims made by AEP Ohio, as if this was some sort of justification for its poorly executed studies. See, e.g., AEP Ohio Brief at 36. It also points to letter writing campaigns as if they are evidence in the record. *Id.* at 40-45. It engages in spurious critiques when it cannot respond to criticism of its own studies. See, e.g., *id.* at 35 (asserting that Dr. Dormady's understanding of other utilities' billing undermined his criticism that Navigant's approach does not provide useful information on customer preferences). It asserts as fact untested assumptions. *Id.* at 39 (referencing assumption, which was untested, that customers for which AEP Ohio had email addresses were not different from other customers in response to a charge of selection bias). None of these spurious claims support a determination of need.

These cases are an extension of the proceeding in which the Commission approved the current AEP Ohio ESP. AEP Ohio Ex. 2 at 2. Because AEP Ohio is seeking to establish a lawful basis to begin collecting a charge as a term of an ESP, AEP Ohio has the burden of proof. R.C. 4928.143(C)(1). See, also, *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, Opinion and Order at 68 (Feb. 25, 2015) (party seeking to alter rate design has some obligation to provide studies supporting that change). To meet that burden, AEP Ohio

must demonstrate need for the facility based on resource planning projections. R.C. 4928.143(B)(2)(c) and Rule 4901:5-5-06(B)(2).

Although there is no burden on the parties opposing the request for a determination of need to provide any studies to counter AEP Ohio's claim, AEP Ohio repeatedly (and without citation) argues that the Commission can rely on its flawed studies since intervenors did not offer their own. The simple answer is that they were not required to; AEP Ohio has the burden of proof. The more penetrating response, however, is that the evidence offered by the intervenors goes to the central question of whether AEP Ohio has satisfied its burden to present a credible case on which the Commission can make a finding of need. That evidence showed that AEP Ohio's studies are badly flawed.

Moreover, AEP Ohio cannot satisfy its burden of proof by raising irrelevant criticisms, as it did in the case of Dr. Dormady, or claiming that untested assumptions are facts, as it did in response to the demonstrated biases inherent in the Navigant methodology. Further, it should not be permitted to base its claim of "need" on letter writing campaigns that are not a part of the record in this case. *In re Application of Columbus Southern Power Co.*, 128 Ohio St. 3 at 517-19. These irrelevant or extra-record assertions serve only to undermine the decision-making process and should not be a basis for a determination of need.

Finally, AEP Ohio's irrelevant attacks and assertions based on extra-record evidence still do not address the central question presented by its version of the need requirement of whether any AEP Ohio customer that wants renewable generation is unable to secure it. Not one witness supporting AEP Ohio's amendment identified such a customer, and as one of the Navigant witnesses conceded, AEP Ohio's survey was



designed to measure customer desires and “*how that feeds into their customer need is not an issue that we explored in the survey.*” Tr. Vol. 3 at 641 (emphasis added). Thus, the fundamental question raised by AEP Ohio’s attempt to redefine need as customer desires remains unanswered. Spurious criticisms and unsupported claims will not cover that deficiency.

4. AEP Ohio and the intervenors supporting the Amendment have not demonstrated that a market failure prevents customers from securing electricity with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs

Even if AEP Ohio had located a mythical customer that claimed it could not access a source of renewable generation, however, it has not demonstrated that a market failure caused that customer’s desires to go unmet.

As the Commission has stated several times, it will consider approving a nonbypassable rider for a generation facility on a finding that the market will not provide that resource. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 39-40 (Aug. 8, 2012) (the Commission will first look to the market to build needed capacity; a nonbypassable charge could be authorized only when generation needs cannot be met through the competitive market). Some demonstration that markets could not address customer interest in renewables, therefore, should have been a fundamental consideration for AEP Ohio in its direct case. Although it largely ignored the issue of market response in its testimony, AEP Ohio now claims that “[a] finding of need will help ameliorate market failures that have discouraged development of in-state, utility-scale renewable resources and left too many AEP Ohio

customers under-served in this area.” AEP Ohio Brief at 60. In fact, however, the record demonstrates an active market for renewable generation resources and their development.

Initially, AEP Ohio provided little evidence to demonstrate market failure.<sup>11</sup> None of AEP Ohio’s witnesses offered any detailed testimony concerning market failure,<sup>12</sup> and the two economists hired by AEP Ohio did not address the question. Tr. Vol. 4 at 1168. Witnesses supporting the amendment also failed to show that market solutions would not address customers’ desire for renewable generation. See, e.g., Tr. Vol. 4 at 1054. In contrast, Dr. Lesser noted that he had not identified any market failure. Tr. Vol. 6 at 1420.

Nonetheless, AEP Ohio asserts three claims to support its argument that there is market failure. First, it states that PJM is indifferent to renewable resources. Second, it asserts that renewable resource deployment in Ohio falls short of that observed in other regions. Third, it claims that five alternatives for renewable resources are not a substitute for its proposed projects. Logically and factually, however, none of these claims supports a finding that the market for renewable generation is failing or will fail to deliver sufficient electricity to meet customer interest.

---

<sup>11</sup> It is not clear from its brief that AEP Ohio is actually arguing that there is a market failure. In the economics of regulation, “market failure” is a term of art that concerns the justification for intervention in markets. Stephen Breyer, *Regulation and its Reform* 15 (1982). It refers to those situations in which regulation is used to address pricing in markets that are naturally monopolistic due to scale economies, situations in which regulation is necessary because of externalities, and situations in which markets fail due to information asymmetries. *Id.* at 15-28; Charles F. Phillips, Jr., *The Regulation of Public Utilities* 44 (2d ed. 1988). Regulation, even in some situations in which markets are not as effective as one might desire, however, may be a poor substitute. As Professor, now Justice, Breyer explained in reference to cost of service ratemaking, “the regulatory process—even when it functions perfectly—cannot reproduce the price signals that a workably competitive marketplace would provide. Thus, only serious market failure will, even arguably, warrant adoption of cost-of-service ratemaking as a cure.” Breyer, *supra*, at 59. Under this well-understood definition of market failure, none of AEP Ohio’s claims bears any family resemblance to market failures due to monopoly, externalities, or informational asymmetry.

<sup>12</sup> The one potential reference to market failure is AEP Ohio Ex. 3 at 9 (PJM does not seek to meet individual customer preferences for a specific type of generation resource). This reference does not indicate market failure, as discussed below.

The first, that PJM is indifferent, actually supports the conclusion that there is no barrier to renewable generation in the current wholesale market structure. AEP Ohio Brief at 63-68. Indifference, by definition, cannot be a barrier to entry or prevent an economic resource from flourishing. If AEP Ohio is correct that renewable resources are economic, see AEP Ohio Ex. 14, JFT at 10 of 41, and that PJM is indifferent, then those resources should clear in markets and be a viable choice for price sensitive small and large customers.

Embedded in AEP Ohio's assertion that PJM's indifference prevents renewable development are several claims that are irrelevant to that assertion. For example, AEP Ohio resurrects the canard that Ohio is a net importer of electricity. Ohio's position as a net electric importer, however, has existed for years because AEP Ohio and other utilities located fossil-fueled plants in other states, not because markets have failed to deliver renewable resources. AEP Ohio Ex. 3 at 10; Tr. Vol. 1 at 101-03. Further, the implied claim that Ohio should be a net exporter contains a harmful policy choice: imposing on customers a subsidy to support an Ohio renewable project so that Ohio moves closer to being a net exporter of electricity encourages the Commission to ignore the efficiency of markets, a result that would impose additional costs on customers without reason. OCC Ex. 18 at 32-34.

In a similar vein, AEP Ohio indicates that PJM markets do not support fuel diversity. AEP Ohio Brief at 62-64. Yet fuel diversity is not an issue in the PJM or Ohio markets. As repeatedly noted, closures of Ohio-based facilities and the *increased* use of renewables do not threaten reliability of the network. AEP Ohio Ex. 19; IEU-Ohio Ex. 1 at 6.

The remainder of AEP Ohio's claims to support its attack on PJM's alleged indifference similarly are irrelevant to the question of whether a market failure exists. For example, AEP Ohio states that renewable generation construction will improve Ohio's economy and provide a price hedge. AEP Ohio Brief at 65-68.<sup>13</sup> Just as it is irrelevant to a finding of need, this claim does not address whether the generation market will fail to meet customer desires for renewable generation. It also ignores reality: markets are in fact responding on several levels to customer interest in renewable generation.

AEP Ohio's second claim, that renewable generation implementation is falling behind that of other states, is an effect without a cause that is linked to market failure. *Id.* at 68-70. Initially, the record demonstrated that state renewable requirements may be much more important than any alleged market failure as an explanation as to why other states may have a higher penetration rate. Tr. Vol. 1 at 104 and 140-41 (Pennsylvania has an in-state renewable requirement; Ohio does not). It also ignores future growth in Ohio. *Id.* at 141.

The third claim, that current offerings are not a substitute for a utility scale project, seems to assume that someone is being left behind. Who that someone is, however, goes unidentified.

More importantly, AEP Ohio's third claim is belied by the record. If, as AEP Ohio asserts, utility scale projects fill a gap, then that gap is being filled. IEU Ex. 1, KMM-6; Tr. Vol 8 at 2190; OCA Ex. 3 at 36. Moreover, the cost of renewable generation is decreasing

---

<sup>13</sup> IEU-Ohio addressed the lack of merit of each of these claims in its initial brief. None provides a valid reason for finding a need for 900 MWs of renewable generation. See IEU-Ohio Brief, *passim*.

so that these resources have “become economic resource options for utilities to consider.” AEP Ohio Ex. 14, JFT-1 at 10 of 47.

Money is always an issue, but financing for large- and small-scale renewable projects is available. Tr. Vol. 8 at 2141 and 2163. Additionally, new financing models such as aggregation for utility scale resources is developing. *Id.* at 2191-94.

Most importantly, customers, developers, and marketers are developing renewable resources without imposing nonbypassable charges on other customers. Industrial and commercial customers, in keeping with their sustainability commitments, are either contracting for renewable credits, constructing their own behind-the-meter facilities, or both. AEP Ohio Ex. 4; Tr. Vol 8 at 2140-57 (various efforts by Owens-Corning, JPMorgan, Fifth Third Bancorp, Nationwide, and Kroger). Dozens of offers for residential and commercial contracts, including one from an AEP Ohio affiliate, are marketed as 100% renewables-based. IEU Ex. 4-6; Tr. Vol. 2 at 303-09; OCC Ex. 18 at 74. Individual customers, including low income residential customers and tenants, have or will have the option of securing renewable generation. Tr. Vol. 7 at 1983.<sup>14</sup>

In a generation segment in which cost is declining and customer interest is increasing, developers and electricity users are busy matching resources and load. Since there is no market failure, the Commission should let the market work. Staff Brief at 9.<sup>15</sup>

---

<sup>14</sup> For additional discussion regarding the scope of competitive response to demand for renewable generation and the lack of any demonstration of market failure, see Kroger Brief at 48-52; OCA Brief at 17-19; OMAEG Brief at 31-34; OCC Brief at 23-27.

<sup>15</sup> The Staff captured the problem succinctly in its brief. The Commission should base its decision whether the market is responsive to demand. Staff Brief at 8 (the Commission should examine what happens in the market rather than what some people may have suggested in a survey).

**C. The Commission should deny AEP Ohio's request to set a hearing for the second phase of these cases**

AEP Ohio asks for expedited scheduling regarding the two renewable energy purchase agreements. In support of this request, AEP Ohio stresses the need for a decision so that developers can begin construction and take advantage of current federal tax advantages. AEP Ohio Brief at 79. The Commission should not act on that request at this time for several reasons.

Initially, the timing of these cases was fully under AEP Ohio's control. It bound itself in a settlement to demonstrate that there is a need for 900 MWs of renewable generation in 2015. It chose to file the Amendment and the purchase power agreement cases in the second half of 2018. Any risk caused by delay rests with AEP Ohio.

Additionally, there is nothing precluding a developer from taking steps to secure the tax benefits of the investment tax credits by making the necessary investment in plant that could trigger a finding that it has begun construction. Under IRS Letter Ruling 2018-59, those actions are completely in the control of the developers and could be done today.<sup>16</sup>

Finally, the record in these cases demonstrates that further hearings concerning the renewable energy power agreements are not needed. AEP Ohio has not demonstrated a need for 900 MWs of renewable generation based on resource planning projections. Even under AEP Ohio's alternative theory of need based on customers' interest in renewable generation, the record does not demonstrate that the market cannot or will not match a renewable product to a customer's interest in renewable electricity.

---

<sup>16</sup> Administrative notice of the IRS Letter Ruling was taken by the Commission. Tr. Vol. II at 400.

Accordingly, the Commission should not set a schedule for further hearings on the renewable energy power agreements at this time.

### **III. CONCLUSION**

Ohio has elected markets as the means by which customers secure electric generation resources with the supplier, price, terms, conditions, and quality options they elect. R.C. 4928.02(B). In these cases, AEP Ohio seeks to upset that policy choice by forcing all retail customers to assume the risk that the resources AEP Ohio selects will not be economic. Before authorizing that assignment of risk, AEP Ohio must demonstrate a need for the generation facility based on resource planning projections. It has failed to do so. Accordingly, the Commission should deny AEP Ohio's request for a finding of need for 900 MWs of renewable energy generation resources and terminate these cases.

Respectfully submitted,

/s/ Frank P. Darr

**Frank P. Darr** (Reg. No. 0025469)

(Counsel of Record)

**Matthew R. Pritchard** (Reg. No. 0088070)

McNEES WALLACE & NURICK LLC

21 East State Street, 17<sup>TH</sup> Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

fdarr@mwncmh.com

mpritchard@mwncmh.com

**COUNSEL FOR INDUSTRIAL ENERGY USERS-OHIO**

## **CERTIFICATE OF SERVICE**

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Reply Brief of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for Industrial Energy Users-Ohio, to the following parties of record on this 27th day of March 2019, via electronic transmission, hand-delivery or U.S. mail, postage prepaid.

/s/ Frank P. Darr

Frank P. Darr

**Steven T. Nourse** (Reg. No. 0046705)  
(Counsel of Record)  
**Christen M. Blend** (Reg. No. 0086881)  
American Electric Power Service Corporation  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, OH 43215  
stnourse@aep.com  
cmblend@aep.com

**Eric B. Gallon** (Reg. No. 0071465)  
**L. Bradfield Hughes** (Reg. No. 0070997)  
Porter Wright Morris & Arthur, LLP  
41 South High Street, 30<sup>th</sup> Floor  
Columbus, OH 43215  
egallon@porterwright.com  
bhughes@porterwright.com

**Christopher L. Miller** (Reg. No. 0063259)  
**Jason M. Rafeld** (Reg. No. 0079809)  
Ice Miller LLP  
250 West Street  
Columbus, OH 43215  
Christopher.miller@icemiller.com  
Jason.rafeld@icemiller.com

**COUNSEL FOR OHIO POWER COMPANY**

**Michael L. Kurtz**  
**Kurt J. Boehm**  
**Jody Kyler Cohn**  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, OH 45202  
mkurtz@BLKlawfirm.com  
kboehm@BLKlawfirm.com  
jkylercohn@BLKlawfirm.com

**COUNSEL FOR THE OHIO ENERGY GROUP**

**Colleen L. Mooney** (Reg. No. 0015668)  
**Christopher J. Allwein** (Reg. No. 0084914)  
Ohio Partners for Affordable Energy  
PO Box 12451  
Columbus, OH 43212-2451  
cmooney@opae.org  
callwein@opae.org

**COUNSEL FOR OHIO PARTNERS FOR AFFORDABLE ENERGY**

**Angela Paul Whitfield** (Reg. No. 0068774)  
Carpenter Lipps & Leland LLP  
280 North High Street, Suite 1300  
Columbus, OH 43215  
paul@carpenterlipps.com

**COUNSEL FOR THE KROGER CO.**



**Richard C. Sahli** (Reg. No. 0007360)  
Richard Sahli Law Office, LLC  
981 Pinewood Lane  
Columbus, OH 43230-3662  
rsahli@columbus.rr.com

**Tony Mendoza**  
Staff Attorney  
Sierra Club  
2101 Webster St., 13<sup>th</sup> Floor  
Oakland, CA 94612  
tony.mendoza@sierraclub.org

#### **COUNSEL FOR THE SIERRA CLUB**

**Maureen R. Willis** (Reg. No. 002847)  
Senior Counsel (Counsel of Record)  
**William J. Michael** (Reg. No. 0070921)  
**Christopher Healey** (Reg. No. 0086027)  
Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
65 East State Street, 7<sup>th</sup> Floor  
Columbus, OH 43215  
Maureen.willis@occ.ohio.gov  
William.michael@occ.ohio.gov  
Christopher.healey@occ.ohio.gov

#### **COUNSEL FOR THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

**Kimberly W. Bojko** (Reg. No. 0069402)  
**Brian W. Dressel** (Reg. No. 0097163)  
Carpenter Lipps & Leland LLP  
280 North High Street, Suite 1300  
Columbus, OH 43215  
Bojko@carpenterlipps.com  
Dressel@carpenterlipps.com

#### **COUNSEL FOR OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

**Joseph Olikier** (Reg. No. 0086088)  
(Counsel of Record)  
**Michael Nugent** (Reg. No. 0090408)  
IGS Energy and IGS Solar, LLC  
6100 Emerald Parkway  
Dublin, OH 43016  
joliker@igsenergy.com  
mnugent@igsenergy.com

#### **COUNSEL FOR IGS ENERGY AND IGS SOLAR**

**Miranda Leppla** (Reg. No. 0086351)  
(Counsel of Record)  
**Trent Dougherty** (Reg. No. 0079817)  
**Chris Tavenor** (Reg. No. 0096642)  
Ohio Environmental Council  
1145 Chesapeake Avenue, Suite 1  
Columbus, OH 43212-3449  
mleppla@theOEC.org  
tdougherty@theoec.org  
ctavenor@theoec.org

#### **COUNSEL FOR THE OHIO ENVIRONMENTAL COUNCIL**

**Robert Dove** (Reg. No. 0092019)  
Kegler Brown Hill Ritter Co., LPA  
65 East State Street, Suite 1800  
Columbus, OH 43215-4295  
rdove@keglerbrown.com

#### **COUNSEL FOR NATURAL RESOURCES DEFENSE COUNCIL**

**Mark A. Whitt** (Reg. No. 0067996)  
**Rebekah J. Glover** (Reg. No. 0088798)  
WHITT STURTEANT LLP  
The KeyBank Building, Suite 1590  
88 East Broad Street  
Columbus, OH 43215  
whitt@whitt-sturtevant.com  
glover@whitt-sturtevant.com

#### **COUNSEL FOR DIRECT ENERGY, LP AND RETAIL ENERGY SUPPLY ASSOCIATION**

**John F. Stock** (Reg. No. 0004921)  
**Orla E. Collier** (Reg. No. 0014317)  
Benesch, Friedlander, Coplan & Aronoff LLP  
41 S. High Street, 26<sup>th</sup> Floor  
Columbus, OH 43215  
jstock@beneschlaw.com  
ocollier@beneschlaw.com

**Mark J. Silberman**  
Benesch Friedlander Coplan & Aronoff LLP  
333 West Wacker Drive, Suite 1900  
Chicago, IL 60606  
(312) 212-4952 (T)  
(312) 767-9192 (F)  
msilberman@beneschlaw.com

**John Rego** (Reg. No. 0039774)  
**Michael Montgomery** (Reg. No. 0070922)  
Benesch Friedlander Coplan & Aronoff LLP  
200 Public Square, Suite 2300  
Cleveland, OH 44114  
jreg@beneschlaw.com  
mmontgomery@beneschlaw.com

**COUNSEL FOR OHIO COAL ASSOCIATION**

**Devin D. Parram** (Reg. No. 0082507)  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, OH 43215  
dparram@bricker.com

**COUNSEL FOR THE OHIO HOSPITAL ASSOCIATION**

**Katie Johnson Treadway** (Reg. No. 0091064)  
One Energy Enterprises LLC  
12385 Township Rd. 215  
Findlay, OH 45840  
ktreadway@oneenergyllc.com

**Dylan F. Borchers**  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, OH 43215-4291  
dborchers@bricker.com

**COUNSEL FOR ONE ENERGY ENTERPRISES LLC**

**Christine M. T. Pirik** (Reg. No. 0029759)  
(Counsel of Record)  
**Terrence O'Donnell** (Reg. No. 0074213)  
**William V. Vorys** (Reg. No. 0093479)  
**Cristina N. Luse** (Reg. No. 0097785)  
Dickinson Wright PLLC  
150 East Gay Street, Suite 2400  
Columbus, OH 43215  
cpirik@dickinsonwright.com  
todonnell@dickinsonwright.com  
wvorys@dickinsonwright.com  
cluse@dickinsonwright.com

**COUNSEL FOR MID-ATLANTIC RENEWABLE ENERGY  
COALITION**

**Michael J. Settineri** (Reg. No. 0073369)  
(Counsel of Record)  
**Gretchen L. Petrucci** (Reg. No. 0046608)  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street  
Columbus, OH 43215  
mjsettineri@vorys.com  
glpetrucci@vorys.com

**COUNSEL FOR PJM POWER PROVIDERS GROUP  
AND THE ELECTRIC POWER SUPPLY ASSOCIATION**

**Michael D. Dortch** (Reg. No. 0043897)  
**Richard R. Parsons** (Reg. No. 0082270)  
**Justin M. Dortch** (Reg. No. 0090048)  
Kravitz, Brown & Dortch, LLC  
65 East State Street, Suite 200  
Columbus, OH 43215  
mdortch@kravitzllc.com  
rparsons@kravitzllc.com  
jdortch@kravitzllc.com

**COUNSEL FOR CALPINE RETAIL HOLDINGS, LLC**

**Nathan D. Painter** (Reg. No. 0076274)  
Painter & Associates, LLC  
5123 Norwich Street, Suite 200  
Hilliard, OH 43026  
(614) 319-3306 (T)  
(614) 594-7170 (F)  
nathan@painterandassociates.com

**COUNSEL FOR DR. NOAH DORMADY**

**Thomas McNamee** (Reg. No. 0018010)  
Public Utilities Section  
Assistant Attorney General  
Office of the Ohio Attorney General  
30 E. Broad St., 16th Floor  
Columbus, OH 43215  
thomas.mcnamee@ohioattorneygeneral.gov

**COUNSEL FOR THE STAFF OF THE PUBLIC UTILITIES  
COMMISSION OF OHIO**

**Sarah Parrot**  
**Greta See**  
Attorney Examiners  
Public Utilities Commission of Ohio  
180 East Broad Street, 12<sup>th</sup> Floor  
Columbus, OH 43215  
Sarah.Parrot@puc.state.oh.us  
Greta.See@puc.state.oh.us

**ATTORNEY EXAMINERS**

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**3/27/2019 3:09:19 PM**

**in**

**Case No(s). 18-0501-EL-FOR, 18-1392-EL-RDR, 18-1393-EL-ATA**

Summary: Brief Reply Brief of Industrial Energy Users-Ohio electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio