

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY BRIEF OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. LEGAL STANDARD..... 2

III. ARGUMENT..... 5

 A. AEP Ohio Does Not Contest Key Facts Which Dispositively Demonstrate that Its Request to Develop Renewable Generation Fails to Satisfy Ohio Law 7

 i. AEP Ohio Has Not Established a Need for the Proposed Development of Generation Based on Resource Planning Projections and Accordingly Has Failed to Meet Its Burden of Proof 7

 ii. AEP Ohio’s Attempts to Redefine Ohio Law Are Unavailing 11

 iii. Given Ohio’s Legal Framework and the Evidence before it, the Commission Erred in Denying the Intervening Parties’ Motion for a Directed Verdict at the Close of AEP Ohio’s Case-in Chief..... 16

 B. Appeals to Customer Desires Do Not Support AEP Ohio’s Attempt to Meet Its Burden of Proof..... 16

 i. AEP Ohio’s Data from Customer Surveys Does Not Demonstrate a Need Based on Resource Planning Projections..... 17

 ii. Testimony at Public Hearings and Submission of Public Comments Do Not Demonstrate Need Based on Resource Planning Projections..... 24

 iii. A Simple Review of the Litigants in this Proceeding Demonstrates that AEP Ohio’s Claims of Near-Unanimous Public Support Are Unfounded..... 27

 C. Claims of Economic Benefit Do Not Support AEP Ohio’s Attempt to Meet Its Burden of Proof..... 28

 D. AEP Ohio’s Claims of Market Failures Are Not Supported by Record Evidence 31

 i. Fuel Diversity, Ohio’s Status as a Net Importer of Energy, and Similar Concerns Do Not Support a Determination that There Has Been a Market Failure or Justify AEP Ohio’s Proposal..... 31

 ii. PJM’s Relatively Lower Renewable Generation Deployment Does Not Support Approval of AEP Ohio’s Proposal 34

 iii. CRES Offerings Allow Customers to Satisfy Their Desires for Renewable Generation..... 35

 E. The Commission Should Afford All Parties Due Process in Deciding this Case..... 36

 F. The Scope of the First Phase of the Hearing Was Unjustly and Unreasonably Defined and Inconsistently Applied..... 37

IV. CONCLUSION..... 39

I. INTRODUCTION

Within a mere twenty words of its post-hearing brief, the Ohio Power Company (AEP Ohio or the Company) admitted that their proposal to charge customers for non-competitive, utility-owned generation projects is unlawful. In discussing R.C. 4928.143(B)(2)(c) (ESP statute), the operative statute in this case, AEP Ohio stated that “the extent to which the Commission should make use of the provision is a policy debate, not a legal one.”¹ As demonstrated by the staggering assertion that the applicability of a statutory provision to its proposal is not a legal question, AEP Ohio reveals that it never intended to seriously contest the legal applicability of the statute and has built its entire case upon convincing the Public Utilities Commission of Ohio (Commission) to ignore the statute and its duty to uphold the law and make a policy decision that is blatantly inconsistent with that law. But not only does AEP Ohio ask the Commission to ignore the ESP statute, it also asks the Commission to ignore the enumerated state policy that favors competition in the generation markets and disfavors the development of generation using customer funds by regulated distribution utilities; a policy which the Commission has already determined precludes the sort of renewable generation development that AEP Ohio proposes here. Instead, AEP Ohio asks this Commission to make some other “policy” decision.

Contrary to AEP Ohio’s attempt to frame this case around the abstract merits of renewable energy in general or the purported desires of a small portion of AEP Ohio customers, this case is **not** about virtues of renewable energy or the benefits that it could provide if properly deployed. This case is about whether AEP Ohio’s specific application before the Commission satisfies Ohio law. The record is clear—it does not.

¹ Initial Post-Hearing Brief of Ohio Power Company Regarding Its Amended Long-Term Forecast Report and the Issue of Need at 1 (March 6, 2019) (Company Brief).

Pursuant to the Attorney Examiners' directive at the close of hearing, OMAEG respectfully submits this reply brief.²

II. LEGAL STANDARD

As explained in OMAEG's initial brief, Ohio law generally prohibits regulated distribution utilities from owning generation.³ The passage of Senate Bill 3 by the General Assembly resulted in a decisive shift away from traditional cost-of-service principles to a competitive-market approach, which "provides for competition in the supply of electric generation services * * *" and where CRES suppliers compete to provide customers' generation service. Indeed, R.C. 4928.02(H) explicitly provides that it is the policy of the state of Ohio 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.

The Commission's adherence to this policy, and to others included under R.C. 4928.02, is not optional: R.C. 4928.06 provides that the Commission "shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated." Given the decisive policy shift away from monopoly-owned generation and towards a competitive market, the Commission should not easily disregard the importance of the state's policy or construe and interpret limited exceptions to the general policy broadly. The General Assembly has set forth specific, carefully-tailored, and limited exceptions to the state policy favoring competitive markets over the sort of monopolized generation that AEP Ohio proposes in this case. None of which apply here.

² Tr. Vol. XII at 2834.

³ Post-Hearing Brief of the Ohio Manufacturers' Association Energy Group at 4-6 (March 6, 2019) (OMAEG Brief).

⁴ *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St. 3d 451, 2004-Ohio-3924, 812 N.E.2d 955, ¶ 2.

More specifically, AEP Ohio is contending that its proposal is authorized by R.C. 4928.143(B)(2)(c). That statute provides:

[t]he 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.⁵

Contrary to AEP Ohio's suggestion in its brief,⁶ the passage of Senate Bill 221 did not change the general policy. In stating that R.C. 4928.143(B)(2)(c) was a "hallmark" of Senate Bill 221, AEP Ohio vastly overstates the reach of the single provision that was narrowly enacted.⁷ Rather than creating an unlimited exception to the general policy of furthering competitive generation markets and prohibiting distribution utility-owned generation, Senate Bill 221 narrowly established a safety net; a provision that would authorize monopoly-owned generation paid for by its customers if, and only if, the distribution utility could first demonstrate that there was a need to construct the facility. The General Assembly went a step further to narrowly define what need meant and when it could be demonstrated: the distribution utility has

⁵ R.C. 4928.143(B)(2)(c) (emphasis added).

⁶ Company Brief at 1-2.

⁷ See *id.* at 1.

to demonstrate that the need is based on resource planning projections. The General Assembly did not leave the word “need” undefined so that a distribution utility could define it as it saw fit. Rather, the General Assembly created the safety net exception with the explicit limitation that the distribution utility had to first establish that there was a need for the generating facility based on resource planning projections. The General Assembly further narrowed the safety net by placing additional limitations on the distribution utility before invoking the exception to the general prohibition against distribution utility-owned generation.

More specifically, pursuant to the plain language of the statute, an electric distribution utility cannot charge consumers for generation facilities unless (1) the facilities will be “owned or operated” by the utility; (2) facilities are sourced through a competitive bid process; (3) the facilities are newly used and useful on or after January 1, 2009; and (4) the utility dedicates the capacity and energy from the generation facilities to Ohio consumers.⁸ These express conditions must each be met before a regulated utility such as AEP Ohio can receive cost recovery from captive customers for owning, operating, or constructing generation resources. Thus, in order for AEP Ohio to recover charges from customers for the development of the proposed renewable generation facilities, it must submit information to the Commission sufficient for the Commission to determine that AEP Ohio will own or operate the proposed facilities, the facilities will be newly used and useful and sourced through a competitive bid process, and that AEP Ohio will dedicate capacity and energy from the generation facilities to Ohio customers. But, first, the law requires AEP Ohio to demonstrate that there is a need for the proposed generation based on resource planning projections.

⁸ R.C. 4928.143(B)(2)(c).

The Commission has clearly interpreted R.C. 4928.143(B)(2)(c) and defined its authority:⁹

Finally, in accordance with Section 4928.143(B)(2)(c), Revised Code, the Commission may authorize, under certain circumstances, a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by an EDU, as a component of its electric security plan (ESP). Among other requirements, the statute provides that the Commission must first determine that there is a need for the facility based on resource planning projections submitted by the EDU, before a nonbypassable surcharge may be authorized.

The Commission has explained that when analyzing an application for need to build a renewable generation facility, it “would first look to the market to build needed capacity and that new generation or capacity projects would only be authorized under Section 4928.143(B)(2), Revised Code, when generation needs cannot be met through the competitive market.”¹⁰ Short of such a showing, AEP Ohio is unable to meet this statutory exception and its request to develop at least 900 MW of renewable energy resources must be denied.

III. ARGUMENT

AEP Ohio attempts to frame this case around the abstract merits of renewable energy in general and the purported desires of its customers to somehow justify charging customers millions of dollars¹¹ to develop a renewable generating facility that will not serve customers, but instead, will be sold into the wholesale regional market.¹² AEP Ohio’s arguments are misguided, however, as the parties are not disputing or contesting that competitively-sourced renewable

⁹ *In re Long-Term Forecast Report of Ohio Power Co.*, Case No. 10-501-EL-FOR, Opinion and Order at 6 (January 9, 2013) (Turning Point Order).

¹⁰ *Id.* at 26.

¹¹ See Tr. Vol. V at 1339.

¹² See OCC Ex. 18 at JAL-6 (Lesser Direct).

energy can provide economic and environmental benefits.¹³ In fact, OMAEG and others who oppose this proposal support the development of renewable generation when that development occurs through competitive, market-driven channels and not by way of an above-market charge paid by customers to a monopoly utility. Indeed, experience demonstrates that truly economical generation sources are more likely to be desired by customers and will thus thrive in the competitive market without the aid of above-market charges or other Commission intervention. OMAEG Witness Seryak explained that “customers are currently free to choose how to meet their varied interests and many do so through their choice of CRES suppliers and various energy products. Thus, any customer ‘want’ can and should be fulfilled through those competitive options.”¹⁴ Industrial Energy Users-Ohio (IEU-Ohio) Witness Murray described how customers in Ohio can competitively source their generation, and, in doing so choose to rely upon renewable generation.¹⁵ OCC Witness Shioshansi testified that the competitive market naturally promotes efficient generation resources without interference from regulatory bodies such as the Commission.¹⁶

Contrary to AEP Ohio’s assertions, the real issue is a simple one: under R.C. 4928.143(B)(2)(c), is there a need for a generation facility based on resource planning projections that necessitates AEP Ohio developing renewable generation at customers’ expense? As demonstrated in the initial briefs of OMAEG, Staff, and others, and reiterated herein, there is not.

¹³ See OMAEG Brief at 1; Initial Brief of the Office of the Ohio Consumers’ Counsel at 2 (March 6, 2019) (OCC Brief).

¹⁴ OMAEG Ex. 16 at 12 (Seryak Direct).

¹⁵ IEU Ex. 1 at 11 (Murray Direct).

¹⁶ OCC Ex. 25 at 9 (Shioshansi Direct).

A. AEP Ohio Does Not Contest Key Facts Which Dispositively Demonstrate that Its Request to Develop Renewable Generation Fails to Satisfy Ohio Law.

- i. AEP Ohio Has Not Established a Need for the Proposed Development of Generation Based on Resource Planning Projections and Accordingly Has Failed to Meet Its Burden of Proof.

In order for the Commission to grant AEP Ohio’s request, under R.C. 4928.143(B)(2)(c), the Company must first demonstrate that a resource planning need exists. As noted above, the law provides that the Commission may not authorize a surcharge to customers for the development of renewable generation by a distribution utility “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.”¹⁷ In its brief, AEP Ohio spends a great deal of time discussing the resource planning need requirement.¹⁸ AEP Ohio, however, mostly refers to it as a “‘need’ finding,”¹⁹ ignoring the full language of the statute, which states a “need based on resource planning projections.”²⁰ This is an improper reading of the statute as AEP Ohio cannot meet its burden of proof by establishing just any need; rather, it must show a need based on resource planning projections.

In its initial brief, OMAEG explained how basic conventions of statutory interpretation—such as construing undefined words in statutes to carry their common, ordinary, accepted meaning—dictate that the word “need” in R.C. 4928.143(B)(2)(c) be read to mean that no surcharge for the development of generation facilities under that provision unless a showing is

¹⁷ See R.C. 4928.143(B)(2)(c).

¹⁸ See, e.g., Company Brief at 9-23.

¹⁹ See, e.g., id. at 6.

²⁰ R.C. 4928.143(B)(2)(c).

made that those facilities are necessary.²¹ Another intervenor used a similar common-meaning analysis to reach the same conclusion.²²

Staff, meanwhile, used a different mode of analysis to arrive at the same result. Staff explained how considering R.C. 4928.143 in light of other statutes enacted by the General Assembly, specifically R.C. 4935.04, shows that AEP Ohio's proposed broad definition of need is illogical, as adopting the Company's definition would render the inclusion of the term "resource planning projections" superfluous.²³ Staff's analysis is sound and demonstrates, consistent with the arguments advanced by OMAEG and others and previously adopted by the Commission, that AEP's proposed need justifications in this case do not pass statutory muster.

Moreover, the Commission has already correctly interpreted the requirements of R.C. 4928.143(B)(2)(c). As noted in the briefs of OMAEG and others,²⁴ AEP Ohio sought approval of charges to customers for developing solar energy resources, commonly referred to as the "Turning Point" project in its 2010 long-term forecast case.²⁵ That case involved a proposal for the development of less than 50 MW of solar energy resources, or, in other words, roughly six percent of the amount of generation AEP Ohio seeks to develop in this case.²⁶ Ultimately, in Turning Point, the Commission determined that speculative assertions that the Company may

²¹ See OMAEG Brief at 21.

²² See Kroger Brief at 33-34.

²³ Staff Brief at 3-5.

²⁴ See OMAEG Brief at 27-28; IEU-Ohio Brief at 13-14; OCC Brief at 6-8; Kroger Brief at 31; Initial Brief of Intervenor Ohio Coal Association at 7 (March 6, 2019) (OCA Brief).

²⁵ *In re Long-Term Forecast Report of Ohio Power Co.*, Case No. 10-501-EL-FOR.

²⁶ *In re Long-Term Forecast Report of Ohio Power Co.*, Case No. 10-501-EL-FOR, Opinion and Order at 2 (January 9, 2013) (Turning Point Order).

need additional renewable resources do not provide a sufficient basis to approve recovery from customers under R.C. 4928.143(B)(2)(c).²⁷

The parties all more or less agree that AEP Ohio is unable to meet this statutory obligation to demonstrate need based on resource planning projections. As noted in the initial briefs of OMAEG and others, AEP Ohio openly admits that “PJM wholesale markets are adequately supplying capacity and energy to the AEP Ohio load zone.”²⁸ Witness after witness who supported the Company’s proposal admitted that there is not a resource planning need justifying AEP Ohio’s request. Company Witness Allen admitted that AEP Ohio was not attempting to address a capacity need.²⁹ Company Witness Ali further established that the proposal was similarly unnecessary to meet any sort of requirements for providing reliable service and that the request was, instead, solely related to the purported reduction of energy prices.³⁰ Even AEP Ohio’s survey of customers, which it attempts to use as a central pillar of its case, was not designed to determine a specific type of need (such as a resource planning need), according to one of the Company’s witnesses who sponsored said survey.³¹ Mid-Atlantic Renewable Energy Coalition (MAREC) Witness Burcat acknowledged that this proposal would not help AEP Ohio to meet either an energy or a capacity need.³²

Meanwhile, considerable testimony from opposing parties reinforced the reality that AEP Ohio does not have a resource planning need for the proposed generation. Staff Witness Benedict testified that he personally reviewed AEP Ohio’s load forecast and determined that

²⁷ Id. at 26.

²⁸ Company Ex. 2 at 3; see also OMAEG Brief at 21; Staff Brief at 11-12; OCC Brief at 5.

²⁹ See Company Ex. 3 at 8 (Allen Direct).

³⁰ Tr. Vol. II at 428.

³¹ Id. at 641 (emphasis added).

³² See Tr. Vol. VIII at 2045 (emphasis added).

sufficient resources exist to meet the Company’s projected load.³³ Staff Witness Siegfried further confirmed that AEP Ohio does not need the proposed 900 MW of renewable generation.³⁴ OCC Witness Sioshansi noted that AEP Ohio has failed to show that customers’ generation needs cannot be met through the competitive market, and, therefore, the proposal should be rejected.³⁵ As Kroger Witness Bieber stated, the need requirement cannot be satisfied as AEP Ohio has not shown that 900 MW of renewable generation is needed to meet demand, peak load, or reserves as R.C. 4928.143(B)(2) requires.³⁶ These sentiments were reflected in the testimony of several other witnesses as well.³⁷ Ultimately, “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 [the Renewable Generation Rider (Rider RGR)] for the proposed 900 MW of renewable energy projects in Ohio.”³⁸

These admissions are crucial, as the plain language of R.C. 4928.143(B)(2)(c) and other Ohio statutes are controlling in this case. The Commission should begin its analysis with the plain language of the statute. The Supreme Court of Ohio has repeatedly held that “[w]hen construing a statute, we first look to its plain language.”³⁹ Additionally, “[w]e apply a statute as it is written when its meaning is unambiguous and definite.”⁴⁰ As discussed above, it is clear

³³ Staff Ex. 2 at 8 (Benedict Direct).

³⁴ Staff Ex. 1 at 4 (Siegfried Direct).

³⁵ OCC Ex. 25 at 7 (Sioshansi Direct).

³⁶ Kroger Ex. 4 at 12-13 (Bieber Direct).

³⁷ See, e.g., OCC Ex. 18 at 6 (Lesser Direct); OCA Ex. 2 at 4 (Brown Direct); OCA Ex. 3 at 3 (Medine Direct); IGS Ex. 10 at 2-3 (Haugen Direct); IGS Ex. 11 at 14 (White Direct); IEU-Ohio Ex. 12 at 5 (Murray Direct); Direct Ex. 2 at 15 (Lacey Direct).

³⁸ OMAEG Ex. 16 at 5 (Seryak Direct).

³⁹ *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.

⁴⁰ *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.

that an analysis that begins with the plain text of the law will end the analysis as the evidence is clear (and AEP Ohio has admitted) that AEP Ohio does not have a need for the facility based on resource planning projections. Period. There is no need to engage in the sideshow that AEP Ohio offers in an attempt to subvert the clear meaning of the statutory provision. The plain language of the statute controls, and the plain language of the statute dictates that AEP Ohio's proposal should be rejected.

ii. AEP Ohio's Attempts to Redefine Ohio Law Are Unavailing.

To overcome its failure to establish need in a manner that is consistent with the statute, AEP Ohio turns to testimony of witnesses to state that the word "need" can have different meanings in different contexts.⁴¹ AEP Ohio's analysis, however, ignores the context that is relevant to the question of the meaning of "need" here. AEP Ohio correctly notes that the Commission must look at "the four corners of the enactment," but then fails to provide such an analysis in its brief.⁴² Specifically, AEP Ohio ignores that the statute contains the phrase "based on resource planning projections" after the term "need." It appears that AEP Ohio would have the Commission just read "resource planning need" out of the statute, stating "the term 'need' in the ESP statute necessarily means something more than resource adequacy as provided by PJM."⁴³

AEP Ohio also acknowledges that the Commission should not use statutory interpretation which would render portions of the statute to be superfluous.⁴⁴ AEP Ohio claims that this means that "need" could not possibly be defined as opposing parties such as OMAEG claim because

⁴¹ Company Brief at 11.

⁴² Id. at 14.

⁴³ Id. at 15.

⁴⁴ Id. at 14-15 (citing *Elec. Classroom of Tomorrow v. Ohio Dept. of Edn.*, Slip Opinion No. 2018-Ohio-3126, ¶ 23).

PJM will always adequately supply sufficient generation to meet demand, and thus, there would never be a situation that arises wherein a distribution utility could have a need under the unmet demand-focused interpretation of OMAEG and others.⁴⁵ This argument lacks merit and directly contradicts the Commission’s decision in Turning Point. As explained previously, the provision in question was put in place not as a “vain and useless” provision as AEP Ohio would like the Commission to believe, but rather as a safety net to address the “doomsday scenario” that AEP Ohio describes in its brief. As Staff noted in its brief, at the time that this exception was added to the statute, such a failure of PJM that would necessitate this sort of safeguard was much easier to imagine than it might be in the current PJM market.⁴⁶ Moreover, it is not the case that PJM could never require localized generation to address congestion issues; only that PJM is adequately ensuring sufficient generation at this time such that AEP Ohio has been unable to establish need.

Furthermore, at the same time that AEP Ohio is arguing that the statute must encompass additional circumstances because the provision only addresses an unlikely but important contingency, it implicitly asks the Commission to find that the phrase “based on resource planning projections” be treated as superfluous in defining the term “need,” as discussed above. Thus, if anything, statutory construction canons about superfluous language detract from AEP Ohio’s argument, not add to it.

Despite AEP Ohio’s contention that terms must be considered in context and not the abstract, the Company then proposed to use a definition of need from a Commission decision that was rendered *before* the provision in question even went into effect. The Company cites the Commission’s February 11, 2009 Entry on Rehearing in Case No. 08-777-EL-ORD for its

⁴⁵ Id.

⁴⁶ Staff Brief at 11-12.

conception of “need” without ever acknowledging that R.C. 4928.143(B)(2)(c) and its limited exception to the prohibition against utility-owned generation was not even in effect at the time that the Entry on Rehearing was issued.⁴⁷

AEP Ohio’s citation to the Commission opinion approving the placeholder Rider RGR is similarly unpersuasive.⁴⁸ The Commission in that case, as noted in the passage AEP Ohio cites, allowed the placeholder Rider RGR, but required that the Company establish a need for any generation facilities developed under Rider RGR under the requirements of R.C. 4928.143(B)(2)(c).⁴⁹ Thus, the cited opinion explicitly declines to address the R.C. 4928.143(B)(2)(c) requirements except to the extent that it generally says that AEP Ohio is required to adhere to those requirements in future proceedings when attempting to populate Rider RGR. Similarly, other statements from the Commission about the general benefits of renewable energy⁵⁰ are irrelevant for the issue at hand considering that the Commission has already held that the Company must satisfy R.C. 4928.143(B)(2)(c) before proceeding with the development of renewable generation resources.

After this series of attempts at misdirection, AEP Ohio turns to one of the sturdier roadblocks to the approval of its request: the Turning Point Order. As noted herein and in the parties’ briefs, the Commission determined that speculative assertions that the Company may need additional renewable resources at some point in the future do not provide a sufficient basis to approve recovery from customers under R.C. 4928.143(B)(2)(c), that the “need based on resource planning projections” provision of the statute requires more.⁵¹

⁴⁷ See Company Brief at 16-17; see also R.C. 4928.143 (amended effective March 22, 2012).

⁴⁸ See Company Brief at 8-9.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Turning Point Order at 26.

AEP Ohio offers several arguments as to why the Commission should abandon its own precedent in violation of the Supreme Court of Ohio’s directive to the Commission to respect its own precedents in order to “assure predictability which is essential in all areas of law, including administrative law.”⁵² None of AEP Ohio’s arguments is compelling.

First AEP Ohio offers a nonsensical assertion that an entry on rehearing in Case No. 11-346-EL-SSO (an ESP proceeding) that was issued before the Turning Point Order somehow makes reliance on the Turning Point Order in this case “questionable.”⁵³ The Company’s assertion is not even intelligible as a sentence, let alone legally persuasive. Second, AEP Ohio argues that the Turning Point Order was fact-intensive and because AEP Ohio believes the facts in this case are different, the precedent does not apply.⁵⁴ Of course, any use of precedent necessarily requires the application of legal principles and statutory interpretations to a different set of facts and different case records. The point of OMAEG and others is that the Commission’s interpretation of need under R.C. 4928.143(B)(2)(c) articulated in the Turning Point Case precludes the finding of need and subsequent cost recovery for utility-owned generation that AEP Ohio seeks here.

AEP Ohio then returns to its practice of citing Commission decisions issued before the relevant statutory provision was even in effect. AEP Ohio cites discussion contained in the

⁵² See *In re Duke Energy Ohio, Inc.*, 150 Ohio St. 3d 437, 443, 2017-Ohio-5536, 82 N.E.3d 1148, ¶ 23 (internal citations omitted).

⁵³ See Company Brief at 19. OMAEG notes that AEP Ohio does not cite specific portions of these decisions and that they do not even appear to address the 2010 Forecast Case in the meaningful way that AEP Ohio suggests in its brief.

⁵⁴ *Id.*

Commission's order in AEP Ohio's Second ESP proceeding.⁵⁵ This citation is problematic and erroneous, as the opinion that AEP Ohio cites was reversed by the Commission on rehearing.⁵⁶

Perhaps in an attempt to minimize the importance of the Turning Point Case, AEP Ohio states that the case only represents "the policy views of a prior Commission." This attempt to belittle a Commission precedent again reveals the flawed approach underlying AEP Ohio's entire analysis in this case. The Commission was not stating a "policy view" in the Turning Point Case. The Commission's job in that case, as it is here, is to engage in statutory interpretation, not make policy. R.C. 4928.143 is not written to allow the policy whims of the Commission to adjust its meaning over time. The statute contains clear, precise language delineating when and how a utility can own generation resources. The *only* job of the Commission is to determine whether or not the statutory criteria have been met in a given case. If AEP Ohio has an issue with the policy that naturally results from the language of R.C. 4928.143, it should take up that policy disagreement with the General Assembly. The General Assembly, unlike the Commission, has the power to modify Ohio law.

AEP Ohio is left with its final argument against the Turning Point precedent. AEP Ohio suggests that the Commission simply ignore the precedent. AEP's argument here is faulty as well. AEP Ohio cites a Supreme Court of Ohio decision for the proposition that the Commission can abandon its policy views or modify its rationale from a prior decision when it explains its reasons for doing so.⁵⁷ This is not a compelling argument, as the Company has failed to present

⁵⁵ Company Brief at 20.

⁵⁶ See *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, et al.*, Case Nos. 11-346-EL-SSO, et al. At ¶ 21 (February 23, 2012) ("In this Entry on Rehearing, the Commission has determined, on two independent grounds, that the Stipulation submitted by the Signatory Parties does not benefit ratepayers and the public interest.")

⁵⁷ Company Brief at 19.

a coherent rationale for the Commission to determine that its interpretation of the statute, which has not been amended since the Turning Point Case, and the application of its interpretation to that case was invalid or in need of revision.

- iii. Given Ohio’s Legal Framework and the Evidence before it, the Commission Erred in Denying the Intervening Parties’ Motion for a Directed Verdict at the Close of AEP Ohio’s Case-in-Chief.

In its initial brief, OMAEG noted that the Commission, given the clear failure of AEP Ohio to meet its statutory burden of establishing a need based on resource planning projections, should have granted the motion for a directed verdict made by several parties⁵⁸ at the close of AEP Ohio’s case-in-chief.⁵⁹ OMAEG described how the Ohio Rules of Civil Procedure and precedent from the Supreme Court of Ohio set a standard for surviving a motion for a directed verdict that AEP Ohio could not meet in this case.⁶⁰ As IEU-Ohio succinctly described, “[t]he refusal to direct a decision adverse to AEP Ohio on the Amendment was error since reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to AEP Ohio.”⁶¹ OMAEG agrees, and asks the Commission to find that the decision to deny the motion was in error and to grant the motion.

B. Appeals to Customer Desires Do Not Support AEP Ohio’s Attempt to Meet Its Burden of Proof.

AEP Ohio is plainly unable to meet the statutory requirements necessary for the Commission to accept its proposal. Instead, it essentially offers the results of a popularity contest where the results were rigged from the start and the Company was the only contestant. Of course, the law is not a popularity contest and the General Assembly left no room in its

⁵⁸ Tr. Vol. VI at 1577-79.

⁵⁹ OMAEG Brief at 29-30.

⁶⁰ Id.

⁶¹ IEU-Ohio Brief at 38.

statutes for the Commission, or anyone else, to weigh public opinion in the interpretation of its statutes. Ultimately, AEP Ohio's appeals in this regard are irrelevant and should carry no weight as either evidence of need or even as accurate assessments of the public's views on these issues.

i. AEP Ohio's Data from Customer Surveys Does Not Demonstrate a Need Based on Resource Planning Projections.

The leading role in AEP Ohio's attempts to direct the Commission's attention away from the required statutory analyses is played by the Navigant "Voice of the Customer" survey that AEP Ohio conducted in an attempt to manufacture evidence in support of its proposal. Throughout its brief, as it did at hearing, AEP Ohio attempts to use the results from a flawed survey as evidence of a resource planning need under R.C. 4928.143(B)(2)(c).

AEP Ohio discusses how it interprets the survey to show that "customers believe it is important that AEP Ohio make greater use of renewable energy"⁶² and that customers are "willing to pay" increased charges for the proposed projects.⁶³ Of course, nowhere in the Ohio Revised Code has the General Assembly provided that a monopoly electric distribution utility may develop or own generation resources if a bias survey of a small fraction of those customers purports to show that those customers are willing to pay slightly more for a specific type of generation resource that the utility will own or develop. Accordingly, these considerations are wholly irrelevant to the Commission's assessment of whether or not AEP Ohio's proposal complies with R.C. 4928.143(B)(2)(c).

The question that the Commission must ask with regard to that statute is whether there is a need based on resource planning projections for AEP Ohio's proposal. The proposition that

⁶² Company Brief at 29-3 (AEP Ohio treats customer responses that state that greater use of renewable energy is "Slightly Important" or "Moderately Important" to be an indication that those customers generally feel that the greater used of renewable energy is "important").

⁶³ Id. at 30-32.

this survey supports such a determination of need is undermined by the testimony of the very witnesses who supported the results of the flawed survey at hearing. Company Witness Horner testified:

Q: And the survey also did not include any question about whether the customers needed renewable energy; isn't that true?

A: Well, the survey was geared toward asking customers and gauging their support for renewable energy as it was presented in the survey to customers.

Q: But my question, Ms. Horner, is did you 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 and expectations for renewable energy.⁶⁴

OMAEG Witness Seryak discussed the flaws in relying on a survey of a small amount of customers, who are not subject matter experts on the issues involved in this case and who may not have understood the questions, to demonstrate “need” for renewable generation.⁶⁵ As Mr. Seryak testified, “customer opinion is important, but has no bearing on ‘need.’ A survey of residential customers whom are not electric system subject matter experts can demonstrate ‘want’ but not ‘need.’”⁶⁶ Mr. Seryak further added that the competitive market is already fulfilling customer “wants” through the various products that are offered by CRES providers.⁶⁷ The survey failed to ask whether customers’ purported “desires” could have been fulfilled by the competitive market or by someone other than AEP Ohio. The survey failed to ask whether customers realized that if their renewable energy “desires” were met by the competitive market,

⁶⁴ Tr. Vol. III at 640-41 (emphasis added).

⁶⁵ OMAEG Ex. 16 at 12-13 (Seryak Direct).

⁶⁶ Id. at 12.

⁶⁷ Id.

they would not be assessed a surcharge on their distribution bills to pay for AEP Ohio to own or develop such facility.

OMAEG Witness Seryak also exposed that the customer survey did not even attempt to assess the views of all of AEP Ohio's customers, as it did not survey large businesses as part of its analysis.⁶⁸ The Commission should consider the possibility that AEP Ohio's largest customers, who, by definition, use more energy and have higher monthly bills, might have more knowledge about Ohio's regulatory framework and could have different opinions on the idea of increased charges on their distribution bills for monopoly-owned generation.⁶⁹ Finally, Mr. Seryak articulated that to the extent that surveys of this sort are used at all, the questions asked to customers should at least attempt to inform customers of the regulatory framework governing the ownership of generation in Ohio.⁷⁰ For instance, Mr. Seryak suggested that the Company could have asked whether "AEP Ohio – a deregulated distribution-only company – should be allowed to participate in the competitive electric generation market and receive customer funds to do so, when the policy of the state is to support competitive market development."⁷¹

AEP Ohio responds to Mr. Seryak in its brief. It raises two points in response. First, it argues that it would be "almost impossible to imagine" how the Company could have questioned the average Ohio electric customer and expect a thoughtful answer "without an additional, detailed presentation outlining a number of historical aspects of electric regulatory law in Ohio."⁷² Second, the Company contends that "the question Mr. Seryak flippantly suggests be

⁶⁸ Id. at 12-13.

⁶⁹ See OMAEG Brief at 36.

⁷⁰ OMAEG Ex. 16 at 13 (Seryak Direct).

⁷¹ Id.

⁷² Company Brief at 34.

posed to AEP Ohio customers happens to be the specific legal question reserved for this Commission in these proceedings.”⁷³

With these objections, AEP Ohio effectively and efficiently demonstrated the flaws underlying its entire case. It is exactly Mr. Seryak’s (and others’) point that customers are not capable of navigating the complex regulations that govern utility ownership of generation in Ohio. And while OMAEG rejects the idea that testimony challenging AEP Ohio’s survey on the merits is necessarily “flippant,” it agrees that most customers are not in a position to answer the legal question that is pending before the Commission.

And that is the point. Customers were not provided the entire story. They were not provided options so that their true desire for monopoly-owned or developed generation at customers’ expense could be evaluated versus renewable energy generated by the competitive market at private investors’ expense. Instead, they were provided misleading, one-sided information. Customers are not positioned to evaluate this proposal under Ohio law. They are not informed on the laws implicated by this proposal and they cannot answer legal questions. When interpreting the statute, the Commission does not apply the law based on public opinion polls or surveys. We can imagine that customer opinion would likely be in favor of significantly lower distribution rates charged by electric distribution utilities or that customers may by and large oppose above-market charges for coal plants through riders on their monthly bills. But the Commission ultimately interprets the law and sets the level of rates and establishes riders pursuant to Ohio law and its rules, and not based on skewed public opinion polls and surveys.

AEP Ohio next attempts to shift the burden of proof in this position by arguing that its proposal is boosted because no other party performed its own survey of AEP Ohio customers.⁷⁴

⁷³ Id. at 34-35.

The other parties (1) do not have a burden of proof in this proceeding; and (2) have articulated at length how this survey actually has no bearing on the legal question in this case. Even if we were operating in a regulatory environment where customer opinion polls and surveys on complex regulatory matters can drive the decisions of the regulators of those issues, it would be the Company's burden to present an adequate assessment of those opinions. It would not be the obligation of opposing parties to spend extensive time and resources to conduct their own survey to counteract the Company's, especially when, as is the case here, the Company's survey has been demonstrated to be severely flawed on its own merit, without the use of another competing survey.

AEP Ohio critiques opposing parties and their witnesses who criticize the survey, stating that those parties and witnesses have limited experience with developing or implementing customer surveys such as the one at issue in this case.⁷⁵ This contention is ironic given that Company Witness Horner—who designed, implemented, and sponsored the customer survey relied upon by AEP Ohio—admitted that she herself did not have significant prior experience with implementing these sorts of surveys.⁷⁶

AEP Ohio further refers to the scores of witnesses challenging the validity of the surveys as “self-professed experts.”⁷⁷ This characterization is not supported by the record in this case or by the Company's conduct during the first phase of the hearing. First, every witness in this case filed written testimony articulating his or her views on the matters at issue in the case. That testimony outlined the witness's background and qualifications. Thus, it is the experience,

⁷⁴ See Company Brief at 36.

⁷⁵ See *id.* at 37.

⁷⁶ Tr. Vol. III at 627-31 (recounting Ms. Horner's employment history and demonstrating that her background does not contain significant experience conducting customer surveys).

⁷⁷ Company Brief at 37.

training, education, skill, and knowledge of these witnesses that qualifies them as experts, not their proclamations that they are experts. Second, AEP Ohio did not object to or challenge the testimony of these witnesses at hearing as lacking sufficient expert foundation. Thus, they waived the argument that the testimony of intervening parties' witnesses lacks sufficient expert foundation.

The evidence demonstrates that those witnesses exposed the deep flaws in AEP Ohio's survey. For example, OCC Witness Dormady, based on his extensive experience, testified that the survey appeared to be designed to support the outcome that AEP Ohio desired, and not to honestly assess the views of the Company's customers.⁷⁸ Dr. Dormady explained how the survey's poor design resulted in several inherent biases affecting the results, including a Framing Bias, Hypothetical Bias, Social Desirability Bias, and a likely Selection Bias.⁷⁹ Dr. Dormady described how the survey used an unreliable approach and failed to include key methodological details.⁸⁰

As OMAEG explained in its initial brief, the survey also failed to properly and consistently code responses from customers.⁸¹ This poor coding may have resulted because Navigant failed to include coding reliability checks by having only a single person code.⁸² On Company Exhibit 7, responses are grouped into different categories, with responses coded as "Supportive," "Mixed," "Neutral/Unclear," and "Negative."⁸³ In its brief, OMAEG

⁷⁸ Id. at 4.

⁷⁹ Id.

⁸⁰ Id. at 5-10.

⁸¹ See OMAEG Br. at 38-40; Tr. Vol. XI at 2688-94.

⁸² OCC Ex. 24 at 10, 27-28 (Dormady Direct).

⁸³ See id.

demonstrated⁸⁴ how this unreliable coding process resulted in survey responses such as “Build wind turbines in KS (Kansas)/IL (Illinois) more wind than OH (Ohio). Don’t bother with solar in OH (Ohio) – cloudy days 50%-inconsistent power generation” being coded as “Supportive,”⁸⁵ comments such as “I prefer a cheaper bill. I don’t care about wind or solar” being coded as “Neutral/Unclear,”⁸⁶ Additionally, the poor coding resulted in the statement “This should not be at the expense of customers” as being coded as “Mixed.”⁸⁷ These coding errors, along with many others, show that the reliability of the survey AEP Ohio relies upon is highly questionable.

In the end, the results of this survey cannot tell us much. The opinions of customers who have not been full advised on the regulatory framework governing this case and who may not be aware of the existence of renewable products in the competitive market without ratepayer funding and who are not representative of AEP Ohio’s entire customer base and whose responses may not have even been adequately recorded are not relevant and certainly cannot be relied upon to create some inflated generalized “need” that would satisfy the statutory need based on resource planning projections. Rather than rely on this dubious survey, the Commission should use its extensive legal and regulatory expertise to evaluate the merits of this proposal under Ohio law, issue an order that is in accordance with Ohio law, and allow the competitive market to work to fulfill the desires of customers.

⁸⁴ OMAEG Brief at 38-39.

⁸⁵ Id. at 31.

⁸⁶ Id. at 88.

⁸⁷ Id. at 48.

ii. Testimony at Public Hearings and Submission of Public Comments Do Not Demonstrate Need Based on Resource Planning Projections.

Similar to its insistence that opinion polls can substitute for legal analysis, AEP Ohio also relies on public comments and testimony at the public hearings for this proceeding to support its argument. AEP Ohio recites testimony from public hearings that supports its proposal as evidence of need.⁸⁸ It also discusses the public comments filed by individuals in this docket as the proceeding has continued.⁸⁹

First, with regard to the public hearing testimony, AEP Ohio has not offered any evidence regarding the cited individuals' backgrounds or knowledge regarding utility regulation in Ohio. Before affording any substantial weight to the comments of individuals who chose to testify at this hearing on the application of R.C. 4928.143(B)(2)(c), it must be determined that those individuals have extensive knowledge about all facets of AEP Ohio's proposal, including the requirements of the law, the facts of the case, the cost to AEP Ohio's customers, and the alternatives available to monopoly-owned generation funded by customers. It cannot be denied that these individuals are supporters of renewable energy or that they want to see more renewable energy in the state. As explained previously, OMAEG and others also support the development of renewable generation when the development occurs through competitive, market-driven channels. The merits and benefits of renewable generation is not the issue in this case. The parties are not disputing or contesting that competitively-sourced renewable energy can provide economic and environmental benefits.

Indeed, OMAEG Witness Seryak testified that part of his business involves providing consulting services regarding energy efficiency and renewable energy and, despite his support

⁸⁸ Company Brief at 40-45.

⁸⁹ Id.

for renewable energy generally, he opposes the specific proposal in this case.⁹⁰ Staff Witness Benedict noted that the Commission and its Staff are committed to ensuring that renewable energy is available in the state, as evidenced by the Commission’s *PowerForward* initiative.⁹¹ Yet that support of renewable energy did not stop Mr. Benedict from concluding that AEP Ohio was improperly “conflating customer preferences with customer needs.”⁹² Finally, the Commission came to a similar conclusion in its Turning Point Order. At the same time the Commission rejected AEP Ohio’s attempt to develop generation facilities as a monopoly utility, the Commission reaffirmed that it was not passing judgment on the merits of renewable energy in general, but rather determining that AEP Ohio had not demonstrated a resource planning need as required under Ohio law.⁹³

Even to the extent that the testifying witnesses at the public hearings provided testimony regarding this proposal, the testimony was not specific enough to allow the Commission to determine that the witnesses had sufficient facts upon which to base their opinions. For instance, AEP Ohio cites one witness who states that he would be willing to pay “a little more” to initiate this project and get it off the ground.⁹⁴ This statement does not offer the Commission enough information to determine the extent of this person’s willingness to pay more for these projects and it has nothing to do with the requirement in the law to first demonstrate that there is a need for the generation facility based on resource planning projections. Other cited comments tout the witness’s assessment of the economic benefits that these projects would purportedly provide.⁹⁵

⁹⁰ OMAEG Ex. 16 at 2.

⁹¹ Staff Ex. 2 at 9 (Benedict Direct).

⁹² Id.

⁹³ Turning Point Order at 27-28.

⁹⁴ Company Brief at 42-43.

⁹⁵ Id. at 43-44.

First, as demonstrated in the initial brief of OMAEG and others and again below, economic benefits are not relevant to the Commission's determination in this case as these purported benefits would occur if the renewable project was developed in the market by private investors and developers (not AEP Ohio). Second, these witnesses do not appear to provide the requisite background to allow the Commission or parties to determine how they arrived at the conclusion that economic benefits would result from AEP Ohio's specific proposal pending before the Commission. Finally, testimony regarding the impact that this project could possibly have on combatting the opioid crisis in Ohio⁹⁶ is completely unsupported by the record. AEP Ohio does not cite evidence to support this conclusion and even if it did have concrete evidence that economic development would have the effect of combatting the opioid crisis, again, there is no evidence that these same benefits would not also occur through private development of these projects or through other economic development measures entirely.

When considering the written public comments, the Commission should note that the comments appear to be identical, form notices of support that different customers merely signed and forwarded to the Commission.⁹⁷ Emailed comments submitted to the Commission also appear to be scripted such that they are remarkably similar in substance.⁹⁸ The fact that the comments are essentially identical and appear to be scripted should be weighed by the Commission as part of its analysis. Repetitive, scripted comments submitted in masse that do not address the statutory issue of whether a resource planning need exists are not persuasive.

⁹⁶ See *id.* at 44.

⁹⁷ See, e.g., 300 Public Comments filed between two separate filings that are all identical in substance and only contain different names at the bottom of the comment.

⁹⁸ Compare Public Comments filed on March 18, 2019 (email from Myra Williams) with Public Comments filed on February 26, 2019 (email from Melissa Meyer).

iii. A Simple Review of the Litigants in this Proceeding Demonstrates that AEP Ohio's Claims of Near-Unanimous Public Support Are Unfounded.

It is an undeniable fact that representatives of AEP Ohio's industrial, residential, and commercial customers participated in this proceeding. For the most part, representatives of these customer groups opposed AEP Ohio's proposal in this case.⁹⁹ These groups all came to the same conclusion: that AEP Ohio's proposal is unlawful and should be rejected. This reality underscores the absurdity of AEP Ohio's arguments regarding relying on customer opinions to come to legal conclusions; surely AEP Ohio would not support an analysis that considers OMAEG, OCC, IEU-Ohio, or some other customer group's simple opposition to an AEP Ohio proposal as legal evidence that the Commission should reject said proposal without even considering the substance of the arguments offered by those groups. The Commission would, and should, certainly reject such a contention in any case, and should reject AEP Ohio's unfounded claims of unanimous customer support in this case.

Notably, in the absence of a survey of large customers, AEP Ohio relies upon public commitments by some of its large customers as evidence of those customers' support of this project.¹⁰⁰ As an initial matter, commitments made by individual companies prior to AEP Ohio raising this proposal with the Commission are not evidence of support for this proposal. As was revealed at hearing, businesses have been able to purchase renewable power to meet their sustainability commitments or renewable energy desires on their own without any sort of above-market charges being paid to electric distribution utilities.¹⁰¹

⁹⁹ See, e.g., OMAEG Brief (representing Ohio's manufacturers); OCC Brief (representing Ohio's residential customers); IEU-Ohio Brief (representing Ohio industrial customers); Kroger Brief (representing a major commercial customers).

¹⁰⁰ See Company Brief at 27-28.

¹⁰¹ See OCC Ex. 17 (noting that 36 businesses had agreed to purchase a collective 3.3 gigawatts of wind and solar power between January and April 2018).

C. Claims of Economic Benefit Do Not Support AEP Ohio's Attempt to Meet Its Burden of Proof.

As OMAEG explained in its initial brief¹⁰² and throughout this pleading, economic impacts or benefits are not relevant to the resource planning need question under R.C. 4928.143(B)(2)(c). The Commission came to the same conclusion in the Turning Point Case,¹⁰³ and several other parties agreed in their respective initial briefs.¹⁰⁴ Nonetheless, despite no reference to economic benefits in the relevant statutes, AEP Ohio uses 16 pages of its brief to tout the purported economic benefits of its proposal.¹⁰⁵ A review of this evidence demonstrates that it would not be persuasive even in the event that it were relevant to the Commission's determination in this proceeding.

OMAEG discussed various flaws with the Company's economic benefit analysis in its initial brief.¹⁰⁶ OMAEG first noted that the economic impact analysis provided by AEP Ohio necessarily relied on information related to specific projects, which the Commission had determined to be beyond the scope of the first phase of the hearing.¹⁰⁷ OMAEG went on to explain how the testimony of Drs. Buser and LaFayette grossly overstated the benefits of these proposed projects to the point where AEP Ohio's economic analysis itself lacks credibility.¹⁰⁸ From Dr. Buser's claim, made without tangible evidence, that these projects would improve public health, standard of living and gender imbalance in the energy field as a whole to his

¹⁰² OMAEG Brief at 41-44.

¹⁰³ Turning Point Order at 25-27.

¹⁰⁴ See, e.g., OCC Brief at 30 (stating that Ohio law prohibits AEP Ohio from arguing that economic benefits justify these projects); Kroger Brief at 40-41 (arguing that the Turning Point Order precludes the consideration of economic benefits that AEP Ohio advocates for in this case).

¹⁰⁵ See Company Brief at 45-60.

¹⁰⁶ OMAEG Brief at 41-44.

¹⁰⁷ Id. at 42.

¹⁰⁸ Id. at 42-43.

assertion that these projects would help to mitigate the national epidemic that is the opioid crisis, his testimony failed to provide evidence to establish concrete benefits of these projects.¹⁰⁹ Moreover, Dr. LaFayette, one of the witnesses advancing AEP Ohio's economic benefit analysis admitted that much of the purported benefits would be attributed to construction and would, thus, be temporary.¹¹⁰

In any event, the purported positive economic benefits, according to AEP Ohio, do not appear to be tied to AEP Ohio being the party developing the facilities. The Company's own witness admitted as much at hearing.¹¹¹ Given that these same benefits would result from a private entity developing these facilities, there is no basis to weigh the purported benefits in AEP Ohio's favor in evaluating the Company's proposal. As was the case with other faulty arguments, accepting this argument would create a slippery slope. If it is the case that any development, investment, or other expenditure of money creates positive ripple effects and local economic benefits, and such benefits were sufficient to allow utilities to impose above-market charges on customers to fund those projects or expenditures, there would be no end to the proposals the Commission would be bound to accept on the basis of the creation of local economic benefits.

As Staff explained, any economic benefits related to this proposal do not depend on AEP Ohio being the entity developing the proposed generation facilities.¹¹² Private construction will still create jobs and, to whatever extent AEP Ohio projects the economic impact of its proposal, bring the same economic impact. Thus, as Staff concluded, "these economic effects, regardless

¹⁰⁹ Id.

¹¹⁰ Tr. Vol. IV at 1147.

¹¹¹ Tr. Vol. IV at 1141.

¹¹² Staff Brief at 7.

of how they are characterized, are not a reason to endorse this proposal.”¹¹³ The Commission, if it even considers economic impacts at all, should not accept AEP Ohio’s attempt to portray these purported economic benefits as only being available in the event that AEP Ohio is the developer of the proposed generation facilities.

Interstate Gas Supply, Inc. (IGS) expounded upon the flaws inherent in AEP Ohio’s economic benefit analysis. IGS explained how the study does not consider the negative impact on customers through increased charges or the negative impact on the competitive market, which benefits customers.¹¹⁴ As IGS noted, the study authored by Drs. Buser and LaFayette was flawed in part because the authors did not have a background in the energy industry and therefore did not appreciate the full implications of AEP Ohio developing generation resources with customers funds.¹¹⁵ IGS agreed with OMAEG that the benefits stated in the economic impact analysis are exaggerated.¹¹⁶ IGS Witness Haugen further explained how the AEP Ohio analysis failed to consider the newly proposed PJM rules regarding state-subsidized resources and concluded that “it is unlikely that the capacity associated with the REPA would have any value in the PJM capacity auction.”¹¹⁷ Mr. Haugen concluded that AEP Ohio’s failure to consider this factor resulted in a fundamentally flawed analysis.¹¹⁸

As OMAEG Witness Seryak testified, if the benefits to these projects are as immense as AEP Ohio contends, “market sources should be sufficient to see these or other renewable energy

¹¹³ Id.

¹¹⁴ Initial Brief of Interstate Gas Supply, Inc. and IGS Solar, LLC at 36-44 (March 6, 2019) (IGS Brief).

¹¹⁵ Id. at 37.

¹¹⁶ IGS Brief at 42.

¹¹⁷ IGS Ex. 13 at 3 (Haugen Direct).

¹¹⁸ Id.

projects through development.”¹¹⁹ As OCC stated in its brief, the Company would not need cost recovery from captive customers for economical projects.¹²⁰ OCC went on to point out that if AEP Ohio truly believes in the economic value of these projects, it is free to make investments in these renewable projects (or any renewable projects for that matter) using shareholder funds.¹²¹

D. AEP Ohio’s Claims of Market Failures Are Not Supported by Record Evidence.

- i. Fuel Diversity, Ohio’s Status as a Net Importer of Energy, and Similar Concerns Do Not Support a Determination that There Has Been a Market Failure or Justify AEP Ohio’s Proposal.

Moving on from its flawed analysis of purported economic benefits, AEP Ohio then turns to a claim that there has been a “market failure” with regard to renewable energy resources.¹²² Much of this argument is premised on PJM’s “indifference” to renewable resources. Of course, AEP Ohio admits that PJM “identifies the most effective and cost-efficient improvements to the grid to ensure reliability and economic benefits on a *system-wide* basis.”¹²³ Thus, to the extent that PJM has not promoted renewable generation to this point, it is because such generation has not been the most effective and cost-efficient. If that reality changes over time, PJM should naturally begin to make greater use of renewable generation. Additionally, it cannot be ignored that, as OCA noted in its brief, PJM and FERC are currently considering multiple proposals to address AEP Ohio’s concern, as well as how a subsidized project like AEP Ohio’s proposed project will be allowed to participate in the competitive market.¹²⁴

¹¹⁹ OMAEG Ex. 16 at 10 (Seryak Direct).

¹²⁰ OCC Brief at 30.

¹²¹ OCC Brief at 30-31.

¹²² Company Brief at 60-79.

¹²³ Id. at 62 (emphasis in original).

¹²⁴ OCA Brief at 17.

AEP Ohio's first point in its discussion of purported market failures is the importance of fuel diversity.¹²⁵ AEP Ohio argues that because an increase in renewable generation would improve fuel diversity, this proposal should be approved.¹²⁶ Importantly, AEP Ohio does not cite any evidence that a lack of fuel diversity in Ohio in fact exists or is currently causing or has the potential to cause problems for Ohio consumers. The insertion of any new generation source will necessarily result in greater fuel diversity, but without evidence that current amounts of fuel diversity are problematic, this is not a justification for approving AEP Ohio's proposal and is irrelevant to the legal issue pending before the Commission.

Nonetheless, the record demonstrates that the competitive market is rapidly resulting in an increase in the amount of renewable generation used in Ohio. AEP Ohio cites Natural Resource Defense Council (NRDC) Witness Stebbins for her testimony about the current ability of customers in Ohio to access renewable generation, but failed to bring up Ms. Stebbins's admission that Ohio has seen significant growth in the amount of renewable generation contained in its overall load, with 40% growth between 2015 and 2017 alone.¹²⁷

AEP Ohio next argues that the proposal should be approved because Ohio is a net importer of energy. AEP Ohio cites statistics regarding this point, but it is unclear why this fact mandates or even suggests approval.¹²⁸ AEP Ohio does not make an argument that Ohioans are disadvantaged by the state's status as a net importer of energy or cite to any Commission order or state policy that would suggest this problem must be resolved. And even if there were such arguments, it is not clear from the record that the 900 MW of renewable generation AEP Ohio

¹²⁵ Id. at 62-64.

¹²⁶ Id.

¹²⁷ Tr. Vol. IV at 1036-37.

¹²⁸ Company Brief at 64-65.

requests here would meaningfully change Ohio's status as a net importer of energy. The fact remains, Ohio has been a net importer of energy for decades.

AEP then returns to its arguments on the economic impact of these projects.¹²⁹ First, as discussed above, this is an irrelevant factor that the Commission should not consider in this proceeding. But AEP Ohio again attempts to shift the burden of proof by contending that other parties should have performed their own economic impact analysis.¹³⁰ As was the case with regard to the customer surveys, it is not incumbent on opposing parties—who do not have a burden of proof—to spend time and resources performing their own economic benefit analysis to disprove that which was offered by the Company, especially when those benefits are not relevant to this case and the legal question pending before the Commission (i.e., is there a resource planning need for the generation facility proposed). And even if those benefits were relevant, the parties are within their rights to expose the extremely flawed analysis the Company offers through cross-examination rather than by spending significant amounts of money to perform their own analysis. The failures of Drs. Buser and LaFayette are not excused simply because no other parties did their own irrelevant analyses. Finally, as the parties have reiterated extensively, any benefits that could result from these projects would result equally from development of the same or similar projects developed through the competitive market.

Lastly, AEP Ohio asserts arguments related to the hedge value of the proposed generation projects.¹³¹ To the extent that there is any hedge value to this 900 MW generation project, AEP Ohio does not identify any instances where customers would have benefited from such a hedge or offer record evidence supporting the likelihood that such customers would benefit from a

¹²⁹ Id. at 65-66.

¹³⁰ Id.

¹³¹ Id. at 67-68.

hedge in the future. Speculative expectations of a hedge benefit do not support a need based on resource planning projections and should not be considered a basis for approval of this project.

ii. PJM’s Relatively Lower Renewable Generation Deployment Does Not Support Approval of AEP Ohio’s Proposal.

AEP’s next purported market failure relates to the fact that PJM has relatively lower deployment levels for renewable resources than is seen in other regions.¹³² AEP does not cite to any evidence from its own testimony or case-in-chief to bolster this argument, instead relying on the testimony of NRDC Witness Stebbins and Sierra Club Witness Goggin.¹³³ As has been discussed before, PJM’s level of renewable generation is, in part, the result of market preferences. As renewable generation becomes more efficient and economical, we would expect its deployment in PJM and elsewhere to increase. AEP Ohio also ignores the fact that customer preferences have caused renewable generation to be developed behind the customer’s meter, outside of the PJM market.¹³⁴ AEP Ohio suggests that the Commission send a “market signal” that “Ohio is open to the business of in-state renewable development.”¹³⁵ It is not the job of the Commission, however, to send market signals. Ohio’s deregulation policy defers to the market to operate efficiently without Commission intervention. Here, the market will be able to do so without approval of this project and, if enough people support increased development of renewable generation and such generation is economical, the markets will support it on their own without a signal from the Commission.

¹³² Id. at 68-70.

¹³³ See id.

¹³⁴ See IEU Ex. 1 at 11-12 (Murray Direct).

¹³⁵ Id. at 69-70.

iii. CRES Offerings Allow Customers to Satisfy Their Desires for Renewable Generation.

AEP Ohio's final purported market failure is that CRES providers do not offer sufficient renewable generation options.¹³⁶ AEP Ohio argues that it is important to provide utility-scale solar generation.¹³⁷ According to AEP Ohio, this allows customers who cannot afford to install solar panels or make use of net metering to access renewable generation.¹³⁸ Again, this is not relevant to the determination of need based on resource planning projections. But the argument is flawed for other reasons as well.

First, customers do not only have access to renewable generation through installation of solar panels on their own property, but, as AEP Ohio acknowledges, customers have access to renewable generation through CRES offerings on the Commission's *Apples to Apples* website to meet their renewable energy needs.¹³⁹ AEP Ohio argues that this is an insufficient option because not all customers are CRES customers. This argument does not withstand scrutiny. The fact of the matter is that a customer who wants to access renewable generation can do so by contracting with a CRES provider or by purchasing solar renewable energy credits (SRECs) through a CRES provider. If a customer chooses not to do that and remain on AEP Ohio's standard service offer, doing so is his or her prerogative, but the customer cannot credibly say that he or she has no access to renewable energy products; the customer has access, he or she is just choosing not to take advantage of it. Additionally, there is nothing that prevents a standard service customer from purchasing SRECs on their own in the competitive market. There is a robust SREC market where a customer may purchase such environmental attributes to support

¹³⁶ Id. at 70-79.

¹³⁷ See, e.g., id. at 72.

¹³⁸ Id. at 71-72.

¹³⁹ See Staff Ex. 2 at 10 (Benedict Direct); Company Brief at 73.

the development of renewable energy. AEP Ohio also argues that because IGS, one supplier in Ohio, did not offer Ohio-only renewable energy products in the past, CRES offerings are insufficient.¹⁴⁰ However, by AEP Ohio's own admission, there are currently Ohio-only offerings available on the *Apples to Apples* website.¹⁴¹ Thus, to the extent that the existence of such options is something that the Commission needs to ensure, customers already have access to several in-state renewable offerings.

E. The Commission Should Afford All Parties Due Process in Deciding this Case.

AEP Ohio's final section of its brief requests that the Commission decide this case and the Cost Recovery Case on an expedited basis.¹⁴² The Commission should reject this request. As the briefing is now complete for the first phase of this hearing, OMAEG takes no issue with the Commission deciding this matter in whatever timeframe allows the Commission sufficient opportunity to carefully consider the arguments of all parties. However, should that decision necessitate a second phase of this process, the Commission should ensure that all parties are afforded due process in that proceeding. Expediting the schedule for a potential second phase of the hearing would unjustly and unreasonably limit the due process of the parties regarding their ability to conduct discovery and prepare for hearing regarding the Cost Recovery issue, which may impose significant costs on customers. In short, if the Commission does not reject AEP Ohio's proposal at this stage as the evidence dictates, it should at least ensure that all parties have sufficient opportunity to prepare for and participate in the second phase of the hearing.

¹⁴⁰ Company Brief at 74.

¹⁴¹ *Id.*

¹⁴² *Id.* at 79-80.

F. The Scope of the First Phase of the Hearing Was Unjustly and Unreasonably Defined and Inconsistently Applied.

In its initial brief, OMAEG noted several procedural rulings made by the Commission that were in error and resulted in an unjust and unreasonable scope of the first phase of the hearing, which the Commission established should focus on need for the proposed generation by AEP Ohio.¹⁴³ Other parties raised similar concerns in their briefs, agreeing with OMAEG's assessment that the decision to defer testimony of some opposing intervenors while allowing AEP Ohio to present testimony that should have been offered in the second phase of the hearing (or not at all) was unjust and unreasonable.¹⁴⁴

For instance, Kroger described how granting AEP Ohio's Motion to Strike or Defer while simultaneously denying the Motion in Limine filed by OMAEG, Kroger and others was an error that resulted in a one-sided presentation of evidence that was inconsistent with precedent that mandates allowing opposing parties to offer testimony rebutting arguments offered by a litigant because a party "opens the door" to such testimony when it makes those arguments.¹⁴⁵ The Office of the Ohio Consumers' Counsel (OCC) aptly explained how the Commission erred by allowing AEP Ohio to present testimony on these issues on the basis that the Company carried a burden of proof.¹⁴⁶ As OCC argued the Commission should not have treated the Company's burden of proof as a license to offer troves of evidence that is irrelevant to the issues in this case.¹⁴⁷

¹⁴³ OMAEG Brief at 7-19.

¹⁴⁴ OMAEG Brief at 10-17; Kroger Brief at 17-22; OCC Brief at 51-53.

¹⁴⁵ Kroger Brief at 20.

¹⁴⁶ OCC Brief at 51-53.

¹⁴⁷ Id.

Additionally, OMAEG's comments regarding the error in the ruling consolidating the cases¹⁴⁸ were echoed by another intervenor where it noted four distinct legal bases that should have precluded consolidation of these matters and described how the two-step approach of consolidating and then bifurcating only confused the issues that were before the Commission in the first phase of the hearing.¹⁴⁹

IEU-Ohio further described how the record in this proceeding was cluttered with irrelevant evidence because the Commission completely departed from relying on the Ohio Rules of Evidence, which are designed to create a more orderly, concise, and fair presentation of evidence.¹⁵⁰

Furthermore, similar to OMAEG's arguments,¹⁵¹ another intervenor explained the improper allowance of rebuttal testimony, reiterating that the rebuttal testimony offered by the Company was improper because it only served to correct an error that AEP Ohio could have—and should have—corrected prior to hearing, or, at the very least, when Company Witness Ali was testifying at hearing.¹⁵²

Neither AEP Ohio nor other supporting parties offered any evidence to the contrary in support of the procedural and evidentiary rulings in their initial briefs to demonstrate that the rulings were just and reasonable. Accordingly, OMAEG renews its request that the Commission determine that the identified procedural rulings were unjust and unreasonable and made in error, prejudicing the parties opposing the Company's request.

¹⁴⁸ Id. at 7-10.

¹⁴⁹ Kroger Brief at 13-17.

¹⁵⁰ See Initial Brief of Industrial Energy Users-Ohio at 33-37 (March 6, 2019) (IEU-Ohio Brief).

¹⁵¹ OMAEG Brief at 17-19.

¹⁵² Kroger Brief at 28-30.

IV. CONCLUSION

AEP Ohio has not demonstrated that its proposal satisfies Ohio law as AEP Ohio has not first shown a need for the proposed generation facilities based on resource planning projections as required by R.C. 4928.143(B)(2)(c). Given that AEP Ohio has failed to make the requisite showing for a finding of need, for the reasons stated herein and in OMAEG's initial brief, the Commission should reject AEP Ohio's attempt to circumvent state policy against monopoly-owned generation and deny AEP Ohio's application. The Commission should further determine that there is no need to proceed to the second phase of this hearing.

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 March 27, 2019.

/s/ Brian W. Dressel
Brian W. Dressel

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