BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY BRIEF OF DIRECT ENERGY, LP

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I. INTRODUCTION

The central issue in this case is whether there can be a "need" for AEP Ohio (AEP or Company) to develop 900 MW of renewable energy resources for reasons *other than* compliance with renewable portfolio standards. Staff's initial brief cuts through all of the noise. Everyone else has a vested interest in the ultimate determination of "need." Staff is the only party that does not. Staff is responsible for critically examining annual long-term forecast report (LTFR) filings, and Staff has concluded that there is no resource planning need for new renewable generation. The Commission should listen to its staff.

The parties arguing for a finding of "need" insist that "'need' is not simply a question of generation resource adequacy."[1] They ignore that the *very purpose* of an LTFR is to demonstrate that generation resources are sufficient to meet demand. If resources are sufficient to meet demand, there can be no "need" for additional resources. If the "need" being alleged here does *not* depend on resource adequacy, then one must ask why this "need" is being asserted in a proceeding under Chapter 4935. The whole point of Chapter 4935 is resource adequacy.

Resource planning requirements exist primarily for the benefit of the public. Power plants, transmission lines, and gas pipelines are necessary evils. These facilities provide enumerable benefits, but these benefits come with a cost—financial and otherwise. All ratepayers pay for these facilities, and some ratepayers have to live next to them. One of the primary ways of balancing the costs and benefits of utility facilities is to limit their construction to what is "necessary."[2] Customers should not have to pay for, nor live by, generation facilities

[1] AEP Br. at 13. *See also* NRDC/OEC/Sierra Club Br. at 7-8; OEG Br. at 2; OPAE Br. at 6.

[2] *Canton Storage & Transfer Co. v. Pub. Util. Comm*., 72 Ohio St.3d 1, 11 (1995).

unless there is a "definite need" for the facilities to maintain "reasonably adequate" service.[3] S.B. 221 did not throw resource planning out the window to create a "generation opportunity" for AEP.[4]

The "definite need" for renewable resources is already been met—and then some. All suppliers and utilities in Ohio are meeting their RPS requirements. AEP's planning forecasts show that sufficient renewable resources will remain available within PJM. Competitive suppliers are providing renewable products to customers who want them. Consumers may install windmills or solar panels and participate in net metering. The public does not "need" to be trapped into paying AEP for something which already exists and customers are able to obtain on their own.

II. ARGUMENT

AEP and its supporters offer different flavors of the same argument. "Need," they say, is not statutorily defined, so whether there is a "need" for more renewable generation is a matter of Commission "discretion."[5] This discretion allegedly includes the authority to ignore the fact that RPS standards are already being met with existing resources, and that no other basis of "need" exists from a resource planning perspective. "Need" means whatever the Commission wants it to mean.

The Commission has the discretion to do many things; finding a "need" for generation resources *despite* rather than *because of* resource planning requirements is not one of them.

None of the proponents for a finding of "need" can tie their arguments to specific statutory language. Their argument is not based on established policy but folk wisdom: the

[3] *Id*.

[4] AEP Br. at 12.

[5] *See* NRDC/OEC/Sierra Club Br. at 4-5.

legislature decided that a little bit of renewable energy is good, so the Commission can decide that more would be better. But the very premise of regulation is that more is *not* better so far as electric generation facilities are concerned. This is precisely the reason for LTFR filings, Ohio Power Siting Board proceedings, and the necessity to demonstrate "need based on resource planning projections" as a condition for Section (B)(2)(c) surcharge approval.[6] The policy of the state of Ohio is to *limit* generation construction to projects "necessary" to fulfill the public's "definite need" for "reasonably adequate" service.[7]

The real "need" AEP is seeking to fulfill is its desire for an insurance policy. Nothing is stopping the Company from moving forward with new renewable projects today. AEP is already recovering costs incurred under renewable PPAs through Rider AER, as it has since *ESP II. AEP does not need Commission approval to execute additional renewable PPAs*. AEP has not firmly committed to the Willowbrook or Highland PPAs because it is concerned that costs incurred under them would be disallowed in a Rider AER audit. AEP *should* be concerned. It would not be able to justify the costs of *new* PPAs because it is meeting its RPS requirements through *existing* PPAs.[8] AEP is attempting an end-run around the statute allowing it to recover *prudent* RPS compliance costs by funneling those costs through Rider RGR. This tactic merely reflects the Company's own skepticism about its ability to demonstrate "need" under any notion of the term that considers "necessity" or prudence.

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

[7] *Canton Storage*, 72 Ohio St.3d at 11.

[8] Tr. I at 165-66.

A. AEP's statutory arguments fail.

This is a proceeding under R.C. 4935.04. No one proclaiming a "need" for new renewable generation has explained how this statute supports their argument.

NRDC/OEC/Sierra Club cobble together various phrases in R.C. 4935.01(A)(1) to claim that "need" means something a casual reading of the statute reveals not to be true.[9] They have virtually *nothing* to say about R.C. 4935.04. AEP cites R.C. 4935.04 and declares—without analysis or support—that "'need' is not simply a question of generation resource adequacy."[10] OPAE cites the statute and declares—again with no analysis or support—that the statute offers the Commission "flexibility" in determining "need."[11] Mid-Atlantic's brief contains one cite to R.C. 4935.04—in the opening sentence.[12] OEG does not even *cite* the statute.

These parties also point to R.C. 4928.143(B)(2)(c). None have explained why Section (B)(2)(c) is even relevant to this proceeding, let alone established that the statute is "ambiguous."[13] Section (B)(2)(c) authorizes a surcharge in the context of an ESP. This is not an ESP. Nothing in Chapter 4935 requires the Commission to consider any aspect of Chapter 4928—concerning "need" or anything else. Even in the context of an ESP, Section (B)(2)(c) establishes a standard of "need" for a specific "generating facility."[14] One could plausibly argue that the Commission may evaluate the need for more than one "facility" in the same proceeding, but absent *any* "facility," there is no "need" to evaluate under Section (B)(2)(c).

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[9] NRDC/OEC/Sierra Club Br. at 7.

[10] AEP Br. at 13.

[11] OPAE Br. at 5.

[12] Mid-Atlantic Br. at 3.

[13] *See* OEG Br. at 4.

[14] Before approving a surcharge, the Commission must determine "in the proceeding that there is need for *the facility* based on resource planning projections[.]" R.C. 4928.143(B)(2)(c) (emphasis added).

Section (B)(2)(c) may be relevant in a Phase 2 proceeding, but the statute does not control here. The statute merely provides further evidence of the continuing desire to ensure that surcharges get approved for facilities that have a definite "need based on resource planning projections."[15] "[I]f the words [are] free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the lawmaking body, there is no occasion to resort to other means of interpretation."[16]

The Commission *must* consider the most recent LTFR during a proceeding involving a surcharge.[17] Section (B)(2)(c) incorporates the phrase "resource planning projections" from R.C. 4935.04. R.C. 4935.04 describes "resource planning projections" as forecasted supply and demand.[18] So under Section (B)(2)(c), "resource planning projections" also means forecasted supply and demand. Interpreting "resource planning projections" to mean something other than "resource planning projections" would render the statute meaningless.

AEP and several other parties claim that because the scope of an LTFR hearing includes more than "resource planning projections," the Commission may consider additional evidence in determining "need."[19] One could assume the Commission may considering *any* evidence during the scope of an LTFR. What the *Commission may consider* and what *AEP must demonstrate* are entirely different subjects. The problem for AEP is not a matter of what the Commission may

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[15] *Id*.

[16] *Risner v. Ohio Dept. of Natural Resources, Ohio Div. of Wildlife,* 2015-Ohio-3731, ¶ 12, 144 Ohio St.3d 278, quoting *Slingluff v. Weaver,* 66 Ohio St. 621 (1902), paragraph two of the syllabus.

[17] R.C. 4935.04(H).

[18] R.C. 4935.04(C)(1) ("A year-by-year, ten-year forecast of *annual energy demand*, peak load, reserves, and a general description of the resource planning projections to *meet demand*[.]") (emphasis added).

[19] *See, e.g.*, AEP Br. at 13-14; NRDC/OEC/Sierra Club Br. at 8; OPAE Br. at 6.

consider; it is a matter of what AEP can prove. AEP has not proven it has a "definite need" to develop 900 MW of renewable generation.

If anything, Section (B)(2)(c) establishes a standard of "need" that is even *more* rigorous than the standard AEP argues under Chapter 4935. AEP posits that the Commission has virtually unlimited discretion to render a finding of "need" under R.C. 4935.04. Even if that were true, Section (B)(2)(c)—unlike R.C. 4935.04(H)—does not say the Commission should or must consider the entire LTFR "hearing record" in determining "need." Section (B)(2)(c) directs the Commission to specifically examine one portion of the LTFR record—"resource planning projections." The legislature's decision to require the OPSB to consider the entire LTFR "hearing record" in considering "need" for a certificate, but to only consider "resource planning projections" when considering whether to approve a Section (B)(2)(c) surcharge, is presumed to have been intentional. "[W]hen language is inserted in a statute it is inserted to accomplish some definite purpose."[20]

The state policies listed in R.C. 4928.02 do not justify the parties' statutory "interpretations."[21] For one, R.C. 4928.143 applies "notwithstanding any other section of Title 49." The policies AEP and the other parties rely on do not apply to Section (B)(2)(c). Even if they did, these policy pronouncements are not binding. "[T]he relevant provisions of R.C. 4928.02 do not impose strict conditions on the commission. By its terms, R.C. 4928.02 does not require anything but merely explains "the policy of this state."[22]

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[20] *State v. Wilson,* 77 Ohio St.3d 334, 336 (1997), quoting *State ex rel. Cleveland Elec. Illum. Co. v. Euclid,* 169 Ohio St. 476, 479 (1959).

[21] *See* AEP Br. at 20; OEG Br. at 5.

[22] *In re Application Seeking Approval of Ohio Power Co.'s Proposal to Enter into an Affiliate Purchase Power Agreement*, 2018-Ohio-4698, ¶ 37.

The legislature did not define "need" in R.C. Chapter 4935 because it did not have to. As discussed below, the term has a particular, technical meaning in the field of utility regulation and generation planning. The statutes incorporating this term must be construed accordingly.

B. The regulatory concept of "need."

As Direct explained in its initial brief, there can be no "need" for AEP to develop more renewable generation unless these resources are "necessary" to comply with RPS requirements.[23] The Commission rejected the claim of "need" in *Turning Point* because the signatory parties "have not demonstrated that the Turning Point project is *necessary* for AEP-Ohio to comply with its SER benchmarks[.]"[24] *Turning Point* did not represent a new or novel interpretation of "need."

"Need" is "[a] relative term, the conception of which must, within reasonable limits, vary with the personal situation of the individual employing it. Term means to have an urgent or essential use for (something lacking); to want, require."[25] AEP is claiming a "need" to develop 900 MW of renewable generation, so "need" must be considered in this context. "Words or phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."[26]

In the regulatory context, the "need" or "necessity" of a utility service or facility comes down to two questions: (i) whether the public has a right to the service (a "definite need"); and (ii) whether the public is receiving "reasonably adequate" service.[27] A utility's desire to offer a

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[23] Direct Br. at 5-6.

[24] *In re Long Term Forecast Report of Ohio Power Company*, Case No. 10-501-EL-FOR, Opin. & Order at 26 (Jan. 9, 2013) (*Turning Point*).

[25] *Black's Law Dictionary* 1031 (6th Ed. 1990).

[26] R.C. 1.42.

[27] *Canton Storage*, 72 Ohio St.3d at 11-13.

service or facility does not establish a "definite need." A claim that customers will "benefit" from enhanced service does not render existing service inadequate.

The regulatory concept of "need" has come up numerous times in motor carrier certificate proceedings. In the not-so-distant past, moving companies were only permitted to operate in specific counties or point-to-point routes. In *Canton Storage*, the Commission granted certificates authorizing statewide operating authority, believing this would make moves more efficient and increase competition.[28] The Court did not disagree that statewide operating authority could be beneficial, but found that the Commission abused its discretion in granting the certificates. Public *necessity* requires more than public *convenience:*

> Of course, it must be conceded that every additional transportation service in every territory, where people live or where people go, may reasonably be expected to be at some time a convenience to some one, and probably to many; and the Legislature must have known that any public transportation operation, anywhere within the state, would be a convenience to some degree to the inhabitants of its territory and to the persons desiring to go into or out of such territory. The Legislature, however, was not attempting to make a certificate to operate available to everyone who might apply, but was attempting to regulate the number of operations, the places of operation, and the character of the operation; and so it provided that, before a certificate could issue, *not only a convenience but a necessity for such operation should exist*. (Emphasis added.)[29]

A service is "necessary" only if there is "a definite need of the general public for [the] service where no reasonably adequate service exists."[30] The Court determined that statewide operating authority was *not* necessary. "There is no need if, as here, the goods are currently deliverable within a reasonable time under the existing service."[31] The Court specifically rejected

[28] *Id*. at 16.

[29] *Id.*, *quoting Canton-East Liverpool Coach Co. v. Pub. Util. Comm.*, 123 Ohio St. 127, 129-130 (1930).

[30] *Id.* at 11 (quoting *Canton-East Liverpool Coach* at paragraph two of the syllabus).

[31] *Id.* at 14.

the Commission's claim that it could "interpret" the relevant statutes in a manner to promote competition. "[O]nly the General Assembly makes policy decisions based upon the concept of free competition."[32]

"'Reasonably adequate' does not contemplate the highest character of service . . . but only contemplates a service which, when measured by the expense of the service, the volume of traffic and the needs of the public, is practicable."[33] While the Commission may certainly authorize a level of service or investment beyond the bare minimum, an "enhanced" level of service is not a "necessary" level of service. "[T]he word "necessary" denotes something that is essential, indispensable, or absolutely required."[34]

The rule of *Canton Storage* is not limited to motor carriers. Many statutes exist to ensure that the provision of any type of utility service is constrained to that which is "necessary." For example, the Certified Territory Act prevents dueling electric companies from running multiple sets of poles and conductors through cities and neighborhoods.[35] Various types of utilities are required to secure a certificate of public convenience and necessity before establishing or expanding service.[36] The ratemaking process punishes unreasonable or imprudent investment.[37]

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[32] *Id.* at 17.

[33] *Id*. at 14 (quoting *Canton-East Liverpool Coach* at paragraph three of the syllabus).

[34] *In re Application of Columbus S. Power Co.*, 2014-Ohio-462, ¶ 28, 138 Ohio St.3d 448, quoting *Webster's Third New International Dictionary* 1510–1511 (1986).

[35] *See* R.C. 4933.81 *et. seq.*

[36] *See* R.C. 4933.25 (water/sewer); R.C. 4927.05(A)(1) (telephone); R.C. 4921.03(A) (motor carriers).

[37] *See Office of Consumers' Counsel v. Pub. Util. Comm'n*, 67 Ohio St. 2d 153 (1981) ("The commission views R.C. 4909.15(D)(2)(b) as a virtual wild card to be played whenever the commission in its discretion sees fit. We interpret the statute less sweepingly [.]").

The entire regulatory process is built around the premise that utility facilities should only burden the public to the extent "necessary" to ensure "reasonably adequate" service.

Some public utility services and facilities demand greater scrutiny over "need" than others. Major pipelines, generating plants and transmission lines are costly to build, potentially dangerous to operate, and seriously affect neighboring landowners.[38] R.C. Chapters 4906, 4935, and 4928 contain extra safeguards to prevent the development and construction of unnecessary facilities.

A. "Need" in the relevant statutory context.

Ohio law does not permit the indiscriminate development and construction of electric generation facilities. R.C. Chapter 4906 prohibits construction of these facilities without first obtaining a certificate of public convenience and necessity.[39] This is not an OPSB certificate proceeding, but LTFR and OPSB proceedings serve the same underlying purpose: to weed out development and construction of generation facilities for which there is no "definite need." Chapters 4935 and 4906 work together to accomplish this goal.

Chapter 4935 requires electric utilities to supply forecasts of "annual energy demand, peak load," and "resource planning projections to meet demand."[40] Information is also required for "projected loads during the period," "a description of major utility facilities planned to be added or taken out of service," "proposed changes in the transmission system" and, significantly,

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[38] *See In re Application of Champaign Wind, L.L.C.*, 2016-Ohio-1513, ¶ 11, 146 Ohio St. 3d 489, 492 ("In April 2012, two blades detached from a wind turbine at the Timber Road II Wind Farm in Paulding County, and blade debris scattered around the surrounding area."); *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 2008-Ohio-990, ¶ 8, 117 Ohio St. 3d 486, 488 ("In its application, AEP estimated that the cost of the project could reach $1.27 billion. However, at oral argument, the parties represented that the overall cost could exceed $2 billion.").

[39] R.C. 4906.04.

[40] R.C. 4935.04(C)(1).

"the major utility facilities that, in the judgment of such person, will be required to supply system demands during the forecast period."[41] All of this information allows the Commission to make a reasoned, critical, and objective determination of whether resources are sufficient to meet demand.

The LTFR process is not set up to analyze the "need" for specific generation facilities. The scope of issues in an LTFR hearing is statutorily limited, as is the timeframe for the Commission's decision.[42] The "need" for a specific facility is the purview of the OPSB, and the OPSB is required to consider the record of an LTFR proceeding in considering the "need" for a new generation facility.[43] If the Commission decides that AEP has adequate resources to meet demand, the OPSB would be hard-pressed to find a "need" for a new AEP facility.

S.B. 221 recognizes and retains the long-established policy against investment in unnecessary generation. The "hybrid" regulatory structure under S.B. 221 gives utilities the opportunity to avoid the risk of disallowance of investment in new generation. Under an MRO, the "cost" of generation service is set by the market.[44] Instead of investing in generation plants to serve load directly, the utility may rely on the energy and capacity resources available within PJM. The utility eliminates the risk of generation disallowances, and customers do not have to worry about absorbing the cost of new, unnecessary generation.

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[41] R.C. 4935.04(C)(2), (3), (5), (6).

[42] *See* R.C. 4935.04(E)(1) ("The scope of the hearing under division (D)(3) of this section shall be limited to issues relating to forecasting.") and (F) (requiring issuance of final order "within ninety days from the close of the record in the hearing.")

[43] R.C. 4906.04; R.C. 4935.04(H) ("The hearing record produced under this section and the determinations of the commission shall be introduced into evidence and shall be considered in determining the basis of *need* for power siting board deliberations under division (A)(1) of section 4906.10 of the Revised Code.") (Emphasis added.)

[44] R.C. 4928.142.

The legislature knew that if utilities elected *not* to rely on the competitive market for the supply and pricing of generation service, then resource planning requirements needed to be retained. A utility may recover "prudently incurred" costs for fuel, purchased power, emissions allowances, and federally-mandated carbon and energy taxes.[45] A surcharge for new generation built after 2009 is permitted only if "there is need for the facility based on resource planning projections."[46] The legislature eliminated any ambiguity in the term "need" in R.C. 4928.143(B)(2)(c) with a defining clause: "based on resource planning projections submitted by the electric distribution utility."

"Resource planning projections" are a required element of an LTFR.[47] An LTFR must include "A year-by-year, ten-year forecast of annual energy demand, peak load, reserves, and a general description of the *resource planning projections* to meet demand[.]"[48] The words surrounding "resource planning projections" impart a clear meaning to this term. "Resource planning projections" means planning information that shows the utility can "meet demand" established in its "forecast."

AEP's standard service offer combines MRO-like generation procurement within an ESP. Although PJM resources are more than sufficient to supply 100% of AEP's standard service offer load, approximately 30% of its load requirements are being fulfilled with above-market, coal-fired generation.[49] AEP is meeting its RPS requirements through PPAs with the Timber

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[45] R.C. 4928.143(B)(2)(a).

[46] R.C. 4928.143(B)(2)(b) and (c).

[47] R.C. 4935.04(C)(1).

[48] *Id*.

[49] *In re Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Purchase Power Agreement*, Case No. 14-1693-EL-RDR, Opin. & Order at 94 (Mar. 31, 2016) (*PPA Rider* Order) ("The effect of the PPA rider is that the bills of all customers would reflect a price for retail electric generation service that

Road, Power Ridge and Wyandot facilities.[50] The public's "definite need" for energy sourced from renewable resources is "reasonably adequate."

C. AEP has not established a "definite need" for new renewable resources.

AEP cannot show a "definite need" to develop 900 MW of renewable resources.

The Company admits it has no resource planning need for new renewable generation. Its entire theory of "need" is premised on its desire to provide more renewable resources so the public may receive "benefits." AEP's argument for "need" is a different flavor of the same argument considered and rejected in *Canton Storage*. Developing more renewable resources "may reasonably be expected to be at some time a convenience to some one, and probably to many," but this does not demonstrate a "definite need" for these resources.[51] The "definite need" for renewable resources is established by statute, and all parties in this proceeding agree that this need is being met.

Instead of showing a "definite need" for more renewable resources, what AEP is really arguing is that it "needs" to develop more renewable generation so it can deliver "benefits." Even if the public would be served by these "benefits," AEP does not explain why developing more renewable generation is the best way to deliver them. Nor can it. The "benefits" promised here are the same "benefits" allegedly provided by subsidizing coal-fired generation:

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is approximately 30 percent based on the cost of service of the PPA units and 70 percent based on the retail market [.]").

[50] Tr. I at 165-66.

[51] *Canton Storage*, 72 Ohio St.3d at 11 (quoting *Canton-East Liverpool Coach*, 123 Ohio St. at 129).

PPA Rider	Here
"AEP Ohio maintains that coal should remain a critical component of fuel diversification efforts."[52]	"[A]dding 900 MW of renewable energy resources would promote greater fuel source diversity."[53]
"[T]he PPA rider will. . . provide a cost-based hedge against market prices, which provides a more balanced approach than relying solely on market-based pricing."[54]	"AEP Ohio's proposal for 900 MW of renewable resources will also result in a valuable hedge against potentially volatile market prices."[55]
"Mr. Allen explained that the stipulation is designed to . . . support economic development and job retention in the state of Ohio."[56]	"Company witness Allen introduced AEP Ohio's filings by noting that 'local renewable energy projects provide local economic development benefits . . . to the communities where they are located as well as the surrounding region and state as a whole.'"[57]

To the extent the public "needs" the benefits promoted by AEP, the public is already receiving them through Rider PPA. "According to Mr. Vegas, the 3,111 MW included in the affiliate PPA and the OVEC PPA, which represents over a third of AEP Ohio's connected retail load, is a significant and reasonable amount of generation to use as a financial hedge to stabilize rates, as required by the Commission in the ESP 3 Case."[58] Now the same suite of "benefits" are being offered to promote renewable generation—so that this generation can displace some of the generation AEP has previously argued should *not* be displaced. Enough said. AEP's recycled and

[52] *PPA Rider* Order at 68.

[53] AEP Br. at 63.

[54] *PPA Rider* Order at 55.

[55] AEP Br. at 67.

[56] *PPA Rider* Order at 54.

[57] AEP Br. at 55.

[58] *PPA Rider* Order at 22-23.

re-purposed promise of "benefits" does not establish a "definite need" for more renewable generation.

AEP has conflated public *convenience* with public *necessity*.[59] There is a "definite need" among the public for generation resources sufficient to meet demand. There is a "definite need" among the public for an energy supply that includes a mandatory level of renewable resources. No statute establishes a "definite need" among the public for renewable energy sourced from Ohio instead of somewhere else; for lower wholesale market LMPs; or for the development of projects intended to fulfil the made-up "need" for economic development rather than a real need to fulfil RPS requirements.

D. AEP's policy arguments fail.

Unable to provide direct statutory support for their arguments, the "need" proponents resort to an appeal to "Commission discretion" to implement their preferred version of public policy. The Commission has no discretion to "interpret" an unambiguous statute. "If the meaning of a statute is unambiguous, we must apply it as written without further interpretation."[60] "An unambiguous statute is applied, not interpreted."[61]

R.C. 4828.64 requires a certain percentage of energy delivered to Ohio consumers to be sourced from renewable resources. The statute is free of ambiguity or doubt. The Commission cannot find a "need" for more renewable generation than the legislature requires. One of the

[59] *Canton Storage*, 72 Ohio St.3d at 11.

[60] *In re Black Fork Wind Energy, L.L.C.,* 2018-Ohio-5206 ¶ 17.

[61] *Sears v. Weimer*, 143 Ohio St. 312 (1944), paragraph five of the syllabus.

"core tenants" of administrative law is that "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."[62]

It is true that R.C.4928.64 does not prohibit a supplier or EDU from exceeding the RPS minimums. This does not establish a "need" to exceed the minimum requirement. If the Company wants to enter PPAs for 900 MW of renewable generation and attempt to recover the costs through Rider AER, it is free to do so. Whether additional renewable generation would make AEP's service "more adequate" does not change the fact that service is already "reasonably adequate" *without* these new supplies. "Reasonably adequate' does not contemplate the highest character of service [.]"[63]

R.C. 4935.04(C)(1) requires an annual filing of "resource planning projections" to allow the Commission to verify forecasted demand and available resources. In the ordinary course, R.C. 4935.04 does not require the Commission to render a finding of "need." AEP has requested such a finding, and all parties assume the Commission may render it (or not). Given the Companies' admitted lack of a "resource planning" need to develop more renewable generation, a claim of "need" on any other basis is irrelevant.

Equating "need" to "unmet demand" does not render Section (B)(2)(c) "superfluous."[64] Again, Section (B)(2)(c) does not control here. The statute is not helpful to AEP in any case. The evident purpose of Section (B)(2)(c) is to address a wholesale market failure or other unforeseen event that threatens the availability or reliability of electricity. To use an AEP term, Section (B)(2)(c) offers a "hedge" against total reliance on wholesale markets for generation requirements. Reading R.C. 4928.143 as a whole and in conjunction with related statutes leaves

[62] *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 328 (2014).

[63] *Canton Storage* at 16.

[64] AEP Br. at 14.

no other plausible interpretation. The statute expressly links "need" to "resource planning projections." AEP's resource planning projections show that PJM has sufficient energy and capacity to meet AEP' customers need for renewable energy. Any claim of need based on anything other than "resource planning projections" is not a "need" so far as Section (B)(2)(c) is concerned.

Several other parties have already explained why the "benefits" promised by AEP are either oversold or illusory. Rather than repeat this discussion, Direct will add to it with the following two points.

First, general attitudes about renewable energy do not give the Commission actionable information. Everyone loves renewable energy—in someone else's back yard. The public comments in the Willowbrook and Highland Power Siting Board proceedings reveal a much different sentiment than that purportedly shown by the Navigant survey. A majority of commenters *oppose* these projects.[65] These landowners' attitudes are not atypical.[66] Direct is not taking sides for or against these commenters. The point is that public attitudes are much more nuanced than AEP has suggested.

Energy policy is ultimately about providing the greatest good for the greatest number. Executing this policy sometimes requires certain people to sacrifice more than others. There is no "win-win."[67] Power plants and transmission lines have to build somewhere, and sometimes the public good requires locating these facilities in someone's back yard, or next to a family

[65] *See* "Public Comments," Case Nos. 18-1334-EL-BGN (Highland); 18-1024-EL-BGN (Willowbrook).

[66] *See, e.g.*, *In re Black Fork Wind Energy, L.L.C.,* 2018-Ohio-5206; *In re Application of Champaign Wind, L.L.C.*, 2016-Ohio-1513, ¶ 4, 146 Ohio St.3d 489, 490*; In re Application of Buckeye Wind, L.L.C.*, 2012-Ohio-878, ¶¶ 3-4, 131 Ohio St.3d 449, 450*; Ohio Edison Co. v. Power Siting Comm'n,* 56 Ohio St.2d 212, 215–16 (1978).

[67] AEP Br. at 11; OEG Br. at 2.

farm. This is why the Commission must continue to honor the concept of "definite need." Sacrifices ought to be demanded of landowners only when absolutely "necessary."

Second, the Commission must also take into account how its decision will affect competitors and competition. In *Turning Point*, "[t]he Commission noted that it would first look to the market to build needed capacity and that new generation or capacity projects would only be authorized under Section 4928.143(B)(2), Revised Code, when generation needs cannot be met through the competitive market."[68] The market has relied on this policy. And this policy has worked. Developers have met the market's need for renewable generation. That which is not broken does not need fixed.

III. CONCLUSION

As Direct indicated in its initial brief, the "benefits" of renewable energy can be taken as a given. Whether new renewable facilities would *benefit* the public is no substitute for evidence that the projects are *necessary* to meet a "definite need." There would be no inconsistency in a final order that agrees with AEP and its supporters about the "benefits" of renewable energy, yet declines to render a finding that there is a "definite need" for AEP to develop additional renewable resources.

[68] *Turning Point* at 26.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was served by electronic mail this 27th day of March, 2019, to the following:

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