

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Power Company for Approval of an) Case No. 11-5333-EL-UNC
Amendment to its Corporate Separation)
Plan.)

**MOTION TO STRIKE PORTIONS OF COMMENTS BY EXELON
GENERATION COMPANY, LLC. AND OHIO POWER COMPANY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") moves to strike portions of the December 15, 2011 Comments filed by Exelon Generation Company, LLC ("Exelon") and portions of the December 29, 2011 Reply Comments filed by Ohio Power Company ("OP" or "Company"). This case involves the separation of generating assets from the AEP distribution utility, which must be approved under R.C. 4928.17(E), and is subject to the enabling rules of Ohio Admin. Code 4901:1-37.

In general, the material should be stricken because OP and Exelon are making arguments for their preferred outcome in this case based upon a settlement in a Duke case.¹ There are multiple things wrong with that, but what's wrong with that for purposes

¹ The Duke Settlement was presented to the Commission for approval (and was eventually approved) in the recent Duke Ohio Case. *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO et al, Opinion and Order (Nov. 22, 2011).

here is that the Duke settlement, by its terms, cannot be used for that purpose.² The specific portions subject to this motion to strike are as follows:

Exelon Comments

Strike page 2, carrying over to page 3, beginning with the sentence “Granting a waiver is certainly not unprecedented, as the Commission provided such a waiver in its November 22, 2011 Opinion and Order regarding the October 24, 2011 Stipulation and Recommendation in Duke Energy Ohio’s ESP proceeding, Case No. 11-3549-EL-SSO et al. (the “Duke Stipulation’). (See Duke Order at 45-46.) Like the Application and Stipulation here, the Duke Stipulation provides for full legal corporate separation and a transfer of generation assets out of Duke Energy Ohio at book value. (See Duke Stipulation ¶¶VII.A – C.). Given these substantially similar circumstances, the Commission should afford AEP Ohio the same treatment.”

Ohio Power Reply Comments

- Strike page 6, the sentence reading: “FES and others supported approval of Duke Ohio’s similar proposal without unnecessary delays and concern over details that do not impact the substance of the proposal.”
- Strike page 7, the sentence reading “As Exelon stated in their comments (at 3), because the Duke and AEP Ohio corporate separation plans present “substantially similar circumstances, the Commission should afford AEP Ohio the same treatment’.”
- Strike page 9 the sentences reading: “IEU and all of the other commenters opposing full approval and advocating the requirement of a market valuation study for AEP Ohio supported the opposite position in the Duke Ohio Stipulation, Case No. 11-3549-EL-SSO. Specifically, in the Duke Ohio decision, the parties advocated and the Commission summarily

² See *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO et al, Stipulation and Recommendation (Oct. 24, 2011).

waived Rules 4901:1-37-09(B) through (D), OAC. In the decision, the Commission explicitly acknowledged that the rules summarily waived ‘set forth the filing requirements and the procedures to be followed for an application requesting approval of the sale or transfer of generating assets.’ (Duke Opinion and Order at 46.) In waiving the rules and approving the generation divestiture, the Commission found that the outcome provides ‘the necessary safeguards to ensure that the statutory mandates pertaining to Duke’s sale of generation assets and corporate separation are adhered to and the policy of the state is carried out.’ (*Id.*)”

- Strike page 10, the sentence reading: “The fact is that the Commission approved the same proposal by Duke Ohio based on the same level of detail and applying the same statutes and rules.”
- Strike page 14, the sentences beginning with “and they should be equitably estopped because they just finished lobbying (successfully) for Duke Ohio to be permitted to transfer its assets at net book value. The Commission determined based on similar information that it was in the public interest to waive Rule 4901:1-37-09(C)(4) and allow Duke Ohio to transfer its generation assets at net book value. If that treatment was in the public interest for Duke Ohio, it is also in the public interest to grant AEP Ohio’s similar request.”
- Strike page 14, carrying over to page 15, the sentences “Granting Duke Ohio’s affiliate full and final approval for generation divestiture up front and waiving the filing and process rules, while simultaneously deferring approval of AEP Ohio’s transfer of assets to AEP GenCo and possibly subjecting it to market valuation studies and protracted litigation, serves to provide Duke Ohio with an undue preference and advantage in violation of this statute. The better approach is to grant AEP Ohio the same relief afforded to Duke Ohio.”
- Strike page 15, the sentence “If Duke Ohio is able to transfer its generation assets at net book value and AEP Ohio is subject to greater scrutiny and a different valuation methodology, then Duke Ohio would be receiving an unfair benefit from the truncated process, which would allow Duke Ohio to avoid the costs associated with complying with O.A.C. 4901:1-37-09(C)(4), and potentially transfer its assets at a different valuation level.”
- Strike page 16, the sentence “In addition, OCC’s position in this regard is not substantiated based on prior Commission application of that rule, including in the recent Duke Ohio decision.”

- Strike page 16, the sentences starting with “which is similar to the arrangement the Commission approved in the Duke stipulation. Section VIII.B of the Duke Stipulation states ‘that contractual obligations arising before the signing of the Stipulation shall be permitted to remain with Duke Energy Ohio without Commission approval for the remaining period of the contract but only to the extent that assuming or transferring such obligations is prohibited by the terms of the contract or would result in substantially increased liabilities for Duke Energy Ohio if Duke Energy Ohio were to transfer such obligations to its subsidiary or affiliate.’”
- Strike page 20, the sentence “However, as FES knows, because it recently supported a waiver of the hearing requirement for Duke Ohio, the Commission is not required to conduct a hearing under Rule 4901:1-37-09.”

The grounds for this Motion to Strike are further explained in the following memorandum in support.

Respectfully submitted,

BRUCE J. WESTON
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MEMORANDUM IN SUPPORT

I. INTRODUCTION—THE DUKE STIPULATION

On December 15, 2011, interested parties, including Exelon Generation Company, LLC (“Exelon”), filed comments in this docket. On December 29, 2011, parties, including Ohio Power Company, filed reply comments.

While this case involves AEP, the Company and Exelon both rely heavily on another case involving Duke, to support their recommendations for expedited review (no hearing) without the filing of detailed information, including a market value study. Specifically, they rely on the corporate separation provisions of the Duke Ohio settlement³ reached in Case No.11-3549-EL-SSO⁴, the Duke Ohio Standard Service Offer case, and on the PUCO Order adopting the Stipulation in that case.⁵ Exelon was a signatory party to the Duke-related Stipulation, while Ohio Power Company, a party in

³ Duke Ohio Stipulation and Recommendation, Section VIII at 25-28.

⁴ *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO et al, Stipulation and Recommendation (Oct. 24, 2011).

⁵ *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO et al, Opinion and Order (Nov. 22, 2011).

the Duke case, agreed to “take no position with regard to the Stipulation.”⁶ OCC, FES, IEU, and the PUCO Staff were also among the Signatory Parties to the Duke Ohio Stipulation.

The Duke Ohio Stipulation resolved all the issues raised by the parties in respect to Duke Ohio’s application for approval of its electric security plan, as well as its application to amend its corporate separation plan, which was consolidated with Case No. 11-3549-EL-SSO.⁷ The parties’ agreement included that the Stipulation was “an agreement by all Parties to a package of provisions rather than agreement to each of the individual provisions included within the Stipulation.”⁸ Additionally, the parties in the Duke case stipulated that the agreement “in its entirety, shall not be interpreted in a future proceeding before this Commission as their agreement to only an isolated provision of this Stipulation.”⁹ In a subsequent clause the parties agreed that the Duke Stipulation “is not intended to reflect the views or proposals that any individual Party may have advanced acting unilaterally.”¹⁰ There is also another provision in the Stipulation that limits the use of the Stipulation in subsequent proceedings and prohibits the Stipulation from serving as precedent before the PUCO. That language proclaims that the Stipulation was “submitted for purposes of these proceedings only and neither this Stipulation nor any Commission order considering this Stipulation shall be deemed binding in any other proceeding nor shall this Stipulation or any such Order be offered or

⁶ Stipulation and Recommendation at 48.

⁷ See Duke Ohio Stipulation and Recommendation at 1 (Oct. 24, 2011).

⁸ Id at 2.

⁹ Id.; id at 40.

¹⁰ Stipulation and Recommendation at 4.

relied upon in any other proceedings except as necessary to enforce the terms of this Stipulation.”¹¹

The Duke Stipulation was approved by the PUCO on November 22, 2011.¹² The PUCO approved, inter alia, Duke Ohio’s full corporate separation, including the transfer of generating assets at net book value. The Commission found the corporate separation plan complied with R.C. 4928.17 and the applicable provisions of the Ohio Administrative Code. According to the PUCO, the provisions of the Stipulation provided “the necessary safeguards to ensure that the statutory mandates pertaining to Duke’s sale of generation assets and corporate separation are adhered to and the policy of the state carried out.”¹³ There was no separate hearing held, nor was there a market value study done of the generating assets that were to be transferred, which serves as a major source of contention by the Company.

II. THE RULES RELATED TO CORPORATE SEPARATION

The process for approving transfer of generating assets is detailed under Ohio Admin. Code 4901:1-37(B)-(D). These are the rules that work in conjunction with R.C. 4928.17, to ensure that the corporate separation satisfies the public interest and is legally sufficient. These rules require the separate filing of an application which shall at a minimum show: the object and purpose of the sale or transfer; a demonstration of how the sale will affect current and future standard service offers; a demonstration of how the

¹¹ Stipulation at 41-42.

¹² *In the Matter of the Application of Duke Energy Ohio, Inc for Authority to Establish a Standard Service offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO et al, Opinion and Order (Nov. 22, 2011).

¹³ Id. at 46.

sale will affect the public interest; and the fair market value and book value of property to be transferred. Additionally, the rules allow the PUCO to fix a time and place for a hearing if the application appears to be unjust, unreasonable, and not in the public interest. These rules provide safeguards to ensure customers' interests are protected in the corporate separation process by requiring an open, transparent process with standards to be met before corporate separation is approved. It is these rules nonetheless that the Company wants to work around.

III. A WAY AROUND THE RULES

Exelon and the Company would have the Commission bypass these detailed rules and filing requirements. To get there, they engage in legal contortionism. This contortionism takes two forms.

First the Company and Exelon argue that the Company should be afforded the same treatment on corporate separation as was granted to Duke Ohio under the Duke Stipulation. The “me too” approach urged means that the PUCO should grant the Company's corporate separation with no more process or filings. This means no hearing, waivers of filing requirements, including a market study, and identical treatment of contractual obligations arising before corporate separation.

Second, the Company interprets the signatory parties' agreement to the entire Duke Ohio settlement package as evidence that the signatory parties agree that a utility need not comply with the individual corporate separation safeguards contained in Ohio Admin. Code 4901-1-37-09(B)-(D). The Company's approach suggests that what OCC or others agreed to in the context of the Duke Ohio settlement should be what they agree

to in this proceeding, regardless of the individual circumstances presented in this proceeding.

IV. USE OF THE DUKE STIPULATION IN FUTURE PROCEEDINGS IS PROHIBITED; CONSEQUENTLY THE COMMENTS OF THE COMPANY AND EXELON SHOULD BE STRIKEN WHEN THEY ATTEMPT TO INVOKE THE DUKE STIPULATION AND THE COMMISSION'S ORDER CONSIDERING THE DUKE STIPULATION.

Under the Duke Stipulation the Company and Exelon are expressly prohibited from using the terms of the Stipulation in a number of respects. Under the Stipulation, the Signatory Parties' agreement to the Stipulation in its entirety is not to be "interpreted in a future proceeding before this Commission as their agreement to only an isolated provision of this Stipulation."¹⁴ Moreover, under the terms of the Duke Stipulation, neither the Stipulation nor a PUCO order considering the Stipulation shall be deemed to be binding "in any other proceeding."¹⁵ The Duke Ohio Stipulation also declares that it may not be offered or relied upon in any other proceedings, except for enforcement purposes.¹⁶

But Ohio Power Company and Exelon submitted comments that depend pervasively upon the individual terms of the Stipulation and the Commission Order adopting the Stipulation. That is wrong. The PUCO should not be persuaded by such fallacious arguments. They are inappropriate and should be stricken and not relied upon by the PUCO to determine whether OP's corporate separation plan should be approved.

The Company's misuse of isolated provisions in the Stipulation to show different treatment between Duke Ohio and OP not only violates the terms of the Stipulation, but is

¹⁴ Duke Stipulation at 40.

¹⁵ Id. at 2

¹⁶ Id. at 2.

also contrary to the inherent nature of a stipulation. A stipulation, such as the Duke Ohio Stipulation, represents a resolution of a number of issues in a proceeding or multiple proceedings. A Stipulation is a package composed of many different provisions—provisions which may not be acceptable on a stand alone basis, but when put together with other terms constitute an acceptable compromise. Indeed as the Duke Ohio Stipulation stated “[t]his stipulation represents an agreement by all Parties to a package of provisions rather than an agreement to each of the individual provisions included within the Stipulation.”¹⁷ It is in the words of the Signatory Parties “a comprehensive compromise of issues raised by Parties with diverse interests.”¹⁸ It simply does not represent the positions that parties would have taken outside the context of a package agreement. To extricate distinct provisions of a Stipulation and attempt to apply those to a different company, under a different set of facts, perverts the whole stipulation process.

Allowing a PUCO-adopted stipulation and a PUCO Order adopting the Stipulation to be used in violation of the terms expressly agreed will have a chilling effect on the willingness of parties to enter into future negotiations. If the Commission wishes to encourage future settlements and encourage respect for terms of past settlements, it must treat a breach of the settlement as a serious matter. It should strike the Comments from the record, as detailed below and not rely upon them to determine the appropriateness of the OP corporate separation plan.

A. The Me Too Provisions that should be stricken:

The Duke Stipulation cannot be used as precedent by its very terms. Accordingly, the following passages from the Company’s Reply Comments should be stricken:

¹⁷ Stipulation and Recommendation at 2.

¹⁸ Id. at 3.

- Page 7, the sentence reading “As Exelon stated in their comments (at 3), because the Duke and AEP Ohio corporate separation plans present “substantially similar circumstances, the Commission should afford AEP Ohio the same treatment.”
- Page 10, the sentence reading: “The fact is that the Commission approved the same proposal by Duke Ohio based on the same level of detail and applying the same statutes and rules.”
- Page 14, carrying over to page 15, the sentences “Granting Duke Ohio’s affiliate full and final approval for generation divestiture up front and waiving the filing and process rules, while simultaneously deferring approval of AEP Ohio’s transfer of assets to AEP GenCo and possibly subjecting it to market valuation studies and protracted litigation, serves to provide Duke Ohio with an undue preference and advantage in violation of this statute. The better approach is to grant AEP Ohio the same relief afforded to Duke Ohio.”
- Page 15, the sentence “If Duke Ohio is able to transfer its generation assets at net book value and AEP Ohio is subject to greater scrutiny and a different valuation methodology, then Duke Ohio would be receiving an unfair benefit from the truncated process, which would allow Duke Ohio to avoid the costs associated with complying with O.A.C. 4901:1-37-09(C)(4), and potentially transfer its assets at a different valuation level.”
- Page 16, the sentence “In addition, OCC’s position in this regard is not substantiated based on prior Commission application of that rule, including in the recent Duke Ohio decision.”
- Page 16, the sentences starting with “which is similar to the arrangement the Commission approved in the Duke stipulation. Section VIII.B of the Duke Stipulation states ‘that contractual obligations arising before the signing of the Stipulation shall be permitted to remain with Duke Energy Ohio without Commission approval for the remaining period of the contract but only to the extent that assuming or transferring such obligations is prohibited by the terms of the contract or would result in substantially increased liabilities for Duke Energy Ohio if Duke Energy Ohio were to transfer such obligations to its subsidiary or affiliate.’”

Similarly, the Exelon Comments should be stricken as follows:

- Page 2, carrying over to page 3, beginning with the sentence “Granting a waiver is certainly not unprecedented, as the Commission provided such a waiver in its November 22, 2011 Opinion and Order regarding the October 24, 2011 Stipulation and Recommendation in Duke Energy Ohio’s ESP proceeding, Case No. 11-3549-EL-SSO et al. (the “Duke Stipulation”).

(See Duke Order at 45-46.) Like the Application and Stipulation here, the Duke Stipulation provides for full legal corporate separation and a transfer of generation assets out of Duke Energy Ohio at book value. (*See* Duke Stipulation ¶¶VII.A – C.). Given these substantially similar circumstances, the Commission should afford AEP Ohio the same treatment.”

B. The “but he said/she said” comments that should be stricken

The fact that OCC, IEU, FES and others supported approving Duke Ohio’s corporate separation within the SSO docket, instead of requiring Duke Ohio to file an application in a separate docket, should not be used against such parties. Similarly, the Company should be precluded from referring to the fact that OCC, FES, and the Staff agreed to waive certain filing requirements in the Duke stipulation (while insisting on the Company meeting them here). The terms of the Duke Stipulation prohibit such use. Accordingly, the following passages from the Company’s Reply Comments should be stricken:

- Page 6, the sentence reading: “FES and others supported approval of Duke Ohio’s similar proposal without unnecessary delays and concern over details that do not impact the substance of the proposal.”
- Page 9 the sentences reading: “IEU and all of the other commenters opposing full approval and advocating the requirement of a market valuation study for AEP Ohio supported the opposite position in the Duke Ohio Stipulation, Case No. 11-3549-EL-SSO. Specifically, in the Duke Ohio decision, the parties advocated and the Commission summarily waived Rules 4901:1-37-09(B) through (D), OAC. In the decision, the Commission explicitly acknowledged that the rules summarily waived ‘set forth the filing requirements and the procedures to be followed for an application requesting approval of the sale or transfer of generating assets.’ (Duke Opinion and Order at 46.) In waiving the rules and approving the generation divestiture, the Commission found that the outcome provides ‘the necessary safeguards to ensure that the statutory mandates pertaining to Duke’s sale of generation assets and corporate separation are adhered to and the policy of the state is carried out.’ (*Id.*)”

- Page 14, the sentences beginning with “and they should be equitably estopped because they just finished lobbying (successfully) for Duke Ohio to be permitted to transfer its assets at net book value. The Commission determined based on similar information that it was in the public interest to waive Rule 4901:1-37-09(C)(4) and allow Duke Ohio to transfer its generation assets at net book value. If that treatment was in the public interest for Duke Ohio, it is also in the public interest to grant AEP Ohio’s similar request.”
- Page 20, the sentence “However, as FES knows, because it recently supported a waiver of the hearing requirement for Duke Ohio, the Commission is not required to conduct a hearing under Rule 4901:1-37-09.”

V. CONCLUSION

Sound regulation should not discourage dispute resolution through settlements. Settlement may bring about regulatory certainty that may otherwise be delayed until the termination of all litigation. Thus, because there is the potential for cost savings and regulatory certainty, the PUCO should not discourage settlements.

If, however, parties to a settlement are not assured that the terms of the settlement agreement, agreed to and eventually approved by the PUCO, will be held inviolate, parties will not be inclined to sign onto settlements. The AEP Company’s repetitive use of the Duke Stipulation against parties and as binding precedent ignores the very essence of the Duke Ohio stipulation, and indeed all stipulations – the stipulation represents a comprehensive package and does not necessarily reflect a parties’ agreement to only an isolated provision of the Stipulation. Additionally, Stipulations are case specific, and as such cannot be deemed binding in any other proceeding.

Accepting the Reply Comments of the Company and relying upon those comments to determine the appropriateness of the Company’s corporate separation plan would be unjust and unreasonable. It would also be bad policy that will have a chilling

effect on parties' willingness to enter into a settlement agreement. For all these reasons, the Commission should strike the portion of Exelon's Comments and the Companies' Reply Comments identified in this Motion to Strike.

Respectfully submitted,

BRUCE J. WESTON
INTERIM CONSUMERS' COUNSEL

/s/ Maureen R. Grady
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike was served via regular U.S. Mail Service, postage prepaid to the persons listed below, on this 13th day of January 2012.

/s/ Maureen R. Grady

Maureen R. Grady
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