BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company to Establish Initial Storm Damage Recovery Rider Rates.	))))	Case No. 12-3255-EL-RDR

INITIAL POST-HEARING BRIEF OF OHIO POWER COMPANY IN SUPPORT OF THE JOINT STIPULATION

Filed: March 3, 2014

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I. Introduction

When an electrical outage occurs typically the burning question asked is when the power will be restored. That is a constant, regardless if the outage occurs in 100 degree heat or at zero degrees. Electricity has become an integral part of our society and one the Commission and utility companies strive to ensure is being provided reliably. Likewise, when there is an outage the Commission and the utility companies work hard to restore power as quickly and safely as possible.

This case involves the recovery of the prudent and reasonable expenses related to the restoration efforts of Ohio Power Company ("Ohio Power" or "AEP Ohio") in response to the major storms that impacted the electric distribution system in Ohio in 2012. The most memorable storm that year was the June 29, 2012 major storm classified as a Derecho that left more than 4.3 million customers without electric service across the country ("June 29 Storm"). Ohio Power spent the dollars associated with restoring power in this and the other major storms that year, but has yet to receive recovery of those dollars spent in the summer of 2012.

In recognition of the need to ensure safe and efficient restoration of electric service in the wake of major storms, the Commission set up a process to ensure AEP Ohio could recover prudently incurred major storm restoration expenses beyond the amount embedded in distribution rates. To effectuate this process the Commission approved a process where the Company would file make a filing detailing its major storm costs and proposed recovery

mechanism, followed by a public comment period in an effort to work towards a resolution of the relevant facts.

On December 6, 2013, all but one of the parties involved in the Commission's established process to consider the recovery of major storm expenses filed a Stipulation and Recommendation ("Stipulation") before the Public Utilities Commission of Ohio ("Commission") to resolve those issues. The Stipulation presented to the Commission is a package to resolve the underlying issue at focus in this case, which is the proper level of expense eligible for recovery from the 2012 major storms (beyond the threshold in rates) and the recovery mechanism.

As a result of the Stipulation, residential customers will only pay $2.34 a month for twelve months and non-residential customers will pay $9.67 over that same fixed period in large part to pay for the service restoration efforts in response to the most destructive and expensive storm in Company history. (Co. Ex. 7 at 4.) The Stipulation is supported by a substantial list of stakeholders representing a diverse group of interests. Not only does the Stipulation address a fair and reasonable compromise on the amount of storm restoration expense recommended for recovery, but the agreement also seeks to educate the Signatory Parties going forward on the challenges faced by a utility managing a major restoration effort after a catastrophic storm. The Stipulation also incorporates a carrying charge to address the delay in recovery of the costs expended by the Company, in the summer of 2012, to safely and reliably restore service to customers. The level of costs disallowed and the decrease in the carrying costs are below what the Company believes are justified, but in the spirit of compromise, and to reach a resolution of these 2012 issues, the Company entered into the Stipulation. All together the Stipulation is supported by the Signatory Parties as satisfying the three-part test traditionally relied upon by the

Commission to judge the reasonableness of a Stipulation and should be adopted without modification. With the support of the Staff and all of the Signatory Parties, it is now time for customers to reimburse the Company for the extraordinary efforts undertaken to restore service in the aftermath of the catastrophic major storm and the subsequent major storms in the summer of 2012.

II. Establishment of the Storm Damage Recovery Rider Mechanism in the ESP II Order.

The Commission established the Storm Damage Recovery Rider Mechanism in AEP Ohio's *ESP II Order*.[1] The Company proposed a storm damage recovery mechanism to recover any incremental expenses above the $5 million threshold allocated to major storm restoration in the settlement in the Company's most recent distribution rate case, 11-351-EL-AIR and 11-352-EL-AIR. (*ESP II Order* at 68.) The mechanism is intended to recover incremental distribution operation and maintenance (O&M) major storm expenses and not capital expenditures. (Id.) The capital expenditures were proposed to be addressed in the distribution investment rider or a rate case. (Id.)

The Commission found that AEP Ohio can defer any incremental distribution expenses above or below the $5 million threshold with some modifications. The Commission determined that AEP Ohio should annually provide information to Staff detailing the storm expenses included in its storm deferral account. (Id.) The Commission found that if AEP Ohio incurs costs due to one or more large storms in a year that the Company should file an application by December 30th of that year seeking recovery of the incremental costs above the $5 million

[1] *In the matter of the the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan.* Case Nos. 11-346-EL-SSO et. al ("ESP II"). August 8, 2012 Opinion and Order at 68-69 ("*ESP II Order*").

threshold. (Id. at 68-69.) The burden for demonstrating that the costs were prudently incurred and reasonable rests with AEP Ohio. (Id. at 69.)

The Commission also determined a process to consider any application filed by AEP Ohio to recover the incremental storm costs. The Commission determined that Staff and any interested parties could file comments on the application within 60 days after the application is filed with the Commission. (Id.) The Commission allowed for a hearing in the event that any objections raised by any of the interested parties or Staff were not resolved by AEP Ohio after the sharing of comments.

OCC had also raised a concern that the carrying charge rate was not specified in AEP Ohio's proposal. (Id. at 68.) As reflected in the Commission *ESP II Order*, OCC suggested the use of long-term debt as opposed to a weighted average cost of capital (WACC) rate. (Id.) The Commission determined that the need to establish which carrying charge level to apply was premature. (Id. at 69.)

III. Overview of the Stipulation

The central issue for this proceeding, which is answered in the Stipulation, is what level of costs associated with the 2012 major storms above the $5 million threshold are reasonable and prudent for recovery in the storm recovery mechanism. The Stipulation represents a balanced package that supports the level of costs that are reasonable and prudent and results in a charge of $2.34 a month for residential customers and $9.67 for non-residential customers over a 12 month total period.

The Stipulation is the result of a lengthy process of negotiation involving experienced counsel representing members of every affected stakeholder group. The Parties participated in significant discovery, met and communicated over several months before the Signatory Parties

agreed to the Stipulation. The Stipulation was achieved through a process that included of all parties and interest groups. The Signatory Parties considered multiple proposals and counterproposals before ultimately reaching agreement on the Stipulation and Recommendation on December 6, 2013. (Co. Ex. 2 at 9-10.)

A host of parties representing a variety of diverse interests (collectively referred to as the "Signatory Parties") have signed the Stipulation and support the package of terms and conditions reflected in the agreement. The Signatory Parties include every party to the case other than the Office of the Ohio Consumers' Counsel. These parties are:

- The Company: Ohio Power Company;
- Independent Staff of the State Agency Representing All Interests: The Commission's Staff (Staff);
- Industrial customers: The OMA Energy Group (OMA), Industrial Energy Users-Ohio (IEU) and The Ohio Energy Group (OEG);
- General Welfare customers: The Ohio Hospital Association (OHA), and
- Commercial customers: The Kroger Co. (Kroger);

The Stipulation resolves the issue concerning what level of costs from AEP Ohio's 2012 major storm restoration efforts were prudently incurred and reasonable and therefore eligible for recovery under the storm damage recovery mechanism previously authorized and established in the *ESP II Order*. The Stipulation provides an agreement representing a compromise of the positions filed in the comment period established by the Commission to review a request by AEP Ohio for recovery under this mechanism. The Stipulation adopted the Application filed by the Company on December 22, 2012 and supplemented on March 3, 2013 (collectively "Application") with the following modifications:

1) An agreed upon recovery of $54,871,799 in O&M costs related to the 2012 major storms. This value represents an agreed $6.1 million dollar decrease in the amount of O&M expenses requested for recovery by AEP Ohio as reflected in the Application filed in the docket[2].

2) The Stipulating Parties agreed that the recovery of the expenses related to the 2012 major storms should occur over a period of 12 months. The Stipulation also contains a clause that allows AEP Ohio to recover carrying costs at the cost of long-term debt (5.34%). The carrying charge total will be calculated using the timeframe of April 1, 2013 through the start of the actual recovery.

3) The Stipulating Parties agreed on a recovery mechanism that establishes the allocation based on a monthly fixed customer charge of $2.34 for residential customers and $9.67 for non-residential customers for a single year. The allocation was tailored after the design of the gridSMART rider in Commission Case No. 10-164-EL-RDR. The Stipulation contains attachments that illustrate the expected recovery assuming collection began with the January 2014 billing cycle.

4) The Signatory Parties included a provision focused on ensuring the parties had a deeper understanding of the issues faced in major storm restoration and the resources available to address those efforts. The Company agreed to set up a meeting to further discuss storm restoration practices with the Signatory Parties.

5) The Stipulation also identified certain refunds the Company secured from vendors and recognized the ability to reflect any future adjustments discovered. The process in the Stipulation requires the Company to share the receipt of any changes with the Staff and update the storm balance going forward accordingly.

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[2] The total value also reflects the removal of $129,549 for refunds from vendors secured by the Company since the filing of the Application.

6) The Stipulation also included an agreement among the seven Stipulating Parties that the Stipulation as a whole satisfies the three-part test traditionally used by the Commission to consider stipulations in its dockets.

Overall, the Stipulation provides a reasonable package that properly resolves the issues facing the Commission in this proceeding. The Stipulation provides a reasonable and prudent outcome in a case focused on determining the appropriate costs for recovery under the established Commission mechanism intended to address unrecovered O&M costs related to major storms. The ultimate disallowance agreed to in the Stipulation is more than any single Signatory Party requested in its comments before the Commission. The Stipulation in conjunction with the other evidence of record, applied to the three-part test applicable to contested settlement agreements, provides an appropriate basis for a Commission decision adopting the Stipulation as filed.

IV. Standard of Review

Rule 4901-1-30, O.A.C, authorizes parties to Commission proceedings to enter into stipulations. Although it is not binding on the Commission, the terms of such agreements are accorded substantial weight. *See Consumers' Counsel v. Pub. Util Comm.* (1992), 64 Ohio St.3d 123,125, *citing Akron v. Pub. Util. Comm*. (1978), 55 Ohio St.2d 155. This concept is particularly valid where the stipulation is supported or unopposed by the vast majority of parties in the proceeding in which it is offered. *Columbus Southern Power Company*, Case No. 09-1089-EL-POR, May 13, 2010 Opinion and Order at 20. While the Commission may place substantial weight on the terms of a stipulation, it must determine from the evidence what is just and reasonable. *In re Columbus S. Power Co.,* 2011 Ohio 2383, P19 (Ohio 2011).

In evaluating the reasonableness of a settlement agreement that is opposed by some parties, the Commission uses the following well-established criteria:

> (a) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
>
> (b) Does the settlement, as a package, benefit ratepayers and the public interest?
>
> (c) Does the settlement package violate any important regulatory principle or practice?

Columbus Southern Power Company, Case No. 09-1089-EL-POR, May 13, 2010 Opinion and Order at 21 (and cases cited therein). The well-established three-part test for contested settlements has been endorsed by the Supreme Court of Ohio for use in this context. *Indus. Energy Consumer of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 561 (1994), citing *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992).

V. The Stipulation and Recommendation Satisfies the Three-part Standard for Reviewing and Approving Contested Stipulations.

A. The Stipulation Is The Result Of Serious Bargaining Among Capable, Knowledgeable Parties.

The record shows that the Stipulation is the result of a lengthy process of negotiation involving experienced representatives of every affected stakeholder group, including industrial, commercial and residential customers. (Company Ex. 2 at 9.); *see also* Signatories' Joint Ex. 1 at 5.) The Signatory Parties were represented by counsel with many years of experience in proceedings before the Commission. (Id.) All Parties were invited to and participated in multiple meetings to discuss resolution of the case. (Id.) These meetings included term sheets for discussion and opportunities for further engagement in settlement discussions. (Id. at 9-10.) OCC was also offered another opportunity for further discussion or acceptance of the final terms reached by the Signatory Parties. (Id. at 10.)

There is no factual disagreement that the Signatory Parties and OCC all participated in the negotiations leading to the Stipulation. OCC witness Yankel only challenges compliance with this prong of the three part test based on the fact that OCC did not ultimately sign the Stipulation. (Tr. V at 896.) However the test is not whether all parties signed the Stipulation, the test is whether there was serious bargaining among capable, knowledgeable parties. OCC witness Yankel verified that he himself attended two settlement meetings and that there may have been more. (Id. at 897.) He also testified, under cross-examination by IEU counsel, that he was not challenging the capability or knowledge of any parties in the negotiations. (Id.) There was also some discussion in the case about the diversity of interests represented in the negotiations. The standard approved by the Court does not include a reference to the representation of diverse interests, but the Stipulating Parties did consider that in their evaluation of the process and considered it satisfied in this situation. (Joint Exhibit at 5.) Just as stated above this language too considers whether the bargaining that led to the Stipulation was among capable, knowledgeable parties representing diverse interests. The same analysis applies that all parties were fully engaged and involved in the negotiations that led to the settlement.

The Commission previously interpreted this first prong of the test to relate to the participation in the negotiations. Specifically the Commission stated:

> In considering whether there was serious bargaining among capable and knowledgeable parties, the Commission evaluates the level of negotiations that appear to have occurred, and takes notice of the experience and sophistication of the negotiating parties.

In the Matter of the Complaint of Dominion Retail v. Dayton Power and Light Company et al. Case Nos. 03-2405-EL-CSS, 04-85-EL-CSS, 03-2341-El-ATA (February 2, 2005 Opinion and

Order at 18.)[3] ("*Dominion Order*") The Commission did not provide OCC a veto right on the reasonableness of Stipulations. In fact, the Commission specifically stated in the *Dominion Order* that "[t]he Commission will not require OCC's approval of stipulations." (*Id.*) Ironically, the very case that first adopted the three part test considered a stipulation not signed by OCC, in *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992). The Commission reviews the content of the Stipulation for approval and the open nature of the negotiations. In the present case there is no argument about OCC's participation in the negotiations. To determine if the negotiations appear to have involved all parties the Commission need not look any further than the fact that the ultimate amount of disallowance of O&M costs reflected in the Stipulation goes beyond any of the filed public positions of the Signatory Parties. (Company Ex. 2 at 6-7.)

Even if a diversity of interests signified by signing a stipulation were a requirement to satisfy the three part test, which it is not, OCC's absence as a Signatory Party does not mean there is a lack of diversified interests among the Signatory Parties in this case. The list of Signatory Parties represents the interests of industrial consumers, commercial consumers, residential consumers and general welfare providers. OCC may take issue with the other entities representing residential interests, but as Company witness Spitznogle testified that the Commission Staff promotes important consumer interests including residential customers. (Company Ex. 2 at 10.) Staff's role is to represent all sides and determine the appropriate balanced outcome in a proceeding. Even OCC witness Yankel recognized this fact in his cross-examination when agreeing that Staff serves as a neutral fact finding party. (Tr. V at 912.) This places the Staff as a representative of the facts as they apply to all interests and its involvement removes potential legal posturing and focuses on the proper outcome in the case. That proper

[3] 2005 WL 389146 (Ohio P.U.C.) at 13.

balanced outcome in this case is represented by the Stipulation signed by the Signatory Parties, including the Commission Staff. Mr. Spitznogle also recognized the residential customer base of the members of the hospitals in the Ohio Hospital Association. (Company Ex. 2 at 10.) As an entity representing the general welfare of the community it provides a unique diverse interest as a Signatory Party. The Signatory Parties represent a diverse group of interests and constitute capable parties knowledgeable about the issues addressed in the case.

B. The Stipulation Does Not Violate Any Important Regulatory Principle or Practice.

The OCC did not provide any substantial testimony asserting the Stipulation violates any important regulatory principle or practice. OCC witness Yankel did provide a short response to a question asking if the Stipulation violated this prong. (OCC Ex. Yankel at 15.) Mr. Yankel testified that rates must be just and reasonable and therefore because he does not agree with the ultimate outcome of the Stipulation that it therefore violates important regulatory principles and practices. (Id.) Mr. Yankel relies on his opinions in the testimony on the public good prong of the test to review stipulations as his evidence that the Stipulation violates important regulatory principles or practices. OCC simply does not agree with the total amount agreed to for recovery. This broad assertion of OCC's paid expert witness, that he does not agree that all the charges are reasonable and prudent, does not amount to evidence of record that there is a violation of an important regulatory principle or practice. The reasonableness and prudence of the costs is the standard for inclusion of the costs in the major storm rider as a factual matter, not proof of a violation of an important regulatory principle or practice. OCC's evidence does not establish that the Stipulation violates the second prong of the Commission's standard to review stipulations.

There was a thorough review of the Company's documentation on the major storm expenses. The Company extensively reviewed the costs and allocations entered into the Company's accounting system checking them for accuracy. (Company Ex. 3 at 19; Tr. IV at 729-730.) As indicated in the direct testimony of Company witness Spitznogle and the comments of the Staff in the docket, the Staff also reviewed extensive documentation on the major storm restoration efforts including data requests, email, meeting with the Company, contracts, policies and procedures all included in thousands of lines of data reviewed. (Company Ex. 2 at 7.) Mr. Spitznogle noted the Staff review that determined a statistically valid sample of invoices for review and that the Staff also reviewed every invoice greater than $100,000 including 92 invoices and detailed support. (Company Ex. 2 at 7.) Staff also reviewed an additional sample of 598 transactions greater than $500. (Id.) The Staff also reviewed all of the discovery it requested of the Company (including one question with over 580 separate transactions) in addition to over 229 Interrogatories and 48 requests for production of documents from OCC. (Id.) Mr. Spitznogle testified that the information was thoroughly vetted. The Commission should adopt the Stipulation offered by the Signatory Parties.

C. As a Package, the Stipulation Benefits Rate Payers and the Public Interest.

The fact that the Commission already approved the mechanism that allows for the recovery of incremental major storm costs that are found reasonable and prudent creates a presumption that the costs that pass that test are in the public interest. The Commission would not approve a mechanism with a test that resulted in something that was not in the public interest. Therefore it is in the public interest to approve reasonable and prudent incremental major storm costs. The need for major storm restoration is an accepted benefit. This case is to determine the reasonableness of the efforts to attain that set benefit.

AEP Ohio witness Spitznogle summarized many of the benefits in the Stipulation that focus on AEP Ohio's reasonable and prudent response to the 2012 major storms. First and foremost, as a result of the Stipulation residential **customers will only pay $2.34 a month for twelve months** and non-residential customers pay $9.67 over that same fixed period to pay for the significant restoration efforts of AEP Ohio in response to the most destructive and expensive storm in the history of the Company. (Company Ex. 2 at 8-10) Mr. Spitznogle also pointed out that it is in the public interest to amicably settle proceedings and enter into agreements. (Id. at 12.) The Commission even favored discussion among the interested parties through comments and discussion of the issues prior to the need for a hearing, in its process to consider an application by AEP Ohio in its *ESP II Order*. (*ESP II Order* at 69.) Mr. Spitznogle testified that there were some disagreements among the parties but that the Stipulation represents a global balance of all issues involved with the need to restore electric service in an organized and responsive manner for customers after a major storm. (Id. at 11.) As indicated by Mr. Spitznogle, the final Stipulation represents an approximate $12 million decrease from the Company's position in the case. (Id. at 12.)

1. The Total Amount of Concessions Made by the Company Exceed the Filed Positions of the Signatory Parties.

At the outset it is important to note that the package in the Stipulation represents an outcome lower in customer impact than any of the positions offered by any of the Signatory Parties in the docket. As pointed out by Mr. Spitznogle, the $6.1 million disallowance agreed to by the Stipulating Parties is above and beyond the $4.9 million included by Staff in its issues list filed prior to the hearing. (Company Ex. 3 at 7.)

Customers will also benefit from the period of time over which carrying charges will accrue and the rate of carrying charges. (Id. at 7-8.) The Company requested a carrying charge

at the weighted average cost of capital (WACC) if the case was not determined by April 1, 2013. (Id. at 8; Company Ex. 1 at para. 29.) The Commission Staff later filed an opposition to a motion filed seeking to start implementing that WACC carrying charge, but did not oppose the Company's request otherwise that sought carrying costs until the full recovery of costs. (Company Ex. 3 at 8; See also by OCC Witness Yankel at Tr. V at 938.) The agreement to lower the carrying cost rate from WACC to long-term debt represents a decrease in excess of $2.2 million. (Id.) The agreement not to collect carrying charges over the period the Company collects the costs of the storm results in an additional savings in excess of an additional $3.5 million. (Id.) Therefore, the concessions agreed to on carrying charges total in excess of $5.8 million. (Id.) Add these concessions to the agreed disallowance, that is above and beyond the highest disallowance proffered by a Stipulating Party in its public positions, and that equals the approximately $12 million in concessions made by the Company in relation to its filed request in the case. Certain Signatory Parties abstained from the carrying charge prong of the Stipulation. This abstention still shows the negotiated result of the Signatory Parties in and of itself because parties that may have been against a carrying charge in comments, agreed not to oppose the implementation of such a charge as part of the overall package provided the Commission. Any opposition to the long-term debt rate by OCC would be inconsistent with its position reflected in the *ESP II Order*. In that decision, the Commission recognized that OCC advocated for a long-term debt rate for the carrying charge as opposed to WACC during the ESP II proceeding. (*ESP II Order* at 68.) The record shows that the carrying charge changes represent a significant compromise that further bolsters the overall package in the Stipulation and should be adopted by the Commission.

OCC witness Yankel is only interested in lowering the amount the Company can recover for restoring service and does not believe that the impact on the public utility should be considered in the weighing of the public benefit. At hearing, Mr. Yankel was asked if he believed there was a need to factor any impact on the utility in determining the "public interest." (Tr. V at 912-913.) The day of the hearing, he responded that he was not talking about taking away dollars the Company deserved, just imprudent costs. (Id. at 913.) However, Mr. Yankel's statement was impeached by his deposition testimony when he responded that he did not believe there is any factor in the public interest that takes into account the impact on the public utility, specifically saying he did "not believe the utility's the public." (Id.) It is clear that Mr. Yankel changed his position between the deposition and the hearing. The two positions are not reconcilable. Mr. Yankel's other testimony on cross examination shows his testimony from the deposition completely disregarding the impact on the utility is his true expert opinion. Mr. Yankel testified at hearing that the $54 million in the Stipulation is more in the public interest than the $61 million requested in the Company Application. (Id.) But Mr. Yankel did not stop there in his disregard for the impact on the utility when considering the public interest. He went on to testify that the closer the amount recovered gets to zero the more it is in the "public interest" as defined in the three-part test under review in this docket. (Id.) The OCC's filed position is focused solely on reducing the dollar amount paid by residential customers, now that power is already restored, and is not concerned with the impact on the utility and what it had to do to provide that service restoration as part of the public interest.

Fortunately, the Commission's review of the facts of this docket are not based in OCC's extreme position to just lower the recovery of expenditures regardless of the impact on the Company and the impact that would have on future restoration across Ohio. The creation of the

mechanism presumes that there is a public interest in restoring power safely and efficiently after major storms and therefore it created a mechanism to recover those prudent costs. A focus on just decreasing the number applied to the mechanism just because customers would be happier with a lower number is not a responsible position and one the Company is confident will not be supported by the Commission. The balanced approach recognizing the value of effective storm restoration and the costs associated with those efforts is recognized in the Stipulation and should be approved by the Commission in the public interest because it weighs all of the interests involved.

OCC witness Yankel testified to Staff's independent position in the case, which also supports the reasonableness of the Stipulation. In his discussion of what parties represent different interest groups, Mr. Yankel testified that Staff does not advocate for residential customers but instead stays as a neutral fact finder. (Tr. Vol. V at 912) Taking Mr. Yankel's statement at face value means that he would view Staff's position as simply seeking the facts without adding in advocacy or self-interest for one party over another. By definition that is what the Commission is striving to determine in its review of what is reasonable and prudent. The Commission standard is not to determine what is best for an individual set of stakeholders. The Commission is charged to make a balanced ruling based on the standard under review that already assumes it is reasonable to approve appropriate incremental storm costs. The Staff in this proceeding entered into a Stipulation with all other parties other than OCC and supported what it determined was an appropriate outcome. That evidence of neutrality, declared by OCC's expert witness shows the reasonableness and prudency of the Stipulation.

2. The Issues Addressed by OCC do not undermine the Reasonableness of the Stipulation.

OCC raises a number of issues in its comments, issues list and through questions at hearing. It is not clear which of these issues OCC will continue to pursue after hearing the Company's explanation of the facts involved at hearing. Therefore the Company will address the issues on reply depending on what is raised. However, there are some issues that the Company predicts that OCC is likely to raise and therefore offers some guidance in the interest of providing the Commission a thorough first review of the post-hearing briefs. If OCC does not raise any of these issues in its initial brief, the Commission can consider the matter dropped by OCC and no longer part of the case without a need for reply.

a. The Use of Storm Services LLC was a Reasonable and Prudent Expense that Enabled AEP Ohio to Restore Electric Service Five Days Faster than if Storm Services was not Used Saving at Least $50 Million in Overall Storm Restoration Costs.

OCC dedicated much of its hearing time attempting to undermine the reasonableness of AEP Ohio's decision to use the vendor Storm Services LLC to respond to the June 29, 2012 storm.[4] The record shows that those concerns are unfounded. But to the extent there is any concern with any of the service offerings provided by Storm Services, there is a Stipulation that already disallows $6.1 million in expenses. That lump sum is not attributed to any specific issue but serves as an overall reasonable level of compromise for the purposes of settlement of this case for Commission approval.

[4] The Storm Services vendor was only used for the June 29, 2012 storm and not the other two 2012 major storms included in the Stipulation.

Mutual assistance is another industry best practice utilized in response to the June 29 Storm, but that required the use of Storm Services to take full advantage of that industry practice. (Company Ex. 3 at 9.) As discussed in testimony by Company witness Dias, it is inefficient and impractical for utilities to maintain the required labor and resources to respond to major storms the size of the June 29 Storm. (Id. at 8.) Participating in the mutual assistance agreements among other utilities saves an individual utility from carrying the employees and costs that may only be needed a few times a year to respond to major storms. (Id. at 10.) Participation in mutual assistance agreements does not guarantee resources will be available for the requesting utility. (Id. at 9.) The resources must be available and requesting utility has the duty to provide appropriate accommodations and resources for outside responders. (Id. at 13.) In an environment when there is competition for those precious outside resources the utility that can guarantee that it can accommodate the outside resources and all the associated needs of those responders in an efficient manner will be able to secure more resources and reduce the outage time for its territory.

The evidence of record shows that AEP Ohio's use of Storm Services allowed it to take timely advantage of the mutual assistance network. As Mr. Kirkpatrick testified, it was difficult securing and managing the necessary labor resources due to the national impact of the June 29 Storm. (Company Ex. 3 at 11.) In fact, there was a significant amount of competition for resources because of the size of the storm. (Company Ex. 7 at 12.) Company witness Kirkpatrick, a witness with over 30 years of experience in the field, testified that the use of Storm Services **enabled AEP Ohio to restore electric service at least five days faster** than if the Company had not used a similar type vendor. (Tr. V at 795.) He also estimated that **those five days likely saved $10 million a day ($50 million) in additional storm restoration costs**.

(Id.) He also testified that there was a cost benefit for customers provided by a faster restoration. (Id.) He testified that the use of Storm Services meant that every single day more and more people are getting their service back on because there are more resources in the field to restore service. (Id.) The testimony at hearing of OCC witness Yankel also supports the value proposition that restoring power quicker saves customers money. Mr. Yankel agreed that a residential customer would only need to be out of electric service for a little more than nine hours to equal the impact of the Stipulation. (Tr. V at 910-911.) That is based on analysis that an outage has a cost to a customer of about $3 an hour. (Id.) AEP Ohio restored service to the nearly 720,000 customers without electric service from the devastation caused by the June 29th Storm impacted over a 12-day period. (Company Ex. 1 at 7-10). The record shows that but for the use of Storm Services the restoration would have taken at least 5 days (120 hours) longer. The impact on the number of customers involved would be exponential.

There is no debate in the record on the fact that faster restoration is a benefit to customers. Mr. Yankel testified under cross-examination that if restoration time could be sped up for any reason, it is a benefit. (Tr. V at 949-950.) In fact, Mr. Yankel agreed that if he were able to see that the use of Storm Services restored power to the system five days earlier that it would make the expense more reasonable. (Id. at 945-946.) Mr. Yankel did not admit that Storm Services sped up restoration but he did provide the testimony that anything that does speed up restoration is a benefit and 5 days would make the expense more reasonable. As discussed in the section below on the credibility of Mr. Yankel, it is clear that he does not have any expertise or experience that allows him to provide expert testimony to determine if Storm Services sped up restoration or not. Mr. Yankel has no practical experience in the field and reviewed the case as an after the fact accounting exercise. (Id. at 939; see discussion below on Mr. Yankel's lack of

restoration experience.) Mr. Kirkpatrick, on the other hand, has over 30 years of operational experience directly on point in a variety of roles and points of view in his work with AEP Ohio and in his work responding to and analyzing numerous storms and issues as a Consultant in the industry on these exact issues. (Company Ex. 7 at 2.) Mr. Kirkpatrick provided the expert record evidence that the use of Storm Services reduced the outage restoration efforts by at least 5 days and $50 million. (Id. at 795.) The use of Storm Services enabled that shorter restoration time. That is a direct benefit related to the manner in which AEP Ohio responded to the storm and is captured in the Stipulation offered for approval by the Signatory Parties.

b. The record shows that OCC witness Anthony Yankel is not a credible witness for the Commission to rely upon in this case.

The testimony and prior actions of Mr. Yankel show that he is not a credible witness for the Commission to rely upon to adopt the OCC positions. Mr. Yankel is a regulatory auditor experienced in record review of concepts and admittedly has no experience with storm restoration oversight or efforts. Mr. Yankel provided inconsistent testimony in this proceeding further undermining his credibility. And Mr. Yankel is not credible in general as shown by his previous statements concerning a study he coauthored raised questions about his credibility that resulted in the D.C. Circuit, United States Court of Appeals, recommending the EPA refer him to the Department of Justice for investigation.

i. Mr. Yankel has no experience with the decisions and oversight needed to understand service restoration after a catastrophic storm.

The testimony provided and cross-examination shows that Mr. Yankel cannot be considered an expert witness on restoration issues. The record shows that Mr. Yankel has no experience with storm restoration (the central action under review in this case), he is not an electrician (Id. at 939), he was not present to experience the harsh conditions, he has never been

in a restoration effort (Id. at 941) he has never managed a large staff or restoration effort and "not been in the field at all" (Id. at 940), he has no knowledge of what an assessor does or work in the field during restoration (Id. at 1002), was unfamiliar with the operations of companies like Storm Services other than what he received from the Company and read on the internet (Id. at 941-942, 985, 1010), and he performed his review as an after the fact in the role of auditor (Id. at 939). Yet he supplied expert testimony for OCC on what were reasonable and prudent expenses in response to a major storm restoration effort. He does not have the requisite knowledge to weigh his accounting point of views with the harsh realities of what is necessary performing major storm restoration and the decisions that are required to lead such a large scale effort. The Commission has a division within its Service Monitoring and Enforcement Department that interacts with utilities on a regular basis concerning restoration and reliability issues. Conversely it is not clear if Mr. Yankel's analysis is even based in fact. For example, on cross-examination he admitted that he had not checked a statement made in his prefiled direct testimony to ensure it was true until the veracity of his statement was challenged in his deposition. (Tr. V at 1009.) When asked at the hearing about his need to change his prefiled testimony Mr. Yankel admitted that he "…believed it to be true but I did not check it, yes." (Id.)

In sharp contrast, the Company provided the testimony of Thomas Kirkpatrick, with over 30 years of experience in distribution operations including Vice President of Distribution of Operations for AEP Ohio, as well as serving Vice President of outside consulting firms, Patrick Engineering, Inc. and Davies Consulting Inc. (Company Ex. 7 at 2.) Mr. Kirkpatrick is also involved in the EEI mutual assistance improvement review involving President Obama that is reviewing the mutual assistance capabilities in the wake of Super storm Sandy. (Company Ex. 7 at 14.) Mr. Kirkpatrick provided testimony throughout the hearing detailing his long history in

the industry and his experience dealing with storm restoration events in Ohio and throughout the country. He and Mr. Dias also provided extensive testimony on the importance of mutual assistance partnership among utilities and the process to activate the optimal amount of resources before the resources are unavailable. (Company Ex. 3 at 8-10; Company Ex. 7 at 11.)

ii. The D.C. Circuit, United States Court of Appeals, recommended the EPA refer Mr. Yankel to the Department of Justice for investigation into previous statements that raised questions about his credibility. *Lead Industries Association, Inc., v. Environmental Protection Agency* (1980), 647 F.2d 1184, 208 U.S. App.D.C.55. *("LIA v. EPA")*

The contents of the attached *LIA v. EPA* decision, denying certiorari, provides a disturbing picture of OCC's chief witness in the case, Mr. Anthony Yankel. According to the opinion, Mr. Yankel was involved as co-author of an important lead study relied upon by the EPA to develop certain lead standards. However, after the report was relied upon by the EPA to create standards, Mr. Yankel went to work for a company in the lead industry and challenged the study that he and two others co-authored. (*LIA v. EPA* at 1187-1188; 58-59.) The Court was contemplating whether to remand or hold the case reviewing EPA ambient air quality standards in abeyance pending consideration of supplemental proceedings before the EPA. The Court found no credibility in the statements offered to hold the proceeding in abeyance (the affidavit of Mr. Yankel) and denied the request. (Id. at 1188-1189; 59-60.)

In the Court's discussion weighing the value of Mr. Yankel's affidavit and pointing out that Mr. Yankel had not shared the basis of his concerns with his coauthors, the Court cited one of the co-author's, Mr. von Lindern's, statements in a letter to the EPA on the issue. Specifically, Mr. von Lindern stated that that Mr. Yankel had went to work for the lead industry [Bunker Hill Co. (a lead/zinc smelting firm)] and requested that he explain the original calculations in the study to him. (*Id.* at 1188; 59.) Mr. von Lindern said he provided an explanation and Mr. Yankel simply

made some non-specific reference to not agreeing with the results of the study and that was the last contact on the issue. (*Id.*) The Court's then indicated in its analysis that Mr. von Lindern reviewed the data after seeing the assertions in Mr. Yankel's affidavit and he found no justification for the claims and no reason for the EPA to reconsider the lead standard. (*Id.* at FN 17.) The Court weighed the fact that Mr. Yankel did not share his claims of error with his co-authors for concurrence and the validation of the study by co-author Mr. von Lindern to determine, "[t]hus it appears that Mr. Yankel's claim of error is anything but proven." (*Id.* at 1188; 59.) The Court also took the extra step in its opinion at this point to include a footnote that suggest that the EPA consider pursuing this matter with the Department of Justice for investigation pursuant to 18 U.S.C. ss 371 (1976) based on the EPA's suggestion that the statements by Mr. Yankel's co-authors "raise questions about the credibility of Mr. Yankel's statements." (*Id.* at FN 20.)

Mr. Yankel's past also impeaches himself as a credible witness. Mr. Yankel claimed to have no knowledge of the Court opinion that discussed his credibility, despite testifying in this proceeding that the report (that he later challenged) made him into a "little bit of a hero." (Tr. V at 964.) Mr. Yankel may not want to accept this harsh indictment on his credibility by the EPA and the D.C. Circuit Court of Appeals, but it is unbelievable to accept that he had no knowledge of the case or finding questioning his reliability. Even if the Commission is to believe that Mr. Yankel had no knowledge of the challenge to the work he claims made him into a hero, the facts of the case and Court's ruling still show that he tried to undermine a report he co-authored without sharing the basis of his concerns with his co-authors after going to work for the lead industry that he himself describes as the "black house." (Id.) The credible action would be to work with his co-authors in what he deemed the "white house" and get agreement on any

problems with the study. The attached opinion shows he did not do that, instead he went to work assumedly getting paid by the "black house" to undermine the study as part of his employer, Bunker Hill's attempts to remand or hold in abeyance the EPA's ambient air quality standards. The D.C. Circuit did not find Mr. Yankel credible and highlighted the ability of the EPA to refer the matter to the Justice Department. Likewise, the Commission should also treat OCC witness Mr. Yankel as an unreliable witness and avoid relying on his prefiled testimony, direct or redirect underlying OCC's positions, to support the Commission's decision in this case.

There is no comparison between the credibility and topicality of the testimony of the AEP Ohio witnesses and the testimony of OCC witness Yankel. The record shows the stark comparison between the AEP Ohio experienced witnesses and the lack of any practical experience with storm restoration for OCC witness Yankel. The Commission must also not ignore the third party indictment on the professional credibility of Mr. Yankel as reflected in the attached court opinion. The Commission should base its decision upon the credible evidence of record provided by the experienced AEP Ohio witnesses and the Stipulation by the Signatory Parties.

c. OCC Misunderstands the Nature of the Services Offered by Storm Services.

The June 29, 2012 Derecho Storm required an extraordinary response by AEP Ohio. The storm was the most destructive and expensive storm in the history of AEP Ohio. (Company Ex. 7 at 4.) The Company utilized approximately 4,400 responders to restore service, 2,000 internal and 2,400 responders external to AEP Ohio. (Company Ex. 7 at 13.) A large scale mutual assistance effort was needed to ensure adequate resources were available to restore service as quickly and safely as possible (Company Ex. 3 at 9.) The use of Storm Services to handle the non-restoration logistics made the overall restoration response more efficient and enabled the

Company to request and secure more external resources to restore service five days faster. (Tr. V at 795.)

Storm Services provided AEP Ohio a service-based offering at a competitive price that allowed the utility to restore electric service five days faster. There may be arguments made by OCC picking through the receipts of Storm Services. These arguments are a red herring. Storm Services provided a service based on a pre-negotiated cost list, they were not a pass through of costs. (Verified by OCC witness Yankel at Tr. V at 944.) Those arguments ignore the prudent nature of securing a vendor like Storm Services in a storm as devastating as the June 29th Storm. As Mr. Kirkpatrick testified, the purpose of hiring a vendor like Storm Services is to have the confidence that you can get all of the support services by hiring a single entity and that takes the responsibility of focusing on those issues off of the utility. (Tr. V at 794.) It is truly all about logistics. Mr. Kirkpatrick testified that any expectation that a company would sit and do an analysis on the issues underlying support logistics in the midst of a major storm that knocked out power to over 700,000 customers would delay the other truly critical processes of acquiring resources and getting them to work on restoring service. (Id. at 794-795.) Mr. Kirkpatrick testified that the hiring of a vendor like Storm Services is prudent and strategic because it enables a shorter restoration time and avoids greater expense. (Id. at 795.)

Utilization of specialized vendors like Storm Services is an industry best practice for severe major storms like the June 29 Storm. (Company Ex. 3 at 11.) Storm Services was only used for one of the three storms under review in this case. The Company recognizes that it is not the type of vendor that is needed in response to all major storms. But it is the type of service needed to effectively respond to a storm at the devastating level of the June 29th Derecho storm. Company witness Dias expressed concern that a negative ruling in this case could impact the use of such a

service in the future and that the associated fewer resources could lead to longer restoration times in major storms. (Id. at 25.)

Storm Services was secured through a competitive pricing process. Company witness Kirkpatrick testified that AEP Ohio's corporate parent company had been exploring the utilization of a vendor that offered major storm restoration logistical services like Storm Services. (Tr. IV at 586.) Company witness Kirkpatrick testified that the AEP parent company issued a request for pricing and completed a review that identified the preferred companies to negotiate contracts with based on the value proposition or value evaluation of the bids provided. (Id. at 587.) Storm Services was selected as the preferred vendor for the eastern companies based upon price and service levels that they could provide the AEP Eastern Companies. (Id. at 587-588.) The June 29th Derecho hit the State of Ohio prior to a final contract being negotiated but, AEP had been negotiating a contract as a result of the competitive bid process that resulted in Storm Services being selected as the preferred vendor of the six that provided bids. (Id. at 597.) AEP Ohio used a necessary vendor acquired through a competitively bid process. (Company Ex. 3 at 11.)

Storm Services provided a number of services that made AEP Ohio's response to the June 29th Derecho more efficient and streamlined. The services offered by Storm Services allowed the Company and the responders working 16 hour days to focus on restoring power. Company witness Kirkpatrick outlines some of the highlights of the services provided by Storm Services that enabled the Company to respond as quickly and effectively as it did to the June 29th Storm. Among the many items discussed[5] throughout the record, Mr. Kirkpatrick specifically mentions

[5] See also Company Ex. 3 at 11 and discussion throughout the cross-examination and redirect of Company witness Kirkpatrick.

some of the key logistical provisions secured and maintained by Storm Services at pages 20-21 of his direct testimony:

-Strategically placed housing for the restoration responders;

-Food services for the restoration responders;

-Including on-site breakfast and dinner, and

-Lunches to go so they could eat in the field and avoid breaking down active restoration sites and travel to secure food.

-Laundry Services for the responders working 16 hour days in 100 degree heat;

-Shower and Restroom facilities;

-Staging Sites that saved time on prep and rest including less travel time;

-Material lay down areas;

-Easy access to materials so responders are not trapped in service centers for supplies;

-After hours refueling center to fill trucks while responders slept;

-Increased wrench time due to clustered responders being fed, briefed and on road to assignments quicker;

-Portable facilities that could be moved to new areas when needed depending on storm impact;

-General logistics to support a full-service restoration camp.

OCC witness Yankel takes a misguided and more simplified view of the impact of Storm Services that cannot be rooted in an understanding of the elements of storm restoration. Mr. Yankel compares the vast variety of services offered by Storm Services as an apples-to-apples comparison to securing a hotel room for responders. (Tr. V at 944-945.) Mr. Yankel has no experience with the fact that securing Storm Services enabled the Company to request more responders before they were allocated to other companies or areas of the country. He also has no

experience to properly judge the increased efficiency of restoration efforts or decreased length of the outage due to utilization of Storm Services. In short, Mr. Yankel provides a simplified after the fact accountant's point of view on the reasonableness of the actions by restoration experts responding to a catastrophic emergency. The experts in the area agree, vendors like Storm Services improve restoration response and are much more than just hotels. OCC's attempts to criticize the practicality of vendors like Storm Services only highlight the agencies inexperience with service restoration. In an attempt to ensure all interested stakeholders have some understanding of the issues facing a utility during major storm restoration, the Company invites OCC to join the Signatory Parties in the meetings on restoration outlined in the Stipulation if it is adopted by the Commission.

d. The July 18, 2012, storm qualifies as a major event under the Commission's rules and the incremental distribution O&M expenses associated with the storm should be recovered through the SDRR.

Through the Opinion and Order issued August 8, 2012, in Case Nos. 11-346-EL-SSO et al. ("*ESP II* Order"), the Commission approved the AEP Ohio's proposal for deferral of incremental distribution expenses over or under $5 million annually relating to major storm events. *ESP II* Order at 68-69. More specifically, "[t]he determination of what a major storm is or is not would be determined by the methodology outlined in the IEEE Guide for Electric Power Distribution Reliability Indices, as set forth in Rule 4901:1-10-10(B), O.A.C." *Id.* at 68. (Record citations omitted.) As used in Rule 4901:1-10-10(B), a "Major event" encompasses:

> any calendar day when an electric utility's system average interruption duration index (SAIDI) exceeds the major event day threshold using the methodology outlined in section 4.5 of standard 1366-2003 adopted by the institute of electric and electronics engineers (IEEE) in "IEEE Guide for Electric Power Distribution Reliability Indices." The threshold will be calculated by

> determining the SAIDI associated with adding 2.5 standard deviations to the average of the natural logarithms of the electric utility's daily SAIDI performance during the most recent five-year period. The computation for a major event requires the exclusion of transmission outages. For purposes of this definition, the SAIDI shall be determined in accordance with paragraph (C)(3)(e)(iii) of rule 4901:1-10-11 of the Administrative Code.

Rule 4901:1-1-10-01(Q), O.A.C. On June 29, July, 18 and July 26, 2012, AEP Ohio's service territory experienced three storms involving a major event as defined in Rule 4901:1-10-01-(Q). Accordingly, the incremental distribution O&M expenses associated with these three storms should be recovered through the SDRR as contemplated by the Commission in the *ESP II* Order.

In his pre-filed direct testimony, Company witness Kirkpatrick discusses the step-by-step process for determining a major event day ("MED") pursuant to IEEE Standard 1366. *See* Co. Ex. 7 at 6-8. IEEE Standard 1366 "contains a methodology for major event categorization based on actual daily SAIDI compared to a threshold value . . . . Any day with a daily SAIDI greater than the threshold value is classified as a MED." *Id.* at 6-7. The Company's Outage Management System ("OMS") provides the daily performance data for the MED threshold calculation, which is performed using a computer software application to ensure accuracy and consistency in the results. (*Id.* at 7.) AEP Ohio's MED threshold for 2012 (excluding transmission) was 8,775,323 customer minutes interrupted ("CMI"). (*Id.* at 8.) No party disputes this figure. The calculation of the Company's MED threshold and calculation of the CMI for each event appropriately incorporates and reflects the OMS data for the combined legal entity Ohio Power Company. The event CMI for each of the three storms exceeded AEP Ohio's 2012 MED threshold. (*Id.*; *See, also* Exhibit TLK-1.) Therefore, the incremental distribution O&M expenses associated with the June 29, July, 18 and July 26, 2012, storms should be recovered through the SDRR

OCC argues that AEP Ohio should not collect from customers expenses associated with the July 18, 2012, storm because that storm does not qualify as a major storm event. OCC Ex. 1 at 4. OCC does not dispute that the June 29 and July 26 storms qualify as major events pursuant to Rule 4901:1-10-01-(Q). OCC's position concerning the July 18 storm is based on incomplete data and calculations. The Commission should reject OCC's position and find that the July 18 storm qualifies as a major event as defined in Rule 4901:1-10-01-(Q) and that, therefore, the incremental distribution O&M expenses associated with the July 18 storm should be recovered through the SDRR.

According to OCC witness Williams, "[b]ased on the information provided in its Ohio ESSS Rule #10 annual reports, AEP Ohio has not shown that the July 18, 2012 storm meets the PUCO's definition of a 'major event.'" (OCC Ex. 1 at 8.) However, Mr. Williams' reliance on the annual Rule 10 reports as the basis for his conclusion is misplaced for several reasons. First, the annual Rule 10 reports filed pursuant to Rule 4901:1-10-10(C) are solely for the purpose of reporting a utility's performance with respect to the CAIDI and SAIFI reliability standards. As Company witness Kirkpatrick testified, the reliability measures of CAIDI and SAIFI have nothing to do with the determination of a major event for purposes of calculating AEP Ohio's incremental distribution O&M costs in this proceeding. (Tr. IV at 566. Indeed, in explaining how a major event is to be determined for the purposes of the Company's SDRR, the Commission in the *ESP II* Order made no reference to Rule 4901:1-10-10(C), the provision of Rule 10 upon which Mr. Williams relies for the data supporting his calculations. Although a utility must determine its major event days as part of its Rule 10 reporting for purpose of reporting on reliability standard performance during major events, that purpose is separate and

distinct from calculating AEP Ohio's incremental distribution O&M costs in this proceeding as contemplated by the Commission in the *ESP II* Order. (*ESP II* Order at 68.)

Moreover, Mr. Williams' reliance on the individual company Rule 10 reports is erroneous because they report individual company data, not data for Ohio Power Company as a single utility. More specifically, AEP Ohio filed two Rule 10 reports in 2012: one reporting reliability standard performance for the former legal entity Columbus Southern Power Company ("CSP"), and one reporting reliability standard performance for the pre-merger entity Ohio Power Company ("OP").[6] (Tr. IV at 559.) As Mr. Kirkpatrick explained at the hearing, while the determination of a major event for purposes of the separate company Rule 10 reports would involve the methodology set forth in Rule 4901:1-10-01-(Q), it would involve comparing individual company thresholds to individual company outage data. (Tr. IV at 569-570.) Using individual company OMS data to determine AEP Ohio's 2012 major storm events is inconsistent with Rule 4901:1-1-10-01(Q) and the *ESP II* Order. First, Rule 4901:1-1-10-01(Q) defines "Major event" as "any calendar day when an **electric utility's** system average interruption duration index (SAIDI) exceeds the major event day threshold . . . ." 4901:1-1-10-01(Q), O.A.C. (Emphasis added.) Because there was only one AEP electric utility in existence in Ohio in 2012 (the single legal entity Ohio Power Company), relying on individual company data as Mr. Williams has done produces an incomplete picture of the outages experienced by AEP Ohio's system during the July 18 storm. Second, as approved by the Commission, the SDRR and the $5 million threshold relate to the storm expenses of AEP Ohio as a single company; the Commission did not establish an SDRR mechanism for each of the Company's rate zones. (*See*

[6] Although AEP Ohio has requested combined reliability standards for its two rate zones, reliability standards for the combined Company have yet to be approved. *See* Case No. 12-1945-EL-ESS.

ESP II Order at 68-69.) AEP Ohio's calculation of its 2012 MED threshold and event CMI for the July 18 storm appropriately incorporates and reflects the OMS data for the combined legal entity Ohio Power Company. As discussed below, because Mr. Williams used data from the individual company Rule 10 reports to calculate the CMI on July 18, he understated the outages experienced by AEP Ohio's system during that storm.

The sections of the separate company Rule 10 reports relied upon by Mr. Williams only disclose CMI experienced by the utility during a major event. (Tr. V at 870.) In other words, a utility may have experienced *some* CMI on a particular day but may not have experienced *sufficient* CMI to qualify that particular day as a major event; consequently, those CMI actually experienced by the utility would not appear in the as-filed Rule 10 report. (Tr. V at 876-878.) However, in calculating AEP Ohio's CMI on July 18, any CMI experienced by the Company should be included in the 4901:1-1-10-01(Q) calculation. During cross-examination, Mr. Williams agreed that to the extent there were any CMI for AEP Ohio on July 18, they should be included in the MED calculation. (Tr. V at 863, 877-878.) By using zero CMI for the CSP rate zone in calculating AEP Ohio's CMI on July 18, however, Mr. Williams fails to include some of the CMI experienced by the Company on July 18. (OCC Ex. 1 at 7-8.) When asked why he used zero CMI for the CSP rate zone in his calculations, Mr. Williams responded, "[t]here were no CMI reported for July 18 in [the CSP Rule 10] report." (Tr. V at 869-870.) OCC witness Williams' reliance on the as-filed separate company Rule 10 reports – as opposed to the combined Company OMS data underlying the reports – results in an understatement of the CMI experienced on AEP Ohio's system during the July 18 storm.

As discussed in Mr. Kirkpatrick's testimony, AEP Ohio's system experienced 10,450,099 CMI during the July 18 storm. (Co. Ex. 7 at 8; Exhibit TLK-1.) In calculating the total CMI

experienced by AEP Ohio on July 18, Mr. Williams correctly includes the 8,136,533 CMI experienced in the OP rate zone, but incorrectly and unreasonably uses zero CMI for the CSP rate zone. (OCC Ex. 1 at 7.) Due to this fatal error, Mr. Williams fails to include roughly 2.3 million CMI experienced by AEP Ohio during the July 18 storm. As explained above, because the Rule 10 report for the CSP rate zone does not list July 18 as a major event, the roughly 2.3 million CMI experienced by AEP Ohio in the CSP rate zone on July 18 do not appear on the separate company Rule 10 report relied upon by Mr. Williams. But, as Mr. Williams agreed, all CMI experienced on AEP Ohio's system on July 18 should be considered when performing the MED calculation set forth in Rule 4901:1-1-10-01(Q). (Tr. V at 863, 877-878.) When the total CMI experienced by AEP Ohio on July 18 (10,450,099) is compared to AEP Ohio's 2012 MED threshold (8,775,323), it is clear that the July 18 CMI exceeds the Company's 2012 threshold. Therefore, the July 18 storm qualifies as a major event as defined in Rule 4901:1-1-10-01(Q).

As discussed above, OCC's position concerning the July 18 storm is based on incomplete data and incorrect calculations. Relying solely on the separate company Rule 10 reports as the basis for determining a major event for the purposes of this proceeding is inconsistent with Rule 4901:1-1-10-01(Q) and the Commission's directive in the *ESP II* Order. In addition, by simply pulling numbers from the as-filed separate company Rule 10 reports, as opposed to performing a comprehensive CMI analysis using total Company OMS data as the Company did, Mr. Williams fails to account for all CMI experienced on AEP Ohio's system on July 18. For all these reasons, the Commission should reject OCC's position on this issue and find that the July 18 storm does indeed qualify as a major event as defined in Rule 4901:1-10-01-(Q). The incremental distribution O&M expenses associated with the July 18 storm should therefore be recovered through the SDRR as contemplated by the Commission in the *ESP II* Order.

e. The record supports approval of the Stipulation as a reasonable and prudent resolution to the inclusion of the 2012 major storm costs in the major storm mechanism.

The record fully supports adoption of the Stipulation as a prudent and reasonable resolution of this proceeding. The entire docket is dedicated to the simple exercise of determining if the total incremental 2012 storm costs included in the Application are reasonable and prudent. The parties to the case followed the process outlined by the Commission. The Staff and other parties reviewed the invoice and accounting information related to the 2012 storms. The parties all filed comments in the docket that are adopted as part of the Stipulation. The parties discussed the matters in the filed comments. The Company filed testimony in response to the issues raised in comments and supporting the Application, including a description of the basis of the $5 million threshold and the accounting associated with AEP Ohio's major storm practices. (see Company Exs. 3 and 5.) All the parties then continued discussions on the public positions proffered by the interested parties in the record. That effort resulted in the Stipulation offered by the Signatory Parties that represent all parties the case other than the OCC. The Signatory Parties then filed testimony in support of the Stipulation and OCC subsequently filed it testimony expanding its positions and publicly quantifying for the first time prior concerns raised in its initial comments. The Commission has six pieces of prefiled testimony, over 1,000 pages of hearing transcripts from a four day hearing and countless exhibits including the positions of many of the parties prior to the Stipulation. The record adequately contains the review and analysis of the costs incurred to restore power after the 2012 major storms and declare, as supported by the Stipulation, that they were reasonably and prudently incurred and are eligible for recovery in the pre-established recovery mechanism.

IV. Conclusion

For the foregoing reasons, the undersigned Signatory Parties request that the Commission adopt the Stipulation without modification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above filing was served by electronic mail upon the individuals listed below **by the 3rd day of March 2014**.

/s// Matthew J. Satterwhite
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ATTACHMENT

647 F.2d 1184, 208 U.S.App.D.C. 55
(Cite as: 647 F.2d 1184, 208 U.S.App.D.C. 55)

H

United States Court of Appeals,
District of Columbia Circuit.
LEAD INDUSTRIES ASSOCIATION, INC., Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY, Respondent,
Bunker Hill Company, Intervenor.
ST. JOE MINERALS CORPORATION, Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY, Respondent,
Bunker Hill Company, Intervenor.

Nos. 78-2201, 78-2220.
Filed June 27, 1980.
Certiorari Denied Dec. 8, 1980. See 101 S.Ct. 621.

After argument on merits of petitions to review EPA Administrator's promulgation of ambient air quality standards for lead, but before decision was handed down, motion was filed for leave to file documents with court and, on basis of those documents, to have court remand case to EPA or hold case in abeyance pending outcome of supplemental proceedings before EPA. The Court of Appeals held that claim of error in study which was one of three studies which were only part of evidence relied on by EPA Administrator in selecting air lead/blood lead ratio of 1:2 did not justify delaying review of ambient air quality standards for lead promulgated by the Administrator.

Motion denied.

West Headnotes

Environmental Law 149E 642

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek636 Administrative Decisions or Actions Reviewable in General
149Ek642 k. Air Pollution. Most Cited Cases
(Formerly 199k25.15(1) Health and Environment)

Claim of error in study which was one of three studies which were only part of evidence relied on by Environmental Protection Agency in selecting air lead/blood lead ratio of 1:2 did not justify delaying review of the ambient air quality standards for lead promulgated by the Agency. Clean Air Act, § 307(d)(7)(B) as amended 42 U.S.C.A. § 7607(d)(7)(B).

****56 *1185** Motion to Hold Case in Abeyance

Before WRIGHT, Chief Judge, and ROBINSON and MacKINNON, Circuit Judges.

Opinion for the court per curiam.

PER CURIAM:

Six months after oral argument was heard in these cases, but before a decision was handed down, LIA filed a motion for leave to file certain documents with the court and, on the basis of these documents, to have the court remand the case to EPA or, alternatively, to hold the case in abeyance pending the outcome of supplemental proceedings before the Agency.[FN1] At the same time LIA filed a petition with EPA for reconsideration of the lead standards that are the subject of this appeal, alleging that it had uncovered new information that undermined the Agency's analysis. Both LIA's motion in this court and the petition it filed

with EPA rested on an affidavit by Anthony J. Yankel, one of three authors of a study entitled "The Silver Valley Lead Study The Relationship Between Childhood Blood Lead Levels and Environmental Exposure." [FN2] This study is one of several studies referred to in Chapter 12 of the Lead Criteria Document,[FN3] and it is mentioned in the preamble to the final lead standards as one of three studies EPA found particularly useful in determining the appropriate air lead/blood lead ratio to use in calculating the lead standards. Two points are made in the Yankel affidavit. First, Mr. Yankel indicates that a previously undetected error in the study has led him to conclude that the air lead levels shown in the study are in error by a factor of 25 percent or more. According to Mr. Yankel, if the correct air lead values are used the study would indicate an air lead/blood lead ratio of 1:0.8, rather than the ratio of 1:1.95 EPA calculated.[FN4] Second, Mr. Yankel indicates his agreement with one of the objections raised by LIA in its briefs in this case. [FN5] Specifically, Mr. Yankel objects to the fact that EPA used one method for calculating the air lead/blood lead ratio indicated by the data in his study and different methods for calculating the ratios indicated by the data in the other two studies discussed in the preamble to the final regulations.

FN1. The documents consisted of a copy of the Petition for Reconsideration LIA filed with EPA and a supporting affidavit made on April 29, 1980 by Anthony J. Yankel.

FN2. 27 J. A. Air Pollut. Cont. Ass'n 763-767 (1977).

FN3. EPA's "Air Quality Criteria for Lead," Chapter 12.

FN4. See Lead Industries Ass'n, Inc. v. EPA, 647 F.2d 1130, 1163 n.85 (D.C.Cir.1980).

FN5. See brief for petitioner LIA at 37; reply brief for petitioner LIA at 20-21.

By order dated May 30, 1980 we denied LIA's motion to remand the lead standards to EPA, pointing out that under the statutory scheme LIA must first present a petition for reconsideration to EPA, with judicial review available only after a decision to deny the petition is made by EPA's Administrator.***1186 **57** [FN6] Lead Industries Ass'n, Inc. v. EPA, D.C.Cir. No. 78-2201, Order of May 30, 1980. At the same time we withheld decision on LIA's alternative suggestion that the case be held in abeyance pending the outcome of supplemental proceedings before the Agency, and we directed EPA to inform the court by June 11, 1980 of its decision on LIA's petition for reconsideration. Id. EPA has now notified the court of the Administrator's decision denying LIA's petition. Thus there seems to be no reason for further postponing a ruling on LIA's motion to hold the case in abeyance.

FN6. See 42 U.S.C. s 7607(d)(7)(B) (Supp. I 1977).

Since LIA's motion requested that the case be held in abeyance "pending the outcome of supplemental agency proceedings" [FN7] which have now been completed, it would seem at first blush that nothing more remains to be decided with regard to LIA's motion. However, it appears that the "supplemental agency proceedings" LIA has in mind is actual reconsideration of the standards by EPA rather than just the Agency's decision on whether to grant its petition for reconsideration.[FN8] As such, now that EPA has denied its petition we assume that LIA would have us further defer action on this appeal until such time as it is able to obtain judicial review of EPA's decision denying its petition for reconsideration.[FN9] Thus LIA argued in its response to EPA's opposition to its motion that it should not be required to file a separate petition for review should EPA deny the motion for reconsideration, but instead should be allowed to file a response to such an EPA or-

der.[FN10]

FN7. Motion of Lead Industries Association, Inc. for Leave to File Annexed Documents and to Remand or to Hold This Appeal in Abeyance (LIA Motion) at 1.

FN8. Thus LIA urged the court to remand the case to EPA and direct EPA to hold the reconsideration proceedings specified by 42 U.S.C. s 307(d)(7)(B) (Supp. I 1977) or, alternatively, to "hold the case in abeyance pending action by EPA on LIA's petition, and to keep the record open to receive any record materials generated by those proceedings." LIA Motion, supra note 7, at 5.

FN9. It would seem that, ideally, LIA would like us to review EPA's decision without requiring it to bring an independent action for this purpose. See Reply of Lead Industries Association, Inc. to EPA's Response in Opposition to LIA's Motion to File Documents and to Remand or Hold Appeal in Abeyance (LIA Response) at 3-4.

FN10. Id.

We do not believe that further delay of our review of the lead standard whether to allow a separate review of EPA's denial of LIA's motion for reconsideration, or to review this decision ourselves is appropriate in this case. Nothing in the statute suggests that judicial review of an EPA regulation may not proceed even though there is also pending before the court a petition for review of an EPA decision denying a "new information" petition for reconsideration of the same regulation. To the contrary, there is evidence in the statute of a strong congressional desire that the procedure for establishing air quality standards be completed expeditiously and with considerable finality. The Act prescribes strict deadlines for completion of various steps in promulgation of the standards.[FN11] Moreover, Section 307(d) (7)(B) of the Act, 42 U.S.C. s 7607(d)(7)(B) (Supp. I 1977), states that even "new information" reconsideration by EPA does not automatically postpone the effectiveness of the rule, and it limits any stay that may be issued by EPA or a court during such reconsideration to a period of no longer than three months. Id.

FN11. See 42 U.S.C. ss 7408, 7409, 7607 (Supp. I 1977); Lead Industries Ass'n, Inc. v. EPA, supra note 4, 647 F.2d at 1136-1137.

There can be no question that, if our decision in the lead standards case had been handed down before LIA filed its petition for reconsideration with EPA, LIA would have had to bring a separate petition for review of EPA's decision without regard to any challenge to the standards themselves. The fact that LIA's petition and EPA's decision to deny it come at a time when a petition for review of the standards is before the court may, in certain circumstances,***1187 **58** justify delaying review of the standards pending a challenge to EPA's decision to deny the petition for reconsideration. In order to conclude that such a delay is justified, however, the court must be convinced that the "new information" which provides the basis for the reconsideration petition raises substantial questions about the validity of the Agency's analysis.

We do not believe that this case presents an appropriate instance in which to delay review of the standards. In reaching this conclusion we have found it necessary to examine the merits of LIA's "new information" challenge to the lead standards since this is the only way to determine whether LIA has a substantial case. Of course, this examination is by no means a review of EPA's decision to deny LIA's petition for reconsideration. Rather, our review of the merits is analogous to a court's taking a peek at the merits to assess the likelihood of success in ruling on a motion for a preliminary injunction or a petition for a stay. See *Virginia Petroleum Jobbers Ass'n v. FPC,*

259 F.2d 921, 925 (D.C.Cir.1958).

First, we note that the only issue raised in Mr. Yankel's affidavit that merits consideration is his claim that there is a previously undetected error in his study. His objection to the fact that EPA used different methods in calculating air lead/blood lead ratios from the three studies merely repeats an objection LIA raised in its briefs in the lead standards case [FN12] which we dealt with in our opinion in the case.[FN13]

FN12. See brief for petitioner LIA at 37; reply brief for petitioner LIA at 20-21.

FN13. See Lead Industries Ass'n, Inc. v. EPA, supra note 4, 647 F.2d at 1162-1163 & n.85.

Second, even if we were to assume that Mr. Yankel's claim of error is correct, this "new information" would not warrant remand of the lead standards to EPA. As we have previously indicated, that Yankel study is only one of three studies that were discussed in the preamble to the final regulations.[FN14] In turn, these three studies were only part of the evidence on which EPA relied in selecting an air lead/blood lead ratio of 1:2; the decision was also supported by the conclusions in the Criteria Document (which reviewed a large number of studies including these three studies), as well as other expert testimony in the record.[FN15] Indeed, in our opinion in the lead standards case we specifically pointed out that "even if we were to disregard (the) calculations (EPA made from the three studies), we would still conclude that the Criteria Document and the expert testimony in the record provide adequate support for the Administrator's choice of an air lead/blood lead ratio of 1:2." [FN16] It is clear from this that there simply can be no basis for LIA's claim that an alleged error in the Yankel study would justify delaying our review of the lead standards.

FN14. See id., 647 F.2d at 1163.

FN15. See id.

FN16. Id., 647 F.2d at 1163 n.85.

Third, we also find it significant that there must be considerable doubt both about whether in fact there is an error in the Yankel study and about whether this error has any effect on the ratios indicated by the study. The sole basis of LIA's claim of error is the Yankel affidavit, which merely asserts in conclusory terms that there is a previously undetected error in the study. Neither LIA nor Mr. Yankel has presented any facts, data, or analysis to support this claim of error or information that would have allowed EPA or other interested parties to evaluate the claim of error. Indeed, comments received by EPA on LIA's petition for reconsideration indicate that Mr. Yankel has not even bothered to share his purported new information with his two co-authors of the study, and that his co-authors do not share his misgivings about the study. One co-author, Mr. von Lindern, stated in a letter to EPA:

> On April 28, 1980, (Mr. Yankel's affidavit is dated April 29, 1980 [FN17]) Mr. Yankel ***1188 **59** visited me in New Haven, informed me that he was working for the Bunker Hill Co. (a lead/zinc smelting firm (which is an intervenor in the lead standards case)) and requested that I explain the original calculations in our study. After I had done so, he made a vague and non-specific reference to not agreeing with the results of that study. The conversation lasted less than one hour and represents the only professional contact Mr. Yankel and I have had in the last two years.

FN17. See note 1 supra and note 20 infra. With respect to the von Lindern letter, in denying the motion for reconsideration EPA stated:

> In connection with LIA's petition for reconsideration EPA has received several written comments. Mr. Ian H. von Lindern, a co-author of the Silver Valley study, commented that on April 28, 1980 Mr. Yankel came to see him and stated that he was now working for the Bunker Hill Company (a lead/zinc smelting firm that is a member of LIA and an intervenor in the legal challenge to the lead standard). According to Mr. von Lindern, Mr. Yankel made some vague and non-specific statement that he no longer agreed with the results of the Silver Valley study but did not elaborate. Mr. von Lindern commented that the assertions made in Mr. Yankel's affidavit came as a complete surprise to him and that after reviewing the data and calculations Mr. Yankel refers to he found no justification for such claims and no reason for EPA to reconsider the lead standard.
>
> EPA's Denial of Petition for Reconsideration or Revision of the Lead Ambient Air Quality Standards (Denial of Petition), - Fed.Reg. - (filed June 11, 1980).

The assertions he makes in the affidavit come as a complete surprise to me. I have reviewed the data and calculations he refers to and find no justification for his claims. It is true, as Mr. Yankel asserts, that a model was constructed to predict air lead levels at locations where no data were available. However, I find the model does not systematically underpredict at areas for which data existed. I find both underpredictions and overpredictions, (as expected with a 'best fit' model) and none of the magnitude of '25 percent or more' as he alleges.

I fully recognize Mr. Yankel's right and responsibility to exercise his professional judgement (sic) as he deems fit and proper. However, I wish to make it absolutely clear that he has not shared the basis for his change of opinion (with), neither does he have the concurrence of, the other researchers in this study. I would rather that he shared the basis for his assertions and calculations with his co-authors before renouncing the work publically (sic). I object to his use of the term 'error'. I have no idea whether he believes he has found a computational mistake, has changed the data base, or introduced a new method of calculation.[FN18]

> FN18. Letter from Ian H. von Lindern to EPA, annexed to Supplemental Response of the Environmental Protection Agency to Motion of LIA to Remand or Hold This Appeal in Abeyance. Mr. von Lindern goes on to note that in the last two years he has conducted further studies related to the Silver Valley study and has found nothing to warrant reconsideration of the latter study. He concluded:
>
> > I believe EPA has made appropriate use of our study in their formulation of a national standard for lead. I believe there is nothing substantive to Mr. Yankel's affidavit and reconsideration (on) the part of EPA is unjustified.
> >
> > Id.

Mr. Yankel's other co-author, Dr. Walter, while stating that he has no reason to believe that the study contains the error alleged by Mr. Yankel, went on to calculate the effect of this "error" on the study's estimates of the air lead/blood lead ratios. He found that the study would indicate ratios ranging between 1:1 and 1:1.8, as compared with the range of between 1:1.1 and 1:2.1 indicated in the published study. Dr. Walter concluded: "It is my professional opinion that even if Mr. Yankel's position could be substantiated his conclusions do not provide a basis for altering the

EPA standards." [FN19] Thus it appears that Mr. Yankel's claim of error is anything but proven. [FN20] This uncertainty about the validity***1189 **60** of LIA's "new information" challenge militates against any further delay in handing down our decision on LIA's petition for review of the lead standards.

FN19. Letter from Stephen D. Walter, Ph.D., attached to Response of Natural Resources Defense Council, Inc. to Petition of Lead Industries Association, Inc. for Reconsideration of Lead Standards.

FN20. In its order denying LIA's petition for reconsideration EPA suggested that the comments by Mr. Yankel's co-authors "raise questions about the credibility of Mr. Yankel's statements * * *." Denial of Petition, supra note 17, - Fed.Reg. - n.2. EPA may want to consider pursuing this matter further and, if necessary, referring the matter to the Department of Justice for investigation pursuant to 18 U.S.C. ss 371, 1001 (1976).

For the reasons indicated above, we conclude that LIA's motion to hold this appeal in abeyance must be denied. LIA is, of course, free to file a petition for review of EPA's decision to deny its petition for reconsideration of the lead standards.[FN*]

FN* Before this decision was handed down LIA had filed its petition for review of the Administrator's decision, D.C.Cir. No. 80-1677.

So ordered.

C.A.D.C., 1980.
Lead Industries Ass'n, Inc. v. Environmental Protection Agency
647 F.2d 1184, 208 U.S.App.D.C. 55

END OF DOCUMENT

Summary: Brief Initial Post Hearing Brief of Ohio Power Company in Support of the Joint Stipulation electronically filed by Mr. Matthew J Satterwhite on behalf of Ohio Power Company