

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio       )  
Power Company for Approval of Its       ) Case No. 16-0574-EL-POR  
Energy Efficiency/Peak Demand       )  
Reduction Portfolio Plan       )

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**APPLICATION FOR REHEARING BY  
THE ENVIRONMENTAL LAW & POLICY CENTER, NATURAL RESOURCES  
DEFENSE COUNCIL, OHIO ENVIRONMENTAL COUNCIL, AND  
ENVIRONMENTAL DEFENSE FUND**

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Pursuant to Ohio Revised Code (“R.C.”) 4903.10 and Ohio Admin. Code 4901-1-35, the Environmental Law & Policy Center, Natural Resources Defense Council, Ohio Environmental Council, and Environmental Defense Fund (collectively, “Environmental Intervenors”) hereby file this application for rehearing of a portion of the January 18, 2017 Opinion and Order (“Order”) of the Public Utilities Commission of Ohio (“Commission”) in this proceeding. Environmental Intervenors emphasize that we do not challenge the Commission’s approval of the December 9, 2016 Stipulation and Recommendation (“Stipulation”) as reasonable under the applicable three-prong test, and we continue to support the Stipulation as filed. Likewise, we do not request that the Stipulation itself be modified in any way. However, we seek rehearing on the portion of the Commission’s Order in paragraph 32 that goes beyond determining the reasonableness of the Stipulation and that reaches *specific conclusions* regarding the merits of a cost cap for energy efficiency program costs and shared savings. Order at 8.

This aspect of the Order is unlawful and unreasonable because it lacks any basis in findings of fact made on the evidentiary record as required by R.C. 4903.09, and is contrary to the agreement of the parties as commemorated in the Stipulation. Therefore, the Environmental Intervenors respectfully request that the Commission revise the Order to remove any conclusions

in paragraph 32 regarding the merits or propriety of applying an annual cost cap to Ohio Power Company's ("AEP") efficiency programs in 2019 and 2020, or to other utilities with energy efficiency portfolio plan filings currently before the Commission.

## **I. FACTS**

The parties in this case entered into a Stipulation regarding AEP's energy efficiency and peak demand reduction portfolio plan for 2017-2020 ("Portfolio Plan") that was filed on December 9, 2016. The Stipulation provides that an annual cost cap of approximately \$110 million will apply to AEP's programs for program years 2017 and 2018, but that the parties will participate in a proceeding in early 2017 to determine whether the cap should be eliminated for program years 2019 and 2020. Stipulation at 4, 12-13.

As explained in Footnote 4 of the Stipulation, the Environmental Intervenors oppose application of a cost cap in any year. Stipulation at 12 n.4. However, we agreed to the Stipulation in order to ensure timely implementation of AEP's energy efficiency programs in 2017 with the understanding that we would have the opportunity to present evidence on the merits of the cost cap issue in a full hearing with respect to program years 2019 and 2020. This tradeoff is commemorated in the Stipulation, which provides for such a hearing to be held in March 2017 (or as soon as possible thereafter), during which all parties would have the opportunity to "submit evidence and argument concerning whether the annual cost cap should be eliminated in Plan years 2019-2020." Williams Test. at 9. Consistent with the Stipulation framework reserving the merits of the cost cap issue for a future hearing, the supporting testimony of AEP witness Jon Williams does not go into significant detail regarding the merits of the cost cap, and the Environmental Intervenors refrained from presenting any evidence or arguments against it. Thus, the full record before the Commission regarding the cost cap is the

Stipulation itself, which describes the mechanics of the cap, and Mr. Williams' simple explanation that AEP has agreed to reduce its Portfolio Plan expenditures to comply with the annual cost cap, subject to the future litigation of the cap's applicability for program years 2019 and 2020. Williams Test. at 4-5. Despite the lack of record evidence specifically on the *merits* of the cap as a standalone policy, rather than as part of a negotiated package, the Commission's Order offered the following pronouncement in paragraph 32 about the cost cap provision of the Stipulation:

The addition of an annual cost cap is a reasonable response to concerns which have been raised regarding potential increases in the costs of the EE/PDR programs, and the annual cost cap should incent AEP Ohio to manage the costs of the programs in the most efficient manner possible. In light of the importance of the annual cost cap, the Commission notes that we will be reluctant to approve stipulations in other EE/PDR program portfolio cases which do not include a similar cap on EE/PDR program costs.

Order at 8.

## **II. ARGUMENT**

The Environmental Intervenors continue to support the Stipulation as filed in this case, and we do not challenge the Commission's approval of the Stipulation package as reasonable under the applicable three-prong test. Likewise, we do not request that the Stipulation itself be modified in any way. However, we believe that the original AEP plan filed in June 2016 has significant customer benefits that may be lost due to the cost cap, and we intend to present arguments to that effect in the hearing contemplated by the Stipulation. Therefore, we request that the Commission revise the Order to remove the conclusions in paragraph 32 regarding the merits of applying an annual cost cap to AEP's efficiency programs in program years 2019 and 2020, or to other utilities with energy efficiency portfolio requests currently before the

Commission. The signatory parties (including Staff) specifically agreed to the process articulated in Section X of the Stipulation to allow for a separate, full and fair hearing on the merits of a cap for 2019 and 2020. The Stipulation provides for the application of a cost cap in 2017 and 2018 as an interim measure to allow for implementation of AEP's Portfolio Plan pending that hearing, but does not commit any party to supporting the cost cap itself as a substantive matter. The Order undermines this framework by reaching beyond the Stipulation to endorse an annual cost cap not only as part of an overall settlement package that gained consensus of the parties, but as a general matter across all efficiency cases for all utilities in all years. The Commission's failure to base this far-reaching conclusion on any record evidence violates R.C. 4903.09, which provides:

in all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

R.C. 4903.09.

The Ohio Supreme Court has unequivocally interpreted R.C. 4903.09 to mean that "the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion." *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306, 312, 513 N.E.2d 337. In fact, "[a] legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support." *Indus. Energy Users-Ohio v. PUC*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 30 (citations and internal quotation marks omitted). In this case, while Environmental Intervenors agree that the Stipulation as a whole is reasonable under the Commission's three-prong test, there is no record support underlying the

Commission's three central findings in paragraph 32 of the Order regarding the *merits* of a cost cap: first, that "concerns . . . have been raised regarding potential increases in the costs of the EE/PDR programs"; second, that "the annual cost cap should incent AEP Ohio to manage the costs of the programs in the most efficient manner possible"; and third, that ultimately "[t]he addition of an annual cost cap is a reasonable response" based on these findings. Order at 8. Nor is there any record support in this case regarding the energy efficiency portfolio plans of *other utilities*, such that the Commission could opine that it is "reluctant to approve stipulations in other EE/PDR program portfolio cases which do not include a similar cap on EE/PDR program costs." *Id.*

The Environmental Intervenors have an array of evidence to present and arguments to make contesting the Commission's statements in paragraph 32 of the Order regarding the merits of a cost cap for AEP's program years 2019 to 2020, as well as the propriety of applying a cost cap to other utility portfolios. However, we did not do so in this case because the Stipulation reserves the cost cap issue for another day, while allowing AEP's energy efficiency programs to go into effect in a timely manner for the benefit of its customers. The Stipulation explicitly supports this approach by establishing a future time (early 2017) for the parties to present evidence regarding the cost cap in this case, and by specifically stating that it should not be used as precedent against the signatory parties in other cases. Stipulation at 12-13. As noted in the Stipulation, the cost cap is reasonable as part of this "package." Stipulation at 1. It accommodates the signatories' varying positions on the cost cap issue, ensuring implementation of AEP's efficiency programs will not be delayed without sacrificing the opportunity for a full and expeditious hearing on the actual merits of a cost cap in later program years. Consistent with this agreed-upon process, neither the Stipulation nor the testimony in support includes any

evidence or statements as to “concerns . . . regarding potential increases in the costs of the EE/PDR programs,” the need for an annual cost cap to “incent AEP Ohio to manage the costs of the programs in the most efficient manner possible,” or the overall reasonableness of an annual cost cap outside of a negotiated settlement. Order at 8. Given the lack of any such evidentiary support in the record, the Commission’s conclusions on these points fail to comply with R.C. 4903.09 and should be removed from the Order.

Similarly, there is no record support in this case regarding the energy efficiency portfolio plans of *other utilities* besides AEP. Neither the Stipulation, nor the testimony filed in support, includes any evidence (or for that matter, any mention at all) of the other utility energy efficiency plans currently pending before the Commission. Further, the Commission’s statements as to those other energy efficiency plans, without any evidence before it in this case as to the individual details of those plans or the circumstances of each utility, could prejudice the other proceedings currently underway. Thus, the Commission’s conclusion that it “will be reluctant to approve stipulations in other EE/PDR program portfolio cases which do not include a similar cap on EE/PDR program costs,” *id.*, should also be removed from the Order.

In a number of recent cases the Commission has emphasized the benefits of parties reaching stipulations as an effective means to present issues to the Commission without putting undue time and resources into contested litigation. *See, e.g., In re Ohio Power Co.*, Case Nos. 14-1693 *et al.*, Opinion and Order (Mar. 31, 2016) at 77-78. If the Commission leaves the Order as written, it may seriously undermine these perceived benefits in future cases. Parties may be reluctant to reach agreements where the Commission may dramatically change the outcome without an opportunity for hearing. The Commission has seemingly given itself *carte blanche* to reach binding, substantive conclusions regarding the merits of individual provisions in a

stipulation, even in the absence of record evidence on the relevant issues. Thus, leaving the Order as written may have a chilling effect on parties who will not be willing to put aside a contentious issue as part of an overall settlement package if doing so will open the door for that issue to be prematurely prejudged during the course of Commission approval of the stipulation. Instead, parties may fight to the bitter end in cases that would otherwise have been amenable to a negotiated resolution.

### **III. CONCLUSION**

Environmental Intervenors emphasize that we do not challenge the Commission's approval of the Stipulation, and do not request that the Stipulation itself be modified in any way. Rather, the Environmental Intervenors respectfully request that the Commission remove the portion of its Order cited on pages 2-3 of this Application regarding the general merits of an annual cost cap. The Commission should leave the propriety of an annual cost cap for program years 2019 and 2020 of AEP's Portfolio Plan, or for other utilities' portfolio plans, for a future decision, after it has had the opportunity to consider properly presented evidence and arguments on the issue, as required by R.C. 4903.09. This was the framework contemplated by the parties to the Stipulation. Furthermore, a decision that endorses a stipulation provision as appropriate policy when the parties have specifically agreed to present evidence on that issue in a future forum may pose a significant obstacle to future settlements along these lines and could have a chilling effect on good faith negotiations.

January 20, 2017

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing has been electronically filed with the Public Utilities Commission of Ohio and has been served upon all parties to the case via electronic mail on January 20, 2017.

/s/ Madeline Fleisher

Madeline Fleisher

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Summary: Application for Rehearing electronically filed by Madeline Fleisher on behalf of Environmental Law and Policy Center and Natural Resources Defense Council and Ohio Environmental Council and Environmental Defense Fund