

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2016 Review of the)
Distribution Investment Rider Contained) **Case No. 17-38-EL-RDR**
In the Tariff of Ohio Power Company.)

In the Matter of the 2017 Review of the)
Distribution Investment Rider Contained) **Case No. 18-230-EL-RDR**
In the Tariff of Ohio Power Company.)

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

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I. Introduction

The Public Utilities Commission of Ohio (“Commission”) first approved Ohio Power Company’s (“AEP Ohio” or the “Company”) Distribution Investment Rider (“DIR”) in 2012 in the Company’s second Electric Security Plan Proceeding. *See In re. Ohio Power Company*, Case No. 11-346-EL-SSO, *et al.*, Opinion and Order at 47 (Aug. 8, 2012). The Commission approved the DIR’s continuation through May 31, 2018 in Case No. 13-2385-EL-SSO. The DIR is reviewed annually for accounting accuracy, prudence, and compliance with the DIR plan developed by the Staff of the Commission and the Company. These proceedings concern the 2016 and 2017 audits of the DIR.

AEP Ohio and Staff have entered into a Joint Stipulation and Recommendation (“Stipulation”) that addresses and resolves each of the auditor’s recommendations and provides additional, significant commitments intended to improve reliability with respect to outages caused by trees outside of the right-of-way (“ROW”) and eliminate uncertainty regarding the accounting treatment for costs associated with such activities. As demonstrated herein and supported by the record developed in these proceedings, the Stipulation easily satisfies each of the three criteria the Commission considers when evaluating a contested settlement. The Office of the Ohio Consumers’ Counsel’s (“OCC”) arguments to the contrary are without merit, and the Commission should disregard or overrule them.

II. Standard of Review

Rule 4901-1-30 of the Ohio Administrative Code authorizes parties to Commission proceedings to enter into stipulations. Although stipulations are not binding on the Commission, their terms are accorded substantial weight. *See Consumers’ Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992) (“*Consumers’ Counsel*”), citing *City of Akron v.*

Pub. Util. Comm., 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). That is especially true where, as here, the stipulation is supported or unopposed by the majority of parties in a proceeding. See *In re Application of Columbus S. Power Co.*, Case No. 09-1089-EL-POR, Opinion and Order at 20 (May 13, 2010) (“*In re Columbus S. Power Co.*”). Although 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 Application of Columbus S. Power Co.*, 129 Ohio St.3d 46, 2011-Ohio-2383, 950 N.E.2d 164, ¶ 19.

In evaluating a contested settlement, the Commission applies a well-established three-part test:

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

In re Columbus S. Power Co. at 21 (citing numerous cases supporting this standard). The Ohio Supreme Court has repeatedly approved this three-part test. See, e.g., *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 561, 629 N.E.2d 423 (1994), citing *Consumers’ Counsel* at 126. Applying the three-prong test, the Commission should approve and adopt the Stipulation filed in this case.

III. The Stipulation Satisfies the Three-Part Test for Evaluation of Contested Settlements.

A. The Stipulation is the product of serious bargaining among capable, knowledgeable parties.

The first prong of the three-part tests asks whether a settlement is “a product of serious bargaining among capable, knowledgeable parties.” *In re Columbus S. Power Co.* at 21. The Stipulation here easily satisfies that standard. Indeed, OCC did not submit any testimony

contesting that the first prong is met.¹ As AEP Ohio witness Moore testified, the Stipulation was the product of meetings and negotiations among the parties and involved experience counsel and technical experts from each party. (AEP Ohio Ex. 1 at 14.) All parties were invited to, and did, participate in multiple meetings and communications regarding the resolution of these cases. (*Id.*; Staff Ex. 3 at 3.) As Staff witness McCarter explained, the decisions made through those meetings and communications “were based upon a thorough analysis of complex issues,” resulting in a settlement that represents “a comprehensive compromise of issues raised by parties with diverse interests. (Staff Ex. 3 at 3.) Under the first prong of the test, therefore, the Stipulation is the product of serious bargaining among capable, knowledgeable parties.

B. The Stipulation as a package benefits ratepayers and the public interest.

The Stipulation also easily satisfies the three-part test’s second prong and benefits customers and the public interest in several ways.

1. The Stipulation efficiently resolves two contested proceedings.

First, as AEP Ohio witness Moore explained, the Stipulation provides for a reasonable resolution of the 2016 and 2017 DIR Audits, which benefits customers and the public interest by reducing the time and expense associated with a fully litigated outcome – even though OCC opposes the Stipulation. (AEP Ohio Ex. 1 at 14.) The Stipulation benefits customers and the

¹ Although not challenging that the first prong of the three-part test is satisfied here, OCC witness Williams incorrectly asserts that the Commission considers the “diversity of interests” in assessing the first prong of the test. (OCC Ex. 2 at 9, n.17.) Diversity of interests, however, is not an element of the first prong of the three prong test, as the Commission has made clear. *In re. Ohio Power Company*, Case No. 14-1693-EL-RDR, *et al.*, Opinion and Order at 52-53 (Mar. 21, 2016) (squarely rejecting OCC’s attempt to revise the three-part test to include a diversity of interests component), citing *In re Vectren Energy Delivery of Ohio Inc.*, Case No. 13-1571-GA-ALT, Opinion and Order at 10 (Feb. 14, 2014); *see also In re FirstEnergy*, Case No. 12-1230-EL-SSO, Opinion and Order at 26 (July 18, 2012), citing *Dominion Retail, Inc. v. The Dayton Power and Light Co.*, Case No. 03-2405-EL-CSS, *et al.*, Opinion and Order at 18 (Feb. 2, 2005), Entry on Rehearing at 7-8 (Mar. 23, 2005).

public interest by implementing each of the audit recommendations in an efficient manner. (*Id.*) If no settlement had been reached between Staff and the Company and the issues were fully litigated, there likely would have been additional data requests issued by Staff, additional testimony filed, additional cross-examination conducted, and additional briefing by the parties on each area of disagreement. But due to the Stipulation, Staff and the Company have not had to litigate those issues in a full-blown adversarial manner. This clearly promotes administrative efficiency, which benefits customers and the public interest.

2. The Stipulation contains significant commitments to address and improve outages causes by trees outside of right-of-way.

Second, as Ms. Moore, AEP Ohio witness Kratt, and Staff witness McCarter discussed, the Company has agreed in the Stipulation to a number of commitments that are designed to reduce the number of outages causes by trees outside of ROW, which will improve customer experience and confirm that DIR investments continue to favorably impact reliability. (*Id.* at 14-15; AEP Ohio Ex. 2 at 7-8; Staff Ex. 3 at 4.) Specifically, through the Stipulation, the Company has committed to:

(1) work collaboratively with Staff to update and coordinate the Company's danger tree program, including anticipated funding levels, to improve reliability for customers (AEP Ohio Ex. 2 at 7; Jt. Ex. 1 at 10 (§ III.B.6.c); Staff Ex. 3 at 4);

(2) provide baseline and additional data for outside ROW tree outages, including production, reliability, and resource utilization data, during the period between the date of the Stipulation and the date new rates become effective as a result of the Company's next EL-AIR case, which will demonstrate the reliability impacts of the Company's danger tree program (AEP Ohio Ex. 2 at 8; Jt. Ex 1 at 10 (§ III.B.6.d); *see also* Jt. Ex. 1 at 9 (§ III.B.6.a (defining the "transition period" referenced in § III.B.6.d)); Staff Ex. 3 at 4); and

(3) achieve improvement in outside ROW tree outages based on danger tree removal work performed during and for two years after the transition period, as compared to the baseline outage data for the period prior to the transition period (AEP Ohio Ex. 2 at 8; Jt. Ex. 1 at 10 (§ III.B.6.e); Staff Ex. 3 at 4).

Each of the Company's outside ROW tree commitments is significant and will provide tangible and measurable customer and public benefits. As Company witness Kratt explained, the Company has been experiencing an increase in outage minutes (System Average Interruption Duration Index, or SAIDI) caused by danger trees since 2013, with a significant increase beginning in 2017, and trees outside ROW were the number one cause of outages, in terms of duration, in 2018. (AEP Ohio Ex. 2 at 4-5.) Trees outside ROW have become the leading cause of outages in the Company's service territory due in large part to the nature of the Company's service territory, which is much more heavily forested than other electric distribution utilities'. (*Id.* at 5-6, Ex. TAK-1 at 9.) As a result, the Company has many more trees and vegetation that it must address to maintain reliability. (*Id.*)

Adding to the challenge already presented by the Company's heavily forested service territory has been a growing issue with dead ash trees due to the outbreak of the Emerald Ash Borer ("EAB"), which has infested many of Ohio's nearly 3.8 billion ash trees, and which began to proliferate in AEP Ohio's service territory in 2013. (*Id.*) Mr. Kratt testified that, as a result of the 3-5 year latency between when a tree is infested with EAB and dies, the Company truly began to experience outages related to trees outside ROW created by EAB infestation in 2017. (*Id.* at 6.) Recognizing the severity of the problem associated with trees outside ROW that it observed in 2017, the Company created a danger tree program in 2018 to remediate such trees. (*Id.* at 7.) AEP Ohio spent approximately \$14.1 million on the danger tree program in 2018, and it projects that it will spend up to \$50 million on the program in 2019. (*Id.* at 7.) The Company's increased spending on danger tree removal has already resulted in a SAIDI improvement of approximately 4 minutes attributable to trees outside ROW as of July 2019. (*Id.*) AEP Ohio's continued dedication to reducing tree outside ROW-caused outages and

improving reliability through its settlement commitments in the Stipulation clearly benefit customers and the public interest in satisfaction of the second prong of the Commission's three-part test.

3. The Stipulation resolves disagreement and provides certainty regarding the Company's vegetation management capitalization policy.

The third respect in which the Stipulation benefits customers and the public interest is through the Company's agreement to, as of the date new rates become effective in the Company's next EL-AIR case, change its policy regarding the capitalization of vegetation management costs and begin expensing inside and outside ROW tree removals that are not undertaken during the initial clearing or widening of a ROW. (Staff Ex. 3 at 4; Jt. Ex. 1 at 8-9 (§ III.B.6.a-b).) OCC witness Hecker disputes this benefit, arguing that the Company's current capitalization policy, which will continue during the period set forth in the Stipulation, will cost customers more and allegedly run afoul of FERC account rules. (OCC Ex. 1 at 10-14.) Mr. Hecker is incorrect. As he conceded at hearing, costs and customer rate impacts would actually be greater if the costs at issue were expensed rather than capitalized. (Tr. at 36-37.) Contrary to OCC's contention, the Stipulation's proposed transition period approach strikes a reasonable resolution of a disputed issue and provides for a timely and logical transition of AEP Ohio's capitalization of tree removal costs.

4. The Stipulation provides certainty regarding future DIR audits.

As Staff witness McCarter explained, the Stipulation also benefits customers and the public interest by "acknowledg[ing] that several operational areas will continue to be examined in the next audit to determine AEP Ohio's adherence to good business practices," which she

testified will “allow the Commission to ensure that customers are paying for expenditures by AEP Ohio that are well controlled.” (Staff Ex. 3 at 4.)

5. OCC’s complaints about the incentive compensation, capital spares, and regulatory oversight are misplaced and do not demonstrate that the Stipulation fails to provide benefits to customers and the public.

OCC contends that the Stipulation fails the second prong of the settlement test for three additional reasons, by allegedly failing to: (1) address the issue of including incentive compensation in the DIR (OCC Ex. 1 at 4-7); (2) address the Company’s capital spares activity (*id.* at 7-9); and (3) provide appropriate accountability and regulatory oversight with regard to AEP Ohio’s DIR spending (OCC Ex. 2 at 11.). None of these claims has merit.

The Stipulation did not “fail to address” incentive compensation, as OCC witness Hecker claims. Rather, the Signatory Parties agreed that the auditor’s recommendation that certain cost elements associated with incentive compensation be removed from the DIR should be addressed in the Company’s upcoming EL-AIR case. (AEP Ohio Ex. 1 at 11-12; Jt. Ex. 1 at 8 (§ III.B.3).) That agreement was consistent with the Commission-approved stipulation in Case Nos. 14-255-EL-RDR, 15-66-EL-RDR, and 16-21-EL-RDR. (*Id.*) Nor did the Stipulation “fail to address” capital spares. Rather, the Signatory Parties agreed to accept the auditor’s recommendation that the Company’s inclusion of capital spares in the DIR be given further review, and agreed that that further review should be undertaken by the next DIR auditor in a future DIR audit. (AEP Ohio Ex. 1 at 6; Jt. Ex. 1 at 5 (§ III.A.7).) Finally, OCC witness Williams’ contention that the Stipulation fails to benefit customers and the public because there is a lack of accountability or regulatory oversight of DIR spending is both ironic in the context of these audit proceedings and an untimely collateral attack on the Commission’s approval of the DIR in prior proceedings. In sum, none of OCC’s arguments refutes the demonstrable benefits that the Stipulation confers.

For all of these reasons, therefore, the Commission should find that the Stipulation satisfies the second part of the settlement test.

C. The Stipulation does not violate any important regulatory principle or practice.

The Stipulation also satisfies the third prong of the settlement test. As Company witness Moore testified, the Stipulation does so by balancing customers' interests, complying with the Commission's order approving the DIR, and providing a reasonable resolution of the 2016 and 2017 audits. (AEP Ohio Ex. 1 at 15.) Staff agrees that the Stipulation "complies with all relevant and important regulatory principles and practices. (Staff Ex. 3 at 5.) OCC witness Hecker contends generally that the Stipulation fails this requirement as well, for the same reasons he advanced in opposition to the second prong of the three-part test. (OCC Ex. 1 at 15.) His position is incorrect, for the reasons set forth in Section III.B, *supra*. Accordingly, the Commission should confirm that the Stipulation does not violate any important regulatory principle or practice, in satisfaction of the test's final element.

IV. Conclusion

The Stipulation represents a reasonable and appropriate resolution of these contested audit proceedings. There is no dispute that it was the product of serious bargaining among capable, knowledgeable parties. And, as the Company has demonstrated, the Stipulation, as a package, benefits customers and the public interest, and it does not violate any important regulatory principle or practice. For the foregoing reasons, the Commission should adopt the Stipulation without modification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon all parties of record. In addition, I hereby certify that a service copy of the foregoing *Initial Post-Hearing Brief of Ohio Power Company in Support of the Joint Stipulation and Recommendation* was sent by, or on behalf of, the undersigned counsel to the following parties of record and attorney examiners this 4th day of October, 2019, via electronic transmission.

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Summary: Brief - Initial Post-Hearing Brief of Ohio Power Company in Support of the Joint Stipulation and Recommendation electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company