BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of The East Ohio Gas Company d/b/a Dominion Energy Ohio for Approval of an Alternative Form of Regulation.	)))	Case No. 19-0468-GA-ALT

THE EAST OHIO GAS COMPANY D/B/A DOMINION ENERGY OHIO
MEMORANDUM CONTRA JOINT MOTION TO STRIKE

Stipulations are binding on signatory parties. Signatory parties sometimes include provisions restricting the ability to cite a stipulation as "precedent" in future proceedings. The next time the Commission "enforces" such a provision against a non-party will be the first time. The motion to strike filed by the Joint Movants (Office of Ohio Consumers' Counsel (OCC) and Northeast Ohio Public Energy Council (NOPEC)) must be denied.

I. INTRODUCTION

The East Ohio Gas Company d/b/a Dominion Energy Ohio (DEO) submitted testimony explaining that the partial stipulation filed in this case requires DEO's Rider CEP to function much like Columbia Gas of Ohio, Inc.'s Rider CEP. The *Commission Order* in the Columbia proceeding finds that certain features of Columbia's Rider CEP provide ratepayer benefits.[1] The testimony in dispute quotes this Order and explains that DEO's Rider CEP contains the same features. It is hard to imagine a more relevant fact or circumstance than that. The Commission is entitled to know what it is being asked to approve, and DEO's testimony does nothing more than call attention to similarities between DEO's Rider CEP and Columbia's.

Nonetheless, the Joint Movants protest testimonial references to the Columbia stipulation. None of their arguments have the slightest thing to do with any rule of evidence or procedure.

[1] Case No. 17-2202-GA-ALT, Opinion and Order (Nov. 28, 2019) at ¶¶ 42-43, 45.

None of the "precedent" or "long standing [] policy" they refer to supports their arguments in the least.[2] To the contrary, the Commission has recognized that non-signatories are *not* bound by stipulation provisions that restrict the right to cite the stipulation in future proceedings.[3]

The Joint Movants complain that "[a] clear reading" of the Columbia settlement "shows that signatory parties intended that the settlement it [sic] reached in that case not be used as evidence in other proceedings for or against the signatory parties."[4] DEO cannot speak to the parties' intent because it was not a party to the Columbia proceeding, let alone a signatory party to the stipulation. DEO cannot "violate the explicit terms" of a settlement it did not sign in a case in which it did not appear.[5] And the *Commission* is not bound by OCC's determination of what is or is not "precedent."

DEO's testimony does not "rel[y] on" the Columbia proceeding to suggest that DEO is alleviated of any burden of proof.[6] The fact that DEO and Staff have agreed to the same basic Rider CEP construct approved for Columbia is merely one of many relevant "facts" and "circumstances" the Commission should consider.[7] "We have instructed the commission to respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law."[8] The Columbia Order is not dispositive here, but

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[2] Joint Movants' Motion at 1.

[3] *See* Case No. 10-501-EL-FOR, Opinion and Order (Jan. 9, 2013), at 4.("As AEP-Ohio was not a signatory party to the stipulation in the DP&L Case, the Company is not bound by its terms and, accordingly, we believe the attorney examiner's ruling denying the motion to strike was appropriate under the circumstances.").

[4]Joint Movants' Mem. Supp. at 3-4.

[5] *Id*. at 4.

[6] *Id*. at 3.

[7] *Id*.

[8] *In re Application of Ohio Power Co.,* 2015-Ohio-2056, ¶ 16, 144 Ohio St. 3d 1, 5, quoting *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.,* 42 Ohio St.2d 403, 431 (1975) (internal quotation marks omitted).

that does not render the Order irrelevant or inadmissible. In any event, the Order does not have to be admitted into evidence to be cited in briefs.

Lastly, the Joint Movants' complain that if the Commission does not "enforce provisions that it approves, parties would have significantly less incentive to negotiate and settle cases."[9] This is nonsense. Again, the Commission cannot "enforce" a settlement term that DEO never agreed to. OCC's settlement decision in the Columbia proceeding has not prejudiced its ability to litigate here. OCC finds itself in the awkward position of explaining why what was good enough in the Columbia proceeding is not good enough here, but that is OCC's problem. The Commission has no responsibility to shield OCC from the consequences of its litigation decisions.

II. ARGUMENT

No Commission rule specifically addresses motions to strike testimony. The Joint Movants' "motion to strike" is more property characterized as a motion *in limine*. "As related to trial, a motion *in limine* is a precautionary request, directed to the inherent discretion of the trial judge, to limit the examination of witnesses by opposing counsel in a specified area until its admissibility is determined by the court outside the presence of the jury. The power to grant the motion is not conferred by rule or statute, but instead lies within the inherent power and discretion of a trial court to control its proceedings."[10]

Ms. Friscic cites the Order approving the Columbia stipulation to show that: (i) DEO's Rider CEP serves the same function as Columbia's CEP Rider, (ii) like Columbia's rider, DEO's

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[9] *Id*. at 5.

[10] *State v. Grubb*, 28 Ohio St. 3d 199, 201, 503 N.E.2d 142, 145 (1986) (internal quotation omitted).

also features a depreciation offset, with a similar impact on rates; (iii) DEO's CEP rates are subject to an annual rate cap that is lower than the Columbia's cap and (iv) the deferral authority sought in this proceeding is the same authority granted to Columbia.[11] This testimony meets all the necessary criteria for admissibility: it is based on the personal knowledge of a competent witness; it is not hearsay; and the subject matter of the testimony is not barred by any rule, statute, or other authority.[12] The Movants do not contest any of this; instead, they argue that Ms. Friscic and DEO are bound by the terms of the Columbia CEP Stipulation not to offer such testimony. This argument, however, lacks any merit.

A. The Columbia stipulation does not bind DEO.

The Columbia stipulation includes the following sentence: "This Stipulation shall not be cited as precedent in any future proceeding for or against any Signatory Party."[13] Although written in the passive voice, the actor subject to the prohibited action (*i.e.,* citing the stipulation as precedent) can *only* be a signatory party. Commission approval of the stipulation changes nothing.

"It is axiomatic that a settlement agreement is a contract designed to terminate a claim by preventing or ending litigation and that such agreements are valid and enforceable by either *party*."[14] DEO is not a party to the Columbia stipulation—a fact readily conceded.[15] "It

[11] *See generally,* Direct Testimony of Vicki Friscic (Aug. 31, 2020) at pp. 11-16.

[12] *See* Evid. R. 401 (defining "relevant evidence"), R. 402 (declaring relevant evidence admissible), R. 602 (limiting witness testimony to personal knowledge), R. 802 (hearsay), R. 803 (hearsay exceptions).

[13] Joint Movants' Mem. Supp. at 3 (emphasis in original).

[14] *Cont'l W. Condo. Unit Owners Assn. v. Howard E. Ferguson, Inc.,* 1996-Ohio-158, 74 Ohio St. 3d 501, 502, 660 N.E.2d 431 (emphasis added).

[15] Joint Movants' Mem. Supp. at 2.

goes without saying that a contract cannot bind a nonparty."[16] Whatever the "signatory parties intended" by entering the Columbia stipulation is not DEO's concern. OCC, NOPEC, and Columbia may have intended that the stipulation "not be used as evidence in other proceedings for or against the signatory parties," but DEO made no such agreement. Suffice it to say, *OCC's intention* for DEO to be bound is no substitute for *DEO's agreement* to be bound. "It is a principle of general application in Anglo–American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party [.]"[17]

Commission orders *may* affect non-parties' rights on collateral estoppel or statutory grounds, but that is *not* what the Joint Movants are arguing and not relevant here. The Joint Movants' arguments fly in the face of "precedent on contract interpretation."[18] The "explicit terms" of the Columbia stipulation do not apply to DEO.

B. The Columbia stipulation does not require the Commission to ignore is own precedent.

The Commission has found that certain features of Columbia's Rider CEP provide ratepayer benefits.[19] DEO's Rider CEP contains many of the same features. Even were it so inclined, the Commission could not simply ignore this fact or pretend that it is dealing with issues of first impression. "Although the Commission should be willing to change its position when the need therefor is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which is essential in all

[16] *E.E.O.C. v. Waffle House, Inc.,* 534 U.S. 279, 294 (2002).

[17] *Hansberry v. Lee,* 311 U.S. 32, 40 (1940).

[18] Joint Movants' Mem. Supp. at 4.

[19] Columbia CEP Order, ¶¶ 42-43, 45.

areas of the law, including administrative law."[20] Given the Commission's responsibility to "respect its own precedents," testimony that does nothing more than call attention to precedent is entirely proper.

The point of requiring the Commission to issue written decisions "is to inform interested parties of the reasons for the commission's action and to provide this court with an adequate record in order to determine whether the decision is lawful and reasonable."[21] Utilities and other stakeholders rely on Commission orders to manage their affairs. When questions arise about whether a proposed course of action is "lawful and reasonable," prior Commission decisions offer a logical place to start. These decisions are public records, so prior orders may be cited as legal precedent—regardless of whether they are offered or admitted into evidence.[22]

OCC cannot expect the Commission to ignore a prior decision simply because OCC wants it to. The Commission decides cases, not OCC. A settlement agreement cannot limit the Commission's ability to "take[] judicial notice of its own records."[23] Nor does OCC's desire to take inconsistent positions without being called-out for it trump the Commission's duty to

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[20] *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 431, 330 N.E.2d 1, 19–20.

[21] *Migden-Ostrander v. Pub. Util. Comm.,* 2004-Ohio-3924, ¶ 17, 102 Ohio St. 3d 451, 455, 812 N.E.2d 955, 959.

[22] *See* R.C. 4901.12 ("[A]ll proceedings of the public utilities commission and all documents and records in its possession are public records."); R.C. 4903.14 ("Upon application, the public utilities commission shall furnish certified copies under its seal of any order made by it, which certified copies shall be prima-facie evidence in a court or proceeding of the facts stated therein."); Ohio Evid. R. 1003 ("A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.").

[23] *Schuster v. Pub. Utilities Comm'n,* 139 Ohio St. 458, 461, 40 N.E.2d 930, 932 (1942) (find that the Commission "would have been derelict in its duty" to not take administrative notice of a utility's abandonment application filed in a previous proceeding).

"respect its own precedents." The Commission is perfectly capable of giving the Columbia proceeding the weight it deserves in this proceeding.

III. CONCLUSION

Stipulations tend to be the rule in Commission rate proceedings rather than the exception. If it were true that stipulations containing a not-to-be-cited-as-precedent provision placed these settlements and the orders approving them off-limits for consideration in future cases, the Commission would be left with very little room to consider its prior decisions. The motion to strike is meritless and should be denied.

Dated: September 14, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a courtesy copy of the foregoing pleading was served by electronic mail upon the following individuals on September 14, 2020:

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Summary: Memorandum Memorandum Contra Joint Motion to Strike electronically filed by Christopher T Kennedy on behalf of The East Ohio Gas Company d/b/a Dominion Energy Ohio