

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Power Company for an Increase in Electric)	Case No. 20-585-EL-AIR
Distribution Rates.)	
)	
In the Matter of the Application of Ohio)	
Power Company for Tariff Approval.)	Case No. 20-586-EL-ATA
)	
In the Matter of the Application of Ohio)	
Power Company for Approval to Change)	Case No. 20-587-EL-AAM
Accounting Methods.)	

INITIAL POST-HEARING BRIEF OF THE KROGER CO.

I. INTRODUCTION

On March 12, 2021,¹ a Stipulation and Recommendation (Stipulation) in the above-referenced proceeding concerning the base distribution rates of Ohio Power Company (AEP) was filed to reasonably resolve the issues in this proceeding. AEP was joined by the Staff of the Public Utilities Commission of Ohio (Commission) (Staff), and twelve intervenors, including The Kroger Co. (Kroger),² in filing the Stipulation. The record before the Commission and long-standing precedent demonstrate that the Stipulation satisfies the legal standard that the Commission uses to evaluate the reasonableness of a stipulation. Specifically, the Stipulation is the product of serious bargaining among capable and knowledgeable parties; will create significant benefits for

¹ On May 11, 2021, AEP filed a revised Stipulation with the Commission. The revised Stipulation corrected minor typographical errors and made no substantive changes to the Stipulation that was filed on March 12, 2021.

² The Signatory Parties to the Stipulation are as follows: AEP; Staff; the Office of the Ohio Consumers' Counsel; Kroger; the Ohio Hospital Association, Ohio Energy Group, Industrial Energy Users-Ohio; the Ohio Manufacturers' Association Energy Group; One Energy, Clean Fuels Ohio; Charge Point; EVgo; Walmart Inc.; and the Ohio Cable Telecommunications Association.

customers and, as a package; is in the public interest; and does not violate any regulatory principle or practice. As such, the Stipulation as a package is just and reasonable and should be approved.

For the reasons discussed herein, Kroger respectfully requests that the Commission reject Opposing Parties' assertions,³ and adopt the Stipulation in its entirety.

II. PROCEDURAL AND FACTUAL BACKGROUND

On April 9, 2020, AEP filed a Notice of Intent to file an application for an increase in its electric distribution rates with the Commission⁴ and AEP filed its Application for an increase in its electric distribution rates on June 1, 2020.⁵ Staff filed an initial Staff Report regarding AEP's application on November 18, 2020, but re-filed the Staff Report on November 25, 2020 to correct errors. Thereafter, on December 18, 2020, several parties, including Kroger, filed objections to the Staff Report.

In an effort to resolve the issues presented in AEP's Application and the Staff Report, AEP and the intervening parties participated in several settlement conferences. All intervening parties participated in, or had the opportunity to participate in, those negotiations. On March 12, 2021, AEP, Staff, and twelve other Signatory Parties filed the Stipulation.

The Stipulation resolves several issues relating to AEP's base distribution rates to the benefit of customers. While the Stipulation provides for an increase in AEP's base distribution rates, it mandates several significant modifications to AEP's initial proposal that benefit customers

³ The Opposing Parties to the Stipulation are as follows: Nationwide Energy Partners, LLC; Armada Power LLC; Interstate Gas Supply, Inc.; Direct Energy Business LLC & Direct Energy Services LLC; Ohio Environmental Council; Environmental Law & Policy Center; Natural Resources Defense Council; and Ohio Partners for Affordable Energy.

⁴ AEP's Notice of Intent to File an Application (April 9, 2020).

⁵ Due to the closure of the Commission's offices from June 1, 2020 through June 5, 2020, the application for a rate increase, submitted by AEP on June 1, 2020 was accepted for filing on June 8, 2020, and deemed timely filed in accordance with R.C. 1.14 and Ohio Adm. Code 4901-1-07 and 4901-1-13. *See In re the Extension of Filing Dates for Pleadings and Other Papers Due to a Building Emergency*, Case No. 20-1132-AU-UNC, Entry (June 8, 2020).

and the public interest. For example, the Stipulation reduces AEP's requested revenue requirement and rate of return, resulting in AEP customers paying approximately \$24.4 million less in annual base distribution charges in comparison to AEP's initial litigation position.⁶ In addition, the Stipulation reduces the 2021-2024 revenue caps on the Distribution Investment Rider (DIR) by \$247.75 million in the aggregate,⁷ places a total spending cap of \$153.75 million on the Enhanced Service Reliability Rider (ESRR) during the period of January 2021 through May 2024,⁸ and eliminates the Pilot Throughput Balancing Rider (Rider PTBAR), a decoupling mechanism for residential and small commercial customers.⁹

Moreover, the Stipulation promotes gradualism by reducing the bill impact for certain customer classes resulting from AEP's consolidation of the Ohio Power and Columbus Southern Power Zones.¹⁰ The Stipulation provides that the rate change will be levelized over a three-year period and in the fourth-year the Ohio Power and Columbus Power Zones will have equal rates.¹¹

In exchange for obtaining the foregoing benefits, the Signatory Parties recommend that the Commission approve the Stipulation without modification.¹²

Pursuant to an Attorney Examiner Entry dated April 5, 2021, an evidentiary hearing commenced on May 12, 2021 and concluded on May 18, 2021. Kroger participated in the evidentiary hearing regarding the Stipulation as an intervening party.

⁶ OCC Exhibit 1, Willis Testimony at 6.

⁷ Joint Exhibit 1, Stipulation at 6-7; Staff Exhibit 1, Staff Report at 29.

⁸ Joint Exhibit 1, Stipulation at 9.

⁹ *Id.* at 10.

¹⁰ AEP Ohio Exhibit 6, Moore Testimony at 18-19.

¹¹ Joint Exhibit 1, Stipulation at 16-17.

¹² *Id.* at 20.

III. STANDARD OF REVIEW

Ohio Adm. Code 4901-1-30 permits parties to enter into stipulations, subject to review for approval by the Commission. In numerous cases, the Commission has adopted the following criteria to evaluate whether a stipulation is reasonable and warrants acceptance.¹³

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?¹⁴

As explained in more detail below, the Stipulation satisfies the three-part test and thus, must be approved.

IV. LAW AND ARGUMENT

A. The Stipulation is a Product of Serious Bargaining Among Capable, Knowledgeable Parties.

It is irrefutable that the parties to the Stipulation are capable and knowledgeable. The twelve intervenor Signatory Parties represent the spectrum of consumers of electric services across Ohio and AEP's service territory.¹⁵ Many of the Signatory Parties routinely participate in proceedings before this Commission and have participated throughout the entirety of this distribution rate case.

¹³ *Office of Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125-26 (1992).

¹⁴ See, e.g., *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order at 39 (March 31, 2016).

¹⁵ See, e.g., OCC representing the State's residential customers; OEG, IEU, and OMAEG representing various commercial and industrial customers throughout Ohio; Kroger and Walmart representing large national retailers with significant operations in AEP's service territory; OHA representing hospitals throughout Ohio; Staff representing all consumers of utility services in Ohio, etc.

Here, the record also demonstrates that the Stipulation is the product of serious bargaining. Several settlement conferences occurred before the Stipulation was reached. At the settlement conferences, competent, capable and knowledgeable counsel represented the parties.¹⁶ The bargaining took place over the span of two months and consisted of hours of virtual meetings due to concerns related to COVID-19.¹⁷ Every party had knowledge of the settlement conferences and the ability to participate in the negotiations.¹⁸ The Stipulation represents a compromise to several complex issues related to AEP's electric distribution rates. In order for the Stipulation to be reached, all Signatory Parties made serious concessions that resulted in extensive changes from AEP's initial proposal in this proceeding.¹⁹

Accordingly, the Commission should find that the Stipulation is a product of serious bargaining among capable, knowledgeable parties, and thus, satisfies the first part of the three-part test.

B. The Stipulation, as a Package, Benefits Ratepayers and the Public interest.

The second part of the test specifically requires that the Commission evaluate the settlement as a package.²⁰ As the Commission has previously affirmed, a settlement package allows the Commission to issue a decision on pending issues without the expenditure of time and financial resources to resolve a fully contested case.²¹

¹⁶ See AEP Exhibit 6, Moore Testimony at 16; Tr. Vol. V at 990-991 (Cross-Examination of Williams).

¹⁷ OCC Exhibit 1, Willis Testimony at 5.

¹⁸ AEP Ohio Exhibit 6, Moore Testimony at 16.

¹⁹ *Id.*

²⁰ *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 77 (March 31, 2016).

²¹ *Id.* at 77-78 (internal citations omitted).

AEP witness, Andrea E. Moore, testified extensively about concessions that Signatory Parties made in order to reach a Stipulation that benefits ratepayers and the public interest.²² Kroger supports and incorporates herein Ms. Moore's testimony on those concessions and benefits.

Despite those benefits, Opposing Parties ask that the Commission reject the Stipulation and instead adopt their various alternative proposals. For example, Nationwide Energy Partners, LLC (NEP) asks the Commission to authorize an entirely new rate schedule (or in the alternative implement a new \$3 million pilot program) for low-load factor customers that effectively would have the impact of shifting costs to other customers.²³ Likewise, Ohio Environmental Council (OEC) and the Environmental Law & Policy Center (ELPC) urge the Commission to adopt an EE proposal that AEP had initially proposed but since withdrew from this proceeding as part of the entire settlement package.²⁴ Finally, Armada LLC (Armada) asserts that the Stipulation is not in the public interest, despite the numerous benefits it provides, because of the absence of a water heater controller pilot program that utilizes Armada's proprietary technology.²⁵

The Commission should not consider the foregoing proposals as they are irrelevant to the three-part test and/or are based on unsound methodologies. Moreover, the Commission has determined that in asking whether a stipulation passes the second part of the three-part test, "[t]he question before the Commission is not whether there are other mechanisms that would better benefit ratepayers and the public interest but whether the Stipulation, as a package, benefits

²² AEP Ohio Exhibit 6, Moore Testimony at 17-18.

²³ See NEP Exhibit 35, Notice of Witness Substitution at 2 (May 5, 2021).

²⁴ See OEC Exhibit 1, Direct Testimony of Brendon Baatz at 4 (April 20, 2021) (Baatz Testimony); see ELPC Exhibit 1, Direct Testimony of Chris Neme at 7 (April 20, 2021) (Neme Testimony).

²⁵ See Armada Exhibit 1, Direct Testimony of Eric Rehberg at 2 (April 20, 2021) (Rehberg Testimony).

ratepayers and the public interest.”²⁶ These Opposing Parties have disregarded this precedent and instead attempted to argue that the Commission should ignore the benefits of the Stipulation and instead adopt their proposals, which in their self-serving views, would better benefit some of the ratepayers and/or the public.

NEP’s proposal to implement a new low-load factor rate schedule, or in the alternative, a low-load factor pilot program²⁷ should be rejected and should not be included as a modification to the Stipulation. As noted above, nowhere in NEP’s testimony does it argue that any part of the three-part test for approving Stipulations is not satisfied. Nonetheless, NEP presented testimony to support its recommendation for a new low-load factor rate schedule because it alleges that the proposed rate schedules in the Stipulation will harm low-load factor GS customers.²⁸ However, NEP’s sole support for this proposition and its proposals are a study that is at best unreliable, if not misleading, presented by a witness who was not qualified to perform, or knowledgeable above, the study.²⁹

The Commission should note that while NEP stated that its study is “representative” of low-load factor customers,³⁰ the sample size used in the study is only four accounts and those four accounts consist only of NEP customers.³¹ Eric Rehberg, the NEP witness who sponsored the study, admitted that he had no idea whether any randomization method was used to select the

²⁶ *In the Matter of the Application of The East Ohio Gas Company dba Dominion Energy Ohio for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-468-GA-ALT, Opinion and Order at ¶ 73 (Dec. 30, 2020).

²⁷ See NEP Exhibit 35, Notice of Witness Substitution at 2 (May 5, 2021).

²⁸ *Id.* at 12.

²⁹ See Tr. VI. IV at 656-684 and 737.

³⁰ NEP Exhibit 35, Notice of Witness Substitution at 4 (May 5, 2021).

³¹ See Tr. VI. IV at 743-744 (cross-examination of Rehberg).

sample of four accounts or how they were selected at all.³² This is because Mr. Rehberg had no part in the selection of the accounts and acknowledges that NEP self-selected the four accounts in the sample.³³ In fact, Mr. Rehberg did not even have access to the original data set that formed the basis of the analysis.³⁴ In Mr. Rehberg's adopted testimony, he lists several categories of low-load factor customers (e.g., churches, hospitals, single-switch manufacturers).³⁵ Yet, the sample is only comprised of NEP multifamily unit development accounts that are customers of AEP³⁶ even though the sample is supposed to be representative of low-load factor customers. Critically, the study did not examine whether any behaviors or independent factors may have influenced the four accounts to experience low-load factors.³⁷

Even though the study presented by Mr. Rehberg suffers from major deficiencies, NEP maintains that the Commission should adopt an entirely new rate schedule or a \$3 million pilot program for low-load factor customers.³⁸ NEP acknowledged that AEP could experience a revenue loss if the low-load factor proposals are adopted, but offered no analysis as to which customers will cover that deficit.³⁹ Similarly, NEP did not analyze the impact that its proposals could have on AEP's electric services if the revenue loss is not shifted onto other customers.⁴⁰ Therefore, the Commission should reject NEP's proposal as it based on a flawed study and did not contemplate the impact on non-low load factor customers or AEP's electric services.

³² *Id.* at 760.

³³ *Id.* at 744.

³⁴ *Id.*

³⁵ See NEP Exhibit 35, Notice of Witness Substitution at 3 (May 5, 2021).

³⁶ See Tr. VI. IV at 747 (Cross-Examination of Rehberg).

³⁷ *Id.* at 763.

³⁸ See NEP Exhibit 35, Notice of Witness Substitution at 2 (May 5, 2021).

³⁹ See, e.g., Tr. VI. IV at 742 (Cross-Examination of Rehberg).

⁴⁰ *Id.* at 799.

As another example, the Stipulation does not include an EE program and OEC believes that the inclusion of an EE program would provide additional benefits to customers and the public.⁴¹ ELPC also opposes the lack of an EE program in the Stipulation and notes that AEP had initially proposed an EE program in its Application.⁴² These arguments are without merit. First, neither OEC nor ELPC address the Stipulation *as a package* because their sole focus is on the lack of an EE program. Second, AEP does not currently offer EE programs,⁴³ and the Stipulation does not prohibit AEP from proposing EE programs going forward⁴⁴ so the Stipulation does not change the status quo of EE programs in AEP's service territory in any way. Third, even if the addition of an EE program "would better benefit ratepayers and the public," OEC and ELPC's proposals are irrelevant to the actual question before the Commission.⁴⁵ The Commission must answer whether the Stipulation, as a package, benefits ratepayers and the public interest and *not* whether additional provisions could provide better benefits than the Stipulation.⁴⁶ Therefore, OEC and ELPC's arguments should be disregarded for their failure to adequately address the second part of the three-part test.

For the foregoing reasons, the Commission should find that the Stipulation provides numerous benefits to ratepayers and the public interest and determine that the Opposing Parties' proposals and alternatives proposed to be added to the Stipulation do not address the proper legal standard and test before the Commission and are based on unreliable evidence. Accordingly, the

⁴¹ See OEC Exhibit 1, Baatz Testimony at 4.

⁴² See ELPC Exhibit 1 at 4, Neme Testimony at 7.

⁴³ See OEC Exhibit 1, Baatz Testimony at 4.

⁴⁴ Tr. Vol. III at 512 (Cross-Examination of Baatz).

⁴⁵ *In the Matter of the Application of The East Ohio Gas Company dba Dominion Energy Ohio for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-468-GA-ALT, Opinion and Order at ¶ 73 (Dec. 30, 2020).

⁴⁶ See *id.*

Commission should conclude that the Stipulation passes the second part of the three-part test and reject the proposals of NEP and other Opposing Parties.

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

As set forth above, the third part of the three-part test used to evaluate the reasonableness of a stipulation requires the Commission to determine whether the Stipulation violates any important regulatory principle or practice. The Stipulation here does not violate any important regulatory principle or practice and to the contrary, advances important regulatory principles.

Specifically, the Stipulation promotes gradualism by reducing the bill impact for certain customer classes resulting from AEP's consolidation of the Ohio Power and Columbus Southern Power Zones.⁴⁷ The Stipulation provides that the rate change will occur over a three-year period and in the fourth-year the Ohio Power and Columbus Power Zones will have equal rates.⁴⁸ The Stipulation also promotes gradualism by providing additional time for the implementation of the delayed payment charge as Ohio continues its economic recovery from the COVID pandemic.⁴⁹

Indeed, some Opposing Parties advance proposals that, if adopted, would violate important regulatory principles and practices, including Commission precedent. For example, OEC and ELPC urge the Commission to find that the Stipulation does not pass the three-part test because of the absence of an EE plan and mandatory administrative fee for "voluntary" EE programs".⁵⁰ In a June 17, 2020 Order, the Commission determined "that, in light of H.B. 6, the future for EE programs in this state will be best served by reliance upon *market-based approaches* such as those

⁴⁷ AEP Ohio Exhibit 6, Moore Testimony at 13.

⁴⁸ Joint Exhibit 1, Stipulation at 16-17.

⁴⁹ *Id.* at 14.

⁵⁰ See OEC Exhibit 1, Baatz at Testimony 4; ELPC Exhibit 1, Neme Testimony at 7.

available through PJM and competitive retail electric service providers.”⁵¹ The Commission also has previously determined that a similar proposal to implement a mandatory fee to incent EE programming “has no statutory basis” and such proposals “must be accompanied with a demonstration of need that cannot otherwise be met through market-based approaches.”⁵²

Moreover, Opposing Parties cannot identify any source of law that allows electric distribution utilities to offer voluntary EE programming with mandatory recovery from ratepayers and thus, there proposals should be rejected outright. To the extent that Opposing Parties argue that H.B. 6 only ended mandatory EE programs and that voluntary EE programs are still permissible, that argument is also meritless. The Stipulation states that “[t]he Company agrees to withdraw, without prejudice to any future case, the demand side management (“DSM”) proposal in its Application.”⁵³ As a signatory, AEP voluntarily withdrew its initial EE/DSM proposal and cannot be mandated to implement an EE program, as this would conflict with both the letter and spirit of H.B. 6.

For the foregoing reasons, the Commission should find that the Stipulation passes the third part of the three-part test because it promotes several regulatory principles and practices. In addition, the Commission should conclude that Opposing Parties’ proposals conflict with Ohio law and precedent and should be rejected in their entirety by the Commission.

⁵¹ *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of its 2021 Energy Efficiency and Demand Side Management Portfolio of Programs and Cost Recovery Mechanism*, Case Nos. 20-1013-EL-POR, et al., Entry (June 17, 2020) at ¶ 9 (emphasis added).

⁵² *Id.* at ¶ 8.

⁵³ Joint Exhibit 1, Stipulation at 18.

IV. CONCLUSION

The Stipulation filed on March 12, 2021 is just, reasonable, and in the public interest. It also clearly satisfies all three criteria of the Commission, as it is the product of serious bargaining among the parties; as a package creates numerous benefits for ratepayers and the public interest; and does not violate any regulatory principle or practice.

For the aforementioned reasons, Kroger respectfully requests that the Commission adopt without modification the Stipulation that the Signatory Parties submitted for consideration in this proceeding.

Respectfully submitted,

/s/ Angela Paul Whitfield
Angela Paul Whitfield (0068774)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: paul@carpenterlipps.com
(willing to accept service by email)

Counsel for The Kroger Co.

CERTIFICATE OF SERVICE

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/s/ Angela Paul Whitfield
Angela Paul Whitfield
Counsel for the Kroger Co

stnourse@aep.com	ccox@elpc.org
cblend@aep.com	rkelter@elpc.org
twolffram@aep.com	rlazer@elpc.org
egallon@porterwright.com	whitt@whitt-sturtevant.com
Christopher.miller@icemiller.com	fykes@whitt-sturtevant.com
werner.margard@ohioattorneygeneral.gov	dparram@bricker.com
kyle.kern@ohioattorneygeneral.gov	rmains@bricker.com
Thomas.shepherd@ohioattorneygeneral.gov	dborchers@bricker.com
Angela.obrien@occ.ohio.gov	eakhbari@bricker.com
Christopher.healey@occ.ohio.gov	mjsettineri@vorys.com
john.finnigan@occ.ohio.gov	glpetrucci@vorys.com
mkurtz@BKLawfirm.com	eowoyt@vorys.com
kboehm@BKLawfirm.com	mfleisher@dickinsonwright.com
jkylercohn@BKLawfirm.com	mmcdonnell@dickinsonwright.com
bojko@CarpenterLipps.com	donadio@CarpenterLipps.com
bethany.allen@igs.com	mleppla@theOEC.org
joe.oliker@igs.com	tdougherty@theOEC.org
michael.nugent@igs.com	ctavenor@theOEC.org
evan.betterton@igs.com	little@litohio.com
fdarr2019@gmail.com	hogan@litohio.com
cgrundmann@spilmanlaw.com	dstinson@bricker.com
mpritchard@mcneeslaw.com	mwarnock@bricker.com
rglover@mcneeslaw.com	ktreadway@oneenergyllc.com

bmckenney@mcneeslaw.com
lmckenna@keyesfox.com
DWilliamson@spilmanlaw.com
cgrundmann@spilmanlaw.com

dromig@armadapower.com
todonnell@dickinsonwright.com
jschlesinger@keyesfox.com
rdove@keglerbrown.com

Attorney Examiners:

Sarah.Parrot@PUCO.Ohio.gov
Greta.See@PUCO.Ohio.gov

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Summary: Brief Initial Post-Hearing Brief of The Kroger Co. electronically filed by Mrs. Angela Whitfield on behalf of The Kroger Co.