BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY BRIEF OF
INDUSTRIAL ENERGY USERS-OHIO

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July 6, 2021

Attorneys for Industrial Energy Users-OHIO

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The Public Utilities Commission of Ohio ("Commission" or "PUCO") should approve without modification the Settlement reflected in the Joint Stipulation and Recommendation because it presents a just and reasonable resolution of the issues in this case.[1] As extensively reflected in the initial briefs of the numerous signatory parties, the Settlement was the result of serious bargaining, and produces a lawful and reasonable result that is in the public interest.

While the signatory parties have carried their burden to demonstrate that the Settlement is reasonable, lawful, and passes the Commission's three-part test, the

[1] Joint Exhibit 1 (as updated and filed in the docket in this case on May 11, 2021); Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of an agreement are given substantial weight. *Consumers' Counsel v. Pub. Utils. Comm'n of Ohio*, 64 Ohio St.3d 123, 125 (1992). In the review of a contested settlement, the Commission considers three questions: (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? *Industrial Energy Consumers of Ohio Power Co. v. Pub. Utils. Comm'n of Ohio*, 68 Ohio St.3d 559 (1994); *In re Dayton Power and Light Co. to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 16-395-EL-SSO, et al., Opinion and Order at 16 (Oct. 20, 2017).

opposing parties have not presented evidence that such burden has not been met or that the Settlement should be amended by the Commission. Parties opposing the settlement include Interstate Gas Supply, Inc. ("IGS"), Nationwide Energy Partners ("NEP"), Armada Power ("Armada"), Direct Energy, Ohio Partners for Affordable Energy ("OPAE"), and the Environmental Law and Policy Center, Ohio Environmental Council, and Natural Resources Defense Council (collectively, "Environmental Advocates"). Industrial Energy Users-Ohio's ("IEU-Ohio") Reply Brief focuses on the issues presented by the Environmental Advocates and OPAE, but the omission of a response to issues raised by other opponents of the Stipulation should not be interpreted as IEU-Ohio's support for modification of the Settlement on the issues raised by those other parties.

The Settlement provides that AEP Ohio would withdraw its pre-filed energy efficiency and peak demand reduction ("EE/PDR") program proposal without prejudice, and that AEP Ohio can (but is not required to) propose an EE/PDR program in a future case, thus resulting in the parties avoiding litigation over the lawfulness of an electric distribution utility ("EDU") implementing an EE/PDR program in a distribution rate case.[2] Having withdrawn its pre-filed concept, neither AEP Ohio, the Settlement, nor any other Signatory Party introduced evidence in support of the Commission adopting a specific EE/PDR program as part of this proceeding.

The Environmental Advocates and OPAE oppose the Settlement because it does not include an EE/PDR program.[3] However, they failed to introduce evidence

[2] Joint Ex. 1 at 18-19.

[3] In its Application, AEP Ohio labeled its EE/PDR proposal a demand side management, or DSM, plan. Throughout the case both EE/PDR plans and DSM plans have been used interchangeably, but both terms are referring to the same thing.

demonstrating that the Commission's adoption of an EE/PDR program as part of this proceeding would be lawful or reasonable. The Commission must reject their position.

1. There is no actual EE/PDR program contained in the record;
2. The record lacks evidence demonstrating that the benefits of an actual EE/PDR program outweigh its costs;
3. Generic statements about theoretical benefits of EE/PDR measures in general are insufficient record evidence to adopt a specific EE/PDR program in this case; and in any event, the alleged generic benefits of the EE/PDR measures they present are likely overstated;
4. There is no statutory mandate to implement an EE/PDR program in a distribution rate case;
5. Finally, the Settlement was the product of significant bargaining among knowledgeable and capable parties and therefore there is no need to modify that prong of the 3-part test to require signatory parties to substantively demonstrate the lack of merit on settlement offers made by parties that do not join a settlement.

The Signatory Parties came together to avoid litigating in this case the legality of EDUs offering EE/PDR programs. Accordingly, the Commission will not need to consider the legality of an EDU implementing an EE/PDR program in a distribution rate case, or potentially ever with the enactment R.C. 4928.66(G), because there is no support in the record to adopt an EE/PDR program.

I. ARGUMENT

A. There is no EE/PDR program in the evidentiary record.

There is no EE/PDR program in the evidentiary record and therefore it would be reversible error for the Commission to modify the Settlement in the manner suggested by the Environmental Advocates and OPAE. Pursuant to R.C. 4903.09, the Commission's decision in all contested cases must be based upon the evidentiary record before the

Commission.[4] Moreover, documents and information contained in the Commission's electronic docket are not inherently part of the record evidence in the proceeding.[5] The Court has further held it is reversible error for the Commission to act without evidentiary support.[6] Without an actual EE/PDR program in the record, the Commission has no record evidence before it to modify the Settlement for purposes of including an EE/PDR program into the outcome of this proceeding.[7]

Neither AEP Ohio nor any other intervening party introduced an EE/PDR program into the record. The evidentiary record simply does not contain a comprehensive suite of energy efficiency programs or analysis of how such programs would be implemented. There is no proposal of programs that explains what would be offered to residential or commercial customers, how much such programs would cost, how the programs would

[4] *See also In re Comm. Rev. of Capacity Charges of Ohio Power Co*., 147 Ohio St.3d 59, 2016- Ohio-1607 at ¶53 (April 21, 2016). *See also, MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St. 3d 306, 312, 513 N.E.2d 337 (1987).

[5] *See In re Application Seeking Approval of Ohio Power Company's Proposal to Enter Into an Affiliate Power Purchase Agreement,* Case No. 14-1693-EL-RDR, Fifth Entry on Rehearing (Apr. 5, 2017) at ¶33 (finding that the outcome of Commission proceedings will be based on the record following a thorough review by the Commission.); *In the Matter of the Application of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019*, Case No. 16-743-EL-POR, Opinion and Order (Nov. 21, 2017) at 6 (documents filed in the Commission's case docket but not admitted at hearing "are not considered evidence regarding the truth of the matters asserted therein."); *see also, In re the 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 (Mar. 31, 2016) at 37 (finding that information outside of the record is not evidence that parties can rely upon).

[6] *In re Comm. Rev. of Capacity Charges of Ohio Power Co*., 147 Ohio St.3d 59, 2016- Ohio-1607 at ¶53 (April 21, 2016); *See also, MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St. 3d 306, 312, 513 N.E.2d 337 (1987).

[7] *In re Application of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019*, Case No. 16-743-EL-POR, Opinion and Order (Nov. 21, 2017) at 6 (documents filed in the Commission's case docket but not admitted at hearing "are not considered evidence regarding the truth of the matters asserted therein.").

be funded, their cost-effectiveness, the projected magnitude of aggregate savings, equity among customer classes, or opt-out provisions.[8]

As part of its Application, AEP Ohio included an EE/PDR concept. In its Staff Report of Investigation, the Commission Staff opposed the Commission adopting that pre-filed proposal. The Settlement agreed to by all of the Signatory Parties required AEP Ohio to withdraw that pre-filed concept (and such withdrawal was without prejudice to any future proposals or positions that AEP Ohio or others may make in future proceedings). With the pre-filed EE/PDR concept withdrawn, neither AEP Ohio, the Signatory Parties, nor the Settlement introduced evidence in support of a specific EE/PDR program in this case.

Apparently recognizing the deficiency in the evidentiary record, the Environmental Advocates attempted to broaden the perceived support for the adoption of an EE/PDR program in this case by pointing to the hearing testimony of AEP Ohio employee Jon Williams as evidence that AEP Ohio strongly supports adoption of an EE/PDR program here.[9] However, while AEP Ohio agreed to make Jon Williams available for cross-examination by the Environmental Advocates, AEP Ohio did not offer to introduce his pre-filed direct testimony or an EE/PDR program into the record.[10] AEP Ohio's counsel noted "*Mr. Williams is appearing at the request of the opposing parties. The Company is not offering his testimony that he filed as part of the Application as part of this proceeding and so he is being made available at the request for cross-examination by the opposing*

[8] *See* Ohio Adm.Code 4901:1-39(B).

[9] Environmental Advocates Initial Brief at 1; ELPC Ex. 2 at 6.

[10] Tr. Vol. V at 914, Lines 15-20.

parties" (emphasis added).[11] Consistent with the terms of the Settlement, AEP Ohio did not support, strongly or otherwise, the adoption of an EE/PDR program in this case through the admission of record evidence.

The Environmental Advocates also did not propose a specific EE/PDR program in this case.

> Q. Mr. Baatz, you did not develop an energy efficiency program for this case; is that correct?
>
> A. Not for this case, no.[12]

Likewise, Mr. Neme also did not develop a specific EE/PDR program for this case.[13]

Failing to introduce their own EE/PDR program, the Environmental Advocates on brief point to the hearing testimony of AEP Ohio employee Jon Williams to show an EE/PDR program is in the record. However, the entirety of Mr. Williams' pre-filed testimony was not admitted into the record. At hearing, only select passages from the document labeled as his pre-filed testimony were admitted.[14]

Moreover, as parties alleged at hearing and IEU-Ohio demonstrated on brief, even some of the portions of the pre-filed testimony that were admitted were in error.[15] Similarly, numerous parties opposed admission of the withdrawn EE/PDR program that was attached to the pre-filed testimony of Mr. Williams but that remained unsponsored by any witness or party at hearing.[16] The Attorney Examiner directed counsel for AEP Ohio

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[11] Tr. Vol. V at 914, Lines 15-20.

[12] Tr. Vol. III at 531.

[13] *Id.* at 597-598.

[14] *See* Attorney Examiner Entry (May 27, 2021).

[15] Tr. Vol. V at 914-915; *Id.* at 997, Lines 14-25; *Id*. at 998, Lines 2-6; *see also* IEU-Ohio Initial Brief at 7-11.

[16] *Id*.

and the Environmental Advocates to work together to come to an agreement to highlight the portions of Mr. Williams' pre-filed testimony and the withdrawn EE/PDR program that were discussed in the course of Mr. Williams' cross-examination, which the parties would be allowed to cite in their briefs. The Attorney Examiner subsequently admitted only those portions of Mr. Williams' pre-filed direct testimony and the withdrawn EE/PDR program that were discussed in the course of Mr. Williams' cross-examination.[17]

The portions of Mr. Williams' pre-filed testimony and the withdrawn EE/PDR program that were admitted into the record do not constitute a complete EE/PDR program proposal. The withdrawn EE/PDR concept included a list of residential, cross-sector, and Electric Transportation programs.[18] But those programs were not introduced into the record or proposed by any other party or witness to this proceeding.

The evidentiary problem for the Environmental Advocates and OPAE is that they did not introduce an actual EE/PDR program into the evidentiary record. Their witnesses relied on the pre-filed testimony of Jon Williams (instead of their own analyses or proposals) and the Environmental Advocates failed to properly introduce the underlying evidence through their calling of Mr. Williams as a witness in the proceeding. Through their examination, the Environmental Advocates and OPAE did not lay the foundation for introduction of the EE/PDR program concept reflected in the pre-filed testimony of Jon Williams. The portions of Jon Williams' pre-filed testimony that explained the EE/PDR measures he envisions for such a program were not admitted into the record. Again, and crucially, the information contained in the portions of the pre-filed but not admitted

[17] *See* Attorney Examiner Entry (May 27, 2021).

[18] See ELPC Ex. 2; *see also*, Attorney Examiner Entry (May 27, 2021) at pages 57-66 of the filing.

testimony are not part of the evidentiary record.[19] The Environmental Advocates and OPAE further failed to introduce through Mr. Williams portions of his pre-filed testimony that their own witnesses relied upon.[20] The Environmental Advocates did not propose an energy efficiency program, through either their own witnesses or through Jon Williams. Therefore, the Commission cannot lawfully adopt an EE/PDR program based upon the current state of the evidentiary record.[21]

B. The record does not contain a cost/benefit analysis for an actual EE/PDR plan.

In addition to the lack of an EE/PDR program proposal in the record, there is also no cost-benefit analysis of a specific EE/PDR program. The Environmental Advocates rely on two items in support of their claim that the record shows that an EE/PDR program will produce benefits. First, they rely on generic benefits they attribute to energy efficiency generally.[22] These claims do not support approval of specific EE/PDR program initiatives (which again are devoid from the record), are overstated, and assume energy savings that are not likely to materialize. Second, the Environmental Advocates seek to rely on an unsupported cost-benefit analysis of the withdrawn EE/PDR program, which ELPC witness Chris Neme copied into his testimony. However, the table (Figure 1) in the attachment to Mr. Williams' pre-filed testimony alleging to provide a cost/benefit analysis was not admitted into the record through Mr. Williams and itself contains additional levels

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[19] *Id*.

[20] Tr. Vol. V at 921, starting at Line 18.

[21] *In re Comm. Rev. of Capacity Charges of Ohio Power Co*., 147 Ohio St.3d 59, 2016- Ohio-1607 at ¶53 (April 21, 2016). *See also, MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St. 3d 306, 312, 513 N.E.2d 337 (1987).

[22] Environmental Advocates Initial Brief at 9-18.

of hearsay.[23] Accordingly, the record lacks a cost-benefit analysis demonstrating that any specific energy efficiency initiatives would be reasonable to adopt in this proceeding.

Neither ELPC Witness Chris Neme nor OEC Witness Brendan Baatz conducted their own independent cost-benefit analysis of the measure in an actual EE/PDR program. Neither witness proposed a specific EE/PDR program and analyzed it, nor did they conduct a cost-benefit analysis of the withdrawn EE/PDR program. From OEC Witness Brendan Baatz:

> Q. Your testimony does not contain a utility cost test analysis of the AEP-specific energy efficiency program, correct?
>
> A. No, it does not.
>
> . . .
>
> Q. You did not conduct a total resource cost test analysis of the energy efficiency program attached to the testimony of AEP witness Jon Williams, correct?
>
> A. No, I did not.[24]

Accordingly, as is apparent from the record, OEC Witness Brendan Baatz has not conducted a cost-benefit analysis of the EE/PDR program withdrawn by AEP Ohio. Likewise, ELPC Witness Chris Neme did not conduct an analysis of the withdrawn EE/PDR program but instead copied Figure 1 (of which he did not create or conduct the underlying analyses) into his testimony.[25] While OPAE echoes on brief the position of the Environmental Advocates for the Commission to adopt an EE/PDR program in this case, OPAE's witness did not address an EE/PDR program at all in his testimony.

Although no party supported and introduced into the record a cost/benefit analysis of an actual EE/PDR program, the Environmental Advocates nonetheless cite (and copy-

[23] *Id*. at 11-14, including Figure 1.

[24] Tr. Vol. III at 531-532.

[25] ELPC Ex. 1 at 24; Environmental Advocates Initial Brief at 13.

paste into their Initial Brief) Figure 1 from the pre-filed but not admitted portion of Jon Williams' testimony. Again, this non-record evidence was copied from Jon Williams' pre-filed testimony and inserted into ELPC Witness Chris Neme's pre-filed testimony (and was subject to a motion to strike for hearsay, an issue preserved in IEU-Ohio's Initial Brief). Figure 1 from the withdrawn EE/PDR program purports to outline the alleged projected benefits of that program.

However, ELPC Witness Neme conceded at hearing that he could not sponsor, authenticate, or validate any of the information contained in the table:

> Q. You did not create the table [Figure 1] on page 24 of your testimony, correct?
>
> A. That's correct. This table comes directly from Mr. Williams' testimony.
>
> Q. The UCT benefits here, which is the utility cost test, you did not develop those, correct?
>
> A. That's correct.
>
> Q. Same with the RVT at the end of that table, you did not correct -- independently calculate those values, correct?
>
> A. That's correct.
>
> Q. In fact, you did not independently support this – the creation of this table at all, correct?
>
> A. That's correct.[26]

Witness Neme could not authenticate, support, or validate any of the information in Figure 1 at all, and the Attorney Examiner should have stricken it from the record. At a minimum, the Commission should give no weight to the Table in Witness Neme's testimony that he could not authenticate, support, or validate. Parties could therefore not cross examine Witness Neme about any of the information in the Table or the conclusions

[26] Tr. Vol. III at 601-602.

that could perhaps be drawn from the Table. Parties would be unduly prejudiced if the Commission were to rely on this Figure as a basis to modify the Settlement and adopt an EE/PDR program in this case.

Because Figure 1 was, and remains, hearsay (and in fact contains hearsay within hearsay[27]), IEU-Ohio moved to strike Figure 1 from the testimony of Witness Chris Neme. While that motion to strike was denied at hearing, IEU-Ohio preserved its challenge to the inclusion of Figure 1 as part of ELPC Exhibit 1 (witness Neme's prefiled testimony) in IEU-Ohio's Initial Brief.[28] For the reasons stated in IEU-Ohio's Initial Brief, the Commission should strike Figure 1 from ELPC Witness Neme's testimony, strike it from the Initial Brief of the Environmental Advocates, or at a minimum give now weight to Figure 1 or its purported conclusions in the Commission's decision-making.

C. The generic EE/PDR benefits referenced by the Environmental Advocates, even if true, would not demonstrate the reasonableness of a specific EE/PDR plan. Moreover, their claimed benefits of generic EE/PDR measures appear overstated.

Both ELPC Witness Neme and OEC Witness Baatz testified, generally, that EE/PDR measures produce benefits for customers in excess of costs.[29] The generic testimony about theoretical claimed benefits of EE/PDR measures are insufficient to form

[27] At hearing Mr. Williams testified that the values in Figure 1 were based in part on market assumptions provided to him by a separate division of AEP, the AEP Fundamentals Team. Tr. Vol. V at 988-989. Mr. Williams testified that he is not a part of that team. *Id.* Accordingly, even if Mr. Williams had been asked about the Figure 1 at hearing, he alone could not have authenticated the figure and provided a basis for its admission into the evidentiary record. In fact, the last 2 PUCO cases tied to AEP Ohio's fundamentals forecast (Cases Nos. 14-1693-EL-RDR, *et al.* and 18-501-EL-FOR, *et al.*) resulted in many hours of cross-examination on the AEP Ohio witness who sponsored the fundamentals forecast in those proceeding. The fundamental forecast, and the values contained in that forecast, would have likely generated significant debate in the proceeding had a party actually sought to sponsor and authenticate the information in Figure 1.

[28] *See* IEU-Ohio Initial Brief at 7-11.

[29] ELPC Ex. 1; OEC Ex. 1.

a basis for the Commission to adopt an EE/PDR program in this proceeding.[30] Moreover, the theoretical benefits they claim are likely overstated.

For example, the Environmental Advocates argue that "[EE/PDR] programs produce long-term benefits related to reducing the need for new power plants."[31] But the need for new power plants is dependent upon numerous factors, including PJM Interconnection LLC ("PJM") energy prices, capacity prices, reserve margins, and other factors. To this end, PJM projects generally flat demand through June 2024 but is forecasting significant capacity increases.[32] PJM currently is not just at a point of excess capacity (PJM's capacity auction clears roughly 16% capacity resources in excess of projected peak demand[33]), but has cleared historically high capacity reserve margins in excess of 16%, and is projecting future capacity reserve margins well in excess of 16%. In fact, PJM estimates a current installed capacity reserve margin of approximately 31%, and projects that to increase to 35.9% by June 1, 2024.[34] From a theoretical level, and because PJM is awash in excess generation capacity, there would need to be roughly a 20% reduction in PJM's installed capacity reserves before one could attribute avoided new generation capacity costs to a peak demand reduction measure.

Moreover, the increases in capacity that PJM is forecasting is being driven, in part, by the planned construction of additional renewable generation.[35] Thus, the advocacy

[30] R.C. 4903.09.

[31] *Id*. at 12.

[32] Tr. Vol. III at 538, Lines 7-17; IEU-Ohio Ex. 1.

[33] *See* Tr. Vol. III at 534-36; IEU-Ohio Ex. 1 (The PJM capacity reserve margin was 15.5% for the 2020/21 delivery year and 15.1% for the 2021/22 delivery year, and is projected to be 14.9% for the 2022/23 delivery year, and 14.8% for the 2023/24 delivery year).

[34] *See* IEU-Ohio Ex. 1.

[35] *Id*. at 539, Lines 3-7; IEU-Ohio Ex. 1.

and business decisions from other entities, including environmental groups, that is expected to result in the construction of new generation capacity is directly at odds with theoretical EE/PDR benefit assumptions that EE/PDR measures will result in a need to not construct new generation capacity.

It is not just generation savings that are overstated by the Environmental Advocates. OEC Witness Baatz confirmed on cross-examination that the projected bill savings of energy efficiency that he provided in his pre-filed testimony were based upon current utility tariffs of *all* Ohio's EDUs, not just AEP Ohio's tariffs.[36] Further, the analysis used the Standard Service Offer rate for generation, despite the fact that customers have the option to shop for generation service with a competitive retail electric service ("CRES") provider.[37] He then confirmed that if the CRES rate is less than the standard service offer rate, customers would save less than what he projected.[38]

The theoretical claimed benefits of EE/PDR measures are an insufficient basis for the Commission to rely upon in its decision making. In any event, there are significant holes in the claimed theoretical benefits, which further emphasize why it would be inappropriate for the Commission to act without record evidence as OPAE and the Environmental Advocates request.

D. There is no statutory requirement for an electric distribution utility's base distribution rates to contain an EE/PDR plan.

There is no basis in Ohio law for the Environmental Advocates/OPAE proposition that electric distribution rates are inherently unjust and unreasonable if they do not contain

[36] Id. at 539-541.

[37] *Id*.

[38] *Id*.

an EE/PDR program. One need look no further than to the plethora of electric base rate cases authorized by the Commission over many decades that do not contain an EE/PDR program. The interpretation of R.C. 4905.70 by the Environmental Advocates and OPAE is without merit and should be rejected.

The Environmental Advocates and OPAE argue that the Settlement violates important regulatory principles because without an EE/PDR program the Settlement does not comport with AEP Ohio's obligation to provide just and reasonable service.[39] Similarly, the Environmental Advocates and OPAE argue that providing AEP Ohio's customers with just and reasonable rates *requires* an EE/PDR program.[40] In support of their argument, the Environmental Advocates and OPAE misconstrue the first sentence of R.C. 4905.70 and then disregard the second sentence.

R.C. 4905.70 provides that:

> "The public utilities commission shall initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption, promote economic efficiencies, and take into account long-run incremental costs. Notwithstanding [other sections] of the Revised Code, the commission shall examine and issue written findings on the declining block rate structure, lifeline rates, long-run incremental pricing, peak load and off-peak pricing, time of day and seasonal pricing, interruptible load pricing, and single rate pricing where rates do not vary because of classification of customers or amount of usage."

The statute is not ambiguous, nor has any party suggested otherwise, and therefore the Commission is required to apply the statute as written.[41] Nowhere in R.C.

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[39] Environmental Advocates Brief at 7-9.

[40] *Id*. at 9-18.

[41] *See Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St.3d 50, 524 N.E.2d 441 (1988), paragraph three of the syllabus; *see also Griffith v. Aultman Hosp.*, 146 Ohio St.3d 196, 2016-Ohio-1138, 54 N.E.3d 1196, ¶ 18 ("We apply the statute as written . . . and we refrain from adding or deleting words when the statute's meaning is clear and unambiguous").

4905.70 is the Commission required to adopt an EE/PDR program in a distribution rate case. While the Environmental Advocates and OPAE assert otherwise, they cite to zero precedent that electric distribution rates are unjust and unreasonable in the absence of an EE/PDR program for all customers.

Moreover, the Commission has already authorized programs for AEP Ohio that are consistent with R.C. 4905.70. The statute directs the Commission to consider "lifeline rates," which are assistance programs for low income customers (in the telephone space). AEP Ohio has a Percentage of Income Payment Plan for low income customers. Further, the statute directs the Commission to consider peak load and off-peak pricing, time of day rates, and seasonal pricing. Shopping customers (especially businesses) are authorized to enter into competitive electric supply contracts based on their peak load consumption, as well as to enter into contracts for time-of-use pricing. Through AEP Ohio's gridSMART program, smart meter deployment will further assist residential customers with time-of-use pricing, and, in the meantime, AEP Ohio offers a time-of-use residential product. Additionally, the statute suggests the Commission should consider interruptible programs. To this end, in AEP Ohio's electric security program ("ESP") proceeding, the Commission reauthorized an interruptible program that encourages large customers to reduce their peak demand when the electric grid is constrained. Accordingly, the Commission has authorized a number of programs that are consistent with the statute.

While R.C. 4905.70 clearly does not mandate that the Commission impose an EE/PDR program in an electric distribution rate, to the extent the Commission were required to consider the statute in this proceeding, the Commission has clearly already authorized programs that are consistent with the statute. The statute does not provide a

basis for the Commission to modify the Settlement to impose an EE/PDR program that is not even contained in the record. And, in any event, in 2019 Ohio law changed and repealed the mandate for certain EE/PDR programs. Even before the law changed, and especially afterwards, the policy of the state of Ohio has been to allow mercantile and other business customers that do not want to pay mandatory charges for energy efficiency to opt-out of these charges and programs. The current legislative policy of the state of Ohio is clear that historic mandatory energy efficiency programs have been terminated and any future plans must include an opt-out for large customers.

E. There is no basis or supporting evidence for the Commission to make riders volumetric.

The Commission should reject OPAE's request for the Commission to modify the Stipulation to make certain riders volumetric. In prior cases, the Commission has rejected OPAE's requests to make riders volumetric without supporting detail, analysis, or customer rate impacts.[42] The Commission has held on this issue that "[a] theoretical argument that there is a likelihood of an improper transfer of costs . . . is insufficient."[43] OPAE has provided no evidence to support their theoretical claims regarding transferring of costs or harm to consumers resulting from riders being based upon fixed charges. Additionally, OPAE does not provide a basis for the Commission to modify the Stipulation to make riders established in an ESP into volumetric riders in a distribution rate case. Put simply, riders created in an ESP proceeding cannot be modified in a distribution rate case

[42] *In re Application of The Ohio Development Services Agency for an Order Approving Adjustments to the Universal Service Fund Rider of Jurisdictional Ohio Electric Distribution Utilities*, Case No. 17-1377-EL-USF, Opinion and Order (Oct. 11, 2017) at ¶ 30-37, 52.

[43] *Id*. at ¶ 52.

to make them volumetric. Accordingly, the Commission should not modify the Settlement in the manner suggested by OPAE.

F. The Settlement is the product of serious bargaining by capable and knowledgeable parties.

The Environmental Advocates argue that there is "no evidence to support that negotiations were inclusive in terms of parties' positions actually mattering."[44] This argument is patently without merit and cannot be substantiated. The negotiations in this case were inclusive, extensive, and serious.

The substance of settlement discussions are by their nature, by the Ohio Rules of Evidence, and by Commission precedent supposed to remain confidential. At hearing, and again on brief, the Environmental Advocates seek to upset this and claim, incorrectly, that settlement discussions need not remain confidential for purposes of addressing the first prong of the 3-part stipulation test.[45] In support of this claim they assert that the Attorney Examiners' ruling that confidential settlement discussions could not be introduced into the record contravened Ohio Rule of Evidence 408 regarding admissibility of settlement agreements.[46] However, Ohio Rule of Evidence 408 plainly says "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible."[47] While it is true that exceptions exist for certain purposes such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation, the Environmental Advocates fail to identify precisely which exception applies in this case. Of course, none of the exceptions apply to the first

[44] Environmental Advocates Initial Brief at 5.

[45] *Id*. at 6-7.

[46] *Id*.

[47] Ohio R. Evid. 408.

prong of the Commission's 3-part test. Accordingly, the Attorney Examiners properly sustained objections at hearing to prevent the Environmental Advocates from seeking to provide evidence of conduct or statements made during settlement negotiations.

Moreover, the Environmental Advocates theory would require the signatory parties to any stipulation to prove the negative about the merits of any settlement offer not incorporated into a final publicly-filed stipulation. Such a concept, even if valid, would require signatory parties to not only offer evidence in support of a stipulation, but would place the burden on signatory parties to substantively discredit the merits of the positions of all parties opposing a settlement. Thankfully, such endless and unnecessary litigation can be avoided because, as demonstrated above, the concept has no basis in law or practice.

In any event, this standard is not the standard required by the Commission or Ohio Supreme Court for settlements. The first prong of the 3-part test prohibits settling parties from excluding any class of customers from settlement negotiations.[48] The first prong of the test asks if there was serious bargaining. The first prong of the test asks if those conducting the bargaining were capable and knowledgeable parties. There is evidence in the record on all of these points.[49] In fact, settlement negotiations occurred over many months, and the Environmental Advocates were invited to and participated in the settlement meetings.[50]

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[48] *In re Ohio Edison Co*., 146 Ohio St.3d 222, 54 N.E.3d 1218 (2016); *Time Warner AxS v. Pub. Util. Comm*., 75 Ohio St.3d 229, 233, 661 N.E.2d 1097 (1996).

[49] AEP Ohio Ex. 6 (Moore Testimony) at Page 16, Lines 20-23; OCC Ex. 1 (Willis Testimony) at 5; Tr. Vol. II (Lipthratt Testimony) at 424, Lines 11-16; *see also* Initial Briefs of the Signatory Parties that demonstrate how the Settlement satisfies all 3 prongs of the 3-part stipulation test.

[50] AEP Ohio Ex. 6 (Moore Testimony) at 16 ("All parties were invited to these meetings and no party was left out of the opportunity to negotiate").

II. CONCLUSION

The Commission should adopt the Settlement without modification because it passes the Commission's three-prong test for evaluating the reasonableness of a settlement. The Settlement is the product of serious bargaining among capable and knowledgeable parties, benefits customers and the public interest, and does not violate any important regulatory principle or practice. Ohio law does not require a Settlement in a distribution rate case to include funding for an EE/PDR program. The Settlement provides numerous benefits to a broad range of customers without such a program. Further, the Settlement provides those benefits by resolving issues that should be resolved pursuant to the statutory scheme set forth in R.C. 4909. The generic benefits of an EE/PDR program alleged by the Environmental Advocates and OPAE do not support modification of the Stipulation. Even so, the evidentiary record is devoid of any specific EE/PDR program that the Commission could adopt. Accordingly, IEU-Ohio respectfully requests that the Commission adopt the Settlement without modification. The Settlement, as a package, presents a just and reasonable result for ratepayers and the public interest.

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 the following parties. In addition, I hereby certify that a service copy of the foregoing *Reply Brief of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio, to the following parties of record this 6th day of July 2021, *via* electronic transmission.

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