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

POST-HEARING REPLY BRIEF
OF ENVIRONMENTAL LAW & POLICY CENTER, OHIO ENVIRONMENTAL COUNCIL, AND NATURAL RESOURCES DEFENSE COUNCIL

I. INTRODUCTION

On June 14, 2021, parties in this proceeding submitted initial briefs addressing the proposed Stipulation that Signatory Parties, including the Ohio Power Company ("AEP Ohio"), filed to resolve this rate case. The Environmental Law & Policy Center, Ohio Environmental Council, and Natural Resources Defense Council (collectively, "Environmental Advocates") filed a brief in opposition to the Stipulation. The Environmental Advocates explained that the non-unanimous Stipulation fails the Commission's three-prong test, both through the lack of serious bargaining in the stipulation process and its violation of regulatory principles requiring just and reasonable service, including energy efficiency measures. Environmental Advocates emphasize that AEP Ohio initially included energy efficiency programs in its Application, and then withdrew those programs in order to achieve a stipulation. Numerous signatories to the Stipulation filed briefs in support of the settlement, and in this reply brief, the Environmental Advocates respond to those Signatory Parties' main arguments.

The Environmental Advocates recognize the resource value of settlements and how settlements may alter initial proposals. However, even if some parties reach agreement, the Commission's responsibility to enforce evidentiary standards and protect AEP Ohio's customers does not change. "The [C]ommission may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing." *Duff v. Pub. Utilities Comm'n*, 56 Ohio St. 2d 367, 379, 384 N.E.2d 264, 273 (1978). Essentially, AEP Ohio met with Staff, OCC, and the industrial customer groups and decided on a compromise that excluded the energy efficiency programs. The Environmental Advocates were not part of those side discussions, and our views were not represented in those discussions. The Signatory Parties to the Stipulation and Attorney Examiners then made it extremely difficult for the Environmental Advocates to create a record on the merits of energy efficiency. The fact that the Attorney Examiners excluded all but short excerpts of AEP Ohio witness Williams' testimony on efficiency from the record speaks for itself. The initial briefs of the Signatory Parties also reflect that desire to avoid a discussion of the merits of energy efficiency. The Commission needs to reject or modify the Stipulation so that it contains a robust DSM program, thereby ensuring just and reasonable rates for all consumers.

II. ARGUMENT

A. The Signatory Parties Have Failed to Demonstrate Serious Bargaining.

The Signatory Parties have the burden to prove that their Stipulation satisfies the Commission's three criteria, including that there was serious bargaining leading to the stipulation and that it does not violate any important regulatory principles. *See In re Ohio Power Co.*, Case Nos. 14-1693-EL-RDR *et al.*, Opinion & Order at 18 (Mar. 31, 2016). The Signatory Parties' burden of proof is not merely an evidentiary technicality. It requires the Parties to "prove a positive point"—including that the Stipulation was the result of *serious* bargaining and does not

violate important regulatory principles. The Environmental Advocates do not have to prove the opposite. *In re Application of Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 488–89, 967 N.E.2d 201 (2012). Because the Signatory Parties fail to offer a credible rebuttal of the Environmental Advocates' explanation of how the Stipulation fails the three-part test, the Signatory Parties have not met their burden of proof.

In their initial briefs, the Signatory Parties provide only conclusory statements to support their assertion that there was serious bargaining.[1] Environmental Advocates briefed this issue extensively in our initial brief and will not repeat those arguments here. However, OCC's Initial Brief raises one new point that we refute. OCC argues, that "no party opposing the Settlement presented witness testimony to refute the testimony of OCC witness Willis, AEP Ohio witness Moore, and PUCO Staff witness Lipthratt" on the serious bargaining prong. OCC Br. at 5. This argument again misunderstands the burden of proof. The Signatory Parties must show that the Stipulation was the result of not simply a series of discussions, but actual *serious* bargaining about the issues raised in the Application. As the Environmental Advocates' Initial Brief showed, the record contains no evidence as to the seriousness of the bargaining, and the Signatory Parties successfully opposed all efforts to get any details about the bargaining process before the Commission. Environmental Advocates Br. at 6. With so little evidence to base its decision on, the Commission cannot find that the Signatory Parties have satisfied the first prong of the stipulation test.

[1] Because the Signatory Parties attempted to anticipate the Environmental Advocates' arguments before reading the initial briefs, some parties offered arguments against points that the Environmental Advocates have not made. For example, Kroger's initial brief assumes that the Environmental Advocates focus on the second prong of the stipulation test. *See* Kroger Br. at 9. The Environmental Advocates do not address these issues in their reply.

B. The Stipulation Violates Important Regulatory Principles

The Signatory Parties' initial briefs show they have failed to meet their burden of proving that the Stipulation does not violate serious regulatory principles. AEP Ohio argues that the Stipulation does not violate this prong because "there is no legal requirement that the Company address its DSM proposal in this base case proceeding" and it may "advance any proposal related to DSM" in a future case. AEP Ohio Br. at 20. The Industrial Energy Users ("IEU-Ohio") go into even less detail, asserting that the Settlement "presents a just and reasonable resolution of the issues in this proceeding," without discussing the regulatory principles to which the Stipulation must conform. *See* IEU-Ohio Br. at 5–7. These arguments fail to explain how, without a DSM program, the Stipulation provides just and reasonable service and satisfies Ohio policy in favor of energy conservation. *See id.* at 7–9. As the Environmental Advocates discussed in their initial brief, the absence of such a cost-effective program violates regulatory principles requiring just and reasonable service because customers will be required to pay for electricity that they do not need. Environmental Advocates' Br. at 7–9. Given this evidence, the Stipulation fails.

C. The Commission Must Either Reject or Modify the Stipulation to Include a Robust Demand-Side Management Plan.

The Commission has the discretion to modify stipulations and has often done so to ensure the settlement leads to just and reasonable service. The Environmental Advocates argued in their initial brief for the Commission to use this discretion to increase the DSM portfolio budget from AEP Ohio's original application, but they also endorsed including the originally proposed DSM program in the final stipulation. There is ample support for either option.

In past energy efficiency cases, for example, AEP Ohio ran an energy efficiency program with a budget of approximately $65 million. *See generally In the Matter of the Annual Portfolio Status Report Under Rule 4901:1-39-05(C), Ohio Admin. Code, by Ohio Power Co.*, Case No.

21-139-EL-EEC. That figure is just about double what AEP Ohio originally suggested in its Application. *See* ELPC Ex. 1 at 8. AEP Ohio has essentially conducted its own analysis of an expanded plan; the Commission need only look to the regular reports from AEP Ohio on the energy efficiency portfolio programs it ran before. There are numerous reports and studies showing the efficacy of those programs and their benefits to customers. Whether the Commission expands the proposed DSM Plan or keeps it at the spending level AEP Ohio originally proposed, significant evidence shows how the program would benefit customers.

D. Ohio Law Allows for an AEP Ohio Demand-Side Management Plan.

1. House Bill 6 Did Not Eliminate Energy Efficiency Programs.

Several parties argue against including a DSM program in this rate case based on a clear misreading of Ohio law. Both Kroger and the Ohio Manufacturers' Association Energy Group ("OMAEG") assert that House Bill 6's elimination of mandatory energy efficiency portfolio targets means that AEP Ohio is barred from running any energy efficiency program. *See* Kroger Br. at 11; OMAEG Br. at 26. According to OMAEG, "[t]here is no Ohio law or rule that allows an EDU to implement voluntary EE programming with mandatory cost recovery from customers." OMAEG Br. at 26. This argument entirely ignores those sections of the Ohio Revised Code that continue to embrace and even require energy efficiency measures. For example, the Ohio Revised Code includes in state policy that the Commission ensure customers have access to "adequate, reliable, *efficient*, nondiscriminatory, and *reasonably priced* retail electric service." O.R.C. 4928.02(A) (emphasis added). Statutory language also mandates energy efficiency programs, stating that "[t]he public utilities commission shall initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption." O.R.C. 4905.70. Neither OMAEG nor Kroger cite any law or evidence of legislative intent that House Bill 6 overrode these directives and eliminated voluntary energy

efficiency programs. The law still requires AEP Ohio to provide just and reasonable services, and AEP Ohio itself argued the same before it withdrew the efficiency plan in order to get the Stipulation. AEP Ohio did not withdraw the proposed DSM program for a substantive or legal reason. The proposal was absent from the Stipulation purely because AEP Ohio wanted to reach a compromise.

These Signatory Parties further claim a DSM program would go against the Commission's statement in Duke's recent case that "in light of H.B. 6, the future for [energy efficiency] programs in this state will be best served by reliance upon market-based approaches such as those available through PJM and competitive retail electric service providers." OMAEG Br. at 26 (quoting *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 ¶ 9 (June 17, 2020)); Kroger Br. at 10–11 (same). That statement was merely dicta in a case where the Commission ruled against Duke's shared savings proposal, before the Commission reached any conclusions on the merits of voluntary efficiency programs. The Commission made no evaluation of the utility-run DSM program. That record exists here, and, as the Environmental Advocates have shown, the "market-based approaches" simply cannot achieve the same results or reach the same number of customers as an AEP Ohio-run program .

Finally, Kroger claims that because AEP Ohio voluntarily withdrew its DSM proposal, a Commission decision rejecting or modifying the Stipulation to include a DSM program "would conflict with both the letter and spirit of H.B. 6." Kroger Br. at 11. Kroger offers no evidence, let alone explanation, of House Bill 6's legislative intent. *See id.* Further, Kroger's claim directly conflicts with the statements made on the floor of the House by Representative Seitz while

arguing for the passage of H.B. 6. Representative Seitz stated, in response to a comment that H.B. 6 prohibited future energy efficiency programs:

> By the way, contrary to my colleagues statements a few minutes ago section 4905.70 of the Ohio Revised Code, which remains in effect when we pass this bill, will allow utilities to file for voluntary energy efficiency programs at the Public Utilities Commission of Ohio so it is not true that we are prohibiting voluntary energy efficiency programs initiated by the utilities. And I'm given to believe that at least some of them intend to pursue those opportunities just as they have so successfully done over the years with natural gas where we have a similar program and it's worked quite well without any mandates at all.[2]

Kroger's argument misunderstands both House Bill 6 and the Environmental Advocates' requested relief. House Bill 6 did nothing to change Ohio's underlying policy mandate in favor of energy efficiency, nor did it eliminate the possibility that utilities could run energy efficiency programs. A Commission directive to restore an efficiency program that the utility originally proposed is hardly the mandatory portfolio programs of the pre-H.B. 6 era. AEP Ohio has signaled its willingness to run a program with its originally filed DSM proposal. Requiring AEP Ohio to implement the program it originally proposed does conflict with the letter or spirit of House Bill 6. It addresses a flaw in the Stipulation—and the Stipulation process itself.

2. This Rate Case Is the Proper Forum for Shaping a DSM Program.

Both AEP Ohio and OMAEG point to the Commission's scheduled energy efficiency workshops as evidence that the Commission should not modify the Stipulation to include an AEP Ohio DSM program. *See* AEP Ohio Br. at 20; OMAEG Br. at 27. AEP Ohio argues:

> [G]iven the current state of energy efficiency in Ohio, that the Commission has initiated workshops to allow interested stakeholders to provide input on energy efficiency programs, and that there is no legal requirement that the Company address its DSM proposal in this base rate case, the Company agreed to withdraw the DSM Plan, without prejudice.

[2] Ohio House of Representatives, July 23, 2019, https://ohiochannel.org/video/ohio-house-of-representatives-7-23-2019 at 30:57-31:37. Last accessed July 5, 2021.

AEP Ohio Br. at 20. Yet by removing the DSM program, AEP Ohio harms customers and violates an important regulatory principle in this case. Not only has the Commission not yet started the workshop process, but it also has not yet indicated what the process will look like or what it will involve. Given that the General Assembly has eliminated the energy efficiency targets, rate cases are the optimal place to consider DSM. Energy efficiency should be analyzed in the context of AEP Ohio's options to serve its customers. The Commission should compare demand- and supply-side options together in the same docket. Moreover, AEP Ohio itself argued that the DSM program is in its customers' best interest among the options the utility has for serving its customers. The Commission has AEP Ohio's rate case before it now has an obligation to ensure AEP Ohio's customers receive just and reasonable service.

E. The Commission Should Uphold the Attorney Examiners' Rulings on the Admission of Environmental Advocates' Exhibits.

During the course of the hearing, parties raised issues regarding the admission of testimony into evidence. IEU-Ohio urges the Commission to overrule the Attorney Examiners' denial of its motions to strike the testimony of OEC witness Baatz and ELPC witness Neme. It asserts that both testimonies are "replete with hearsay." IEU-Ohio Br. at 7. IEU-Ohio asserts two types of hearsay are present in the testimonies: (1) quotations and citations to Jon Williams' pre-filed testimony that the Attorney Examiners did not admit at the hearing; and (2) the use of third-party studies. IEU-Ohio Br. at 8. The brief explains that "Jon Williams did not provide any direct witness testimony and much of the cross-examination conducted by the Environmental Advocates was conducted on matters or documents that were not admitted or outside the scope of the evidentiary record." IEU-Ohio Br. at 9. IEU-Ohio also asserts that Mr. Baatz's and Mr. Neme's use of third-party reports in their testimony is hearsay because "none of the authors of

the third-party reports were called to sponsor the reports sought to be relied upon in this proceeding." IEU-Ohio Br. at 10.

Even should the Commission find hearsay, it is not bound to strike the challenged portions of Mr. Baatz's and Mr. Neme's testimonies. As IEU-Ohio admits, "the Commission has used its discretion to deviate from the hearsay standard for some documents that might otherwise be excluded as hearsay." IEU-Ohio Br. at 10. The Ohio Supreme Court has repeatedly recognized "that the commission is not stringently confined by the Rules of Evidence" and has "very broad discretion in the conduct of its hearings." *Greater Cleveland Welfare Rights Org., Inc. v. Pub. Util. Comm'n of Ohio*, 2 Ohio St.3d 62, 68, 422 N.E.2d 1288 (1982); *see also, e.g.*, *Chesapeake & Ohio Ry. Co. v. Pub. Util. Comm.* 163 Ohio St. 252, 263, 126 N.E.2d 314 (1955) ("[T]he Public Utilities Commission, being an administrative body, is not and should not be inhibited by the strict rules as to the admissibility of evidence which prevail in courts . . . ."). The Commission has explained that the concerns about hearsay simply do not apply in the context of a Commission proceeding:

> We note that hearsay rules are designed, in part, to exclude evidence, not because it is not relevant or probative, but because of concerns regarding jurors' inability to weigh evidence appropriately. These concerns are inapplicable to administrative proceedings before the Commission, as the Commission has the expertise to give the appropriate weight to testimony and evidence.

In the Matter of the Application of Ohio Power Co. & Columbus S. Power Co. for Auth. to Merge & Related Approvals, No. 10-2376-EL-UNC, Opinion & Order at 13 (Dec. 14, 2011). Because the Commission has the expertise to assess the weight and value of the testimony presented, it should not overturn the Attorney Examiners' rulings on the hearsay objections.

Should the Commission strictly apply judicial rules of evidence to this administrative proceeding, it should still deny IEU-Ohio's renewed motion. The statements IEU-Ohio challenges in the testimony are not hearsay or are otherwise admissible. By its nature, expert

witness testimony routinely contains opinions from witnesses based on analysis and studies they did not conduct themselves. Expert witnesses render opinions based on studies they believe to be reliable and the PUCO determines the weight to give the witnesses' opinions. The challenged portions of the testimonies are admissible under Rule 703 as facts "upon which an expert bases an opinion." Both Mr. Baatz and Mr. Neme have extensive experience evaluating energy efficiency plans, and the Commission can judge for itself the reliability of the underlying documents.

The Attorney Examiners' ruling reflects this premise. Attorney Examiner See noted that "AEP has put forth in its Application an energy efficiency and demand side management proposal" and that the attorney examiners would "allow the Commission to determine the weight to give to testimony and other evidence on the subject." Tr. Vol. III at 508 ln. 22–24; *id.* at 509 ln. 1–3. She added that "to the extent we have any hearsay, the Commission is more than capable of dealing with that issue." *Id.* at 509 ln. 9–11. As to the reports, Attorney Examiner See explained that the "reports offered by Mr. Neme and noted in his testimony are in support of his opinion, and counsel for the parties may cross-examine Mr. Neme on that portion of his testimony and information that he's offered or drawn from the reports that are cited in his testimony." *Id.* at 589 ln. 1–6.

Moreover, the quotations and excerpts from Jon Williams' withdrawn testimony in support of the initial application are admissions of party-opponent. As Ohio Rule of Evidence 801 explains, a statement is not hearsay if it is offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Ohio R. Evid. 801(D)(2).

III. CONCLUSION

AEP Ohio filed its Application with a DSM program that it acknowledged would save customers money, and benefit even those customers who do not directly participate. Despite being a key component of "just and reasonable" service, an important regulatory principle, the final Stipulation excludes that program because AEP Ohio sacrificed it to satisfy particular Signatory Parties. This process lacked serious bargaining, and the elimination of efficiency programs violates the core principle of just and reasonable service. We therefore urge the Commission to reject the Stipulation, or modify it to include a DSM program of at least the same size and scope as AEP Ohio initially proposed.

Dated July 6, 2021

Respectfully submitted,

/s/ Robert Kelter
Robert Kelter (Counsel of Record)
PHV-2685-2020
Senior Attorney
Environmental Law & Policy Center
35 E. Wacker Drive, Suite 1600
Chicago, IL 60601
(312) 796-3734
rkelter@elpc.org

Caroline Cox (0098175)
Associate Attorney
Environmental Law & Policy Center
21 W Broad St., Suite 800
Columbus, OH 43206
(865) 803-1778
ccox@elpc.org

Counsel for Environmental Law & Policy Center

/s/ Miranda Leppla
Miranda Leppla (0086351) (Counsel of Record)
Trent Dougherty (0079817)
Chris Tavenor (0096642)

Ohio Environmental Council
1145 Chesapeake Ave., Suite I
Columbus, OH 43212
Tel.: 614.487.7506
Fax: 614.487.7510
mleppla@theoec.org
tdougherty@theoec.org
ctavenor@theoec.org

Counsel for Ohio Environmental Council

/s/ Robert Dove
Robert Dove (0092019)
Kegler Brown Hill + Ritter Co., L.P.A.
65 E State St., Ste. 1800
Columbus, OH 43215-4295
Office: (614) 462-5443
Fax: (614) 464-2634
rdove@keglerbrown.com

Counsel for Natural Resources Defense Council

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Post-Hearing Reply Brief* submitted on behalf of the Environmental Law & Policy Center, Ohio Environmental Council, and the Natural Resources Defense Council was served by electronic mail upon the following Parties of Record on July 6, 2021.

/s/ Chris Tavenor
Chris Tavenor (0096642)
Ohio Environmental Council
1145 Chesapeake Ave., Suite I
Columbus, OH 43212
Tel.: 614.487.7506
Fax: 614.487.7510
mleppla@theoec.org
tdougherty@theoec.org
ctavenor@theoec.org

Counsel for Ohio Environmental Council

Email Service List:

donadio@carpenterlipps.com

stnourse@aep.com

ccox@elpc.org

cmblend@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

akhbari@bricker.com

Christopher.healey@occ.ohio.gov

mjsettineri@vorys.com

john.finnigan@occ.ohio.gov

glpetrucci@vorys.com

mkurtz@bkllawfirm.com

eowoyt@vorys.com

kboehm@bkllawfirm.com

mfleisher@dickinsonwright.com

jkylercohn@bkllawfirm.com

mmcdonnell@dickinsonwright.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

dromig@armadapower.com

lmckenna@keyesfox.com

todonnell@dickinsonwright.com

DWilliamson@spilmanlaw.com

jschlesinger@keyesfox.com

rdove@keglerbrown.com

Sarah.Parrot@puco.ohio.gov

Greta.See@puco.ohio.gov

paul@carpenterlipps.com

bojko@carpenterlipps.com

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Summary: Reply Brief of Ohio Environmental Council, Environmental Law & Policy Center, and Natural Resources Defense Council electronically filed by Chris Tavenor on behalf of The Ohio Environmental Council and Environmental Law & Policy Center and Natural Resources Defense Council