

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the 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)	Case No. 20-586-EL-ATA
Company for Tariff Approval)	
)	
In the Matter of the Application of Ohio Power)	Case No. 20-587-EL-AAM
for Approval to Change Accounting Methods.)	

**MEMORANDUM CONTRA NATIONWIDE ENERGY PARTNERS, LLC’S
APPLICATION FOR REHEARING
BY
THE KROGER CO.**

I. INTRODUCTION

On March 12, 2021, The Kroger Co. (Kroger), Ohio Power Company (AEP), the Office of the Ohio Consumers’ Counsel (OCC), and several other Signatory Parties¹ representing diverse interests filed a Stipulation and Recommendation (Stipulation) with the Public Utilities Commission of Ohio (Commission) to resolve complex issues related to AEP’s application for an increase in its base distribution rates.² The Stipulation represents a just and reasonable resolution of the issues in the above-captioned proceeding; is the product of extensive negotiations among parties all of whom have substantial experience practicing before the Commission; as a package, secures substantial benefits for AEP’s customers and the public interest; and is consistent with

¹ The Signatory Parties to the Stipulation are as follows: AEP; Staff of the Commission; OCC; Kroger; the Ohio Manufacturers’ Association Energy Group; the Ohio Hospital Association; Ohio Energy Group; Industrial Energy Users-Ohio; One Energy; Clean Fuels Ohio; Charge Point, EVgo; Walmart Inc.; and the Ohio Cable Telecommunications Association.

² 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.

Commission precedent and advances important regulatory principles. Notwithstanding the foregoing, certain parties, including Nationwide Energy Partners, LLC (NEP), opposed the adoption of the Stipulation based on a relatively limited subset of issues.³

Kroger and the other parties to the proceeding participated in an evidentiary hearing regarding the Stipulation that commenced on May 12, 2021 and concluded on May 18, 2021. The parties then filed their Initial Post-Hearing Briefs and Post-Hearing Reply Briefs on June 14, 2021 and July 7, 2021, respectively.⁴ On November 17, 2021, the Commission issued an Opinion and Order (Order) adopting the Stipulation in its entirety and without modification upon finding that the evidentiary record demonstrated that the Stipulation satisfied its three-part test for evaluating the reasonableness of stipulations.⁵

On December 17, 2021, NEP filed an Application for Rehearing requesting that the Commission revisit and second guess its Order and its analysis of the robust evidentiary record that it relied upon.⁶ Although NEP's Application for Rehearing purports to raise eight distinct assignments of error, it merely repackages the same argument—the same argument that the Commission considered and rejected in its November 17, 2021 Order. More specifically, NEP argued and continues to argue for a self-serving “low-load factor pilot program” and/or a “low-load factor tariff” without presenting any thorough analysis of how such proposals will impact other customers or AEP or how such proposals are justified.⁷ NEP's Application for Rehearing

³ Parties that oppose the Stipulation include: NEP; Armada Power LLC (Armada); Interstate Gas Supply, Inc. (IGS); Direct Energy Business LLC & Direct Energy Services LLC (Direct); Ohio Environmental Council (OEC); Environmental Law & Policy Center (ELPC); Natural Resources Defense Council (NRDC); and Ohio Partners for Affordable Energy (OPAE) (collectively, hereinafter “Opposing Parties”).

⁴ See Entry at ¶ 10 (December 21, 2021); see Kroger's Initial Post-Hearing Brief (June 14, 2021); Kroger's Post-Hearing Reply Brief (July 7, 2021).

⁵ See Order at ¶ 1 (November 17, 2021).

⁶ See NEP's Application for Rehearing (December 17, 2021).

⁷ See NEP Exhibit 35, Notice of Witness Substitution at 2 (May 5, 2021).

also does not adequately address the pertinent legal standard, the Commission’s three-part test and related precedent. Finally, adopting NEP’s proposals would substantially alter the Stipulation as a package, could cause parties to withdraw from the Stipulation, prolong litigation, and jeopardize the numerous benefits that the Stipulation secured for customers and the public collectively.

In accordance with Ohio Adm. Code 4901-1-35(B) and the Commission’s December 21, 2021 Entry,⁸ Kroger hereby files its Memorandum Contra NEP’s Application for Rehearing.

II. ARGUMENT

A. **The Commission’s November 17, 2021 Order Already Considered and Rejected the Same Argument Raised in NEP’s Application for Rehearing.**

Even a cursory review of NEP’s eight assignments of error in its Application for Rehearing reveal that they essentially are all the same argument: that the Commission purportedly erred by not adopting its low-load factor proposal(s), which consist of a low-load factor pilot program and/or a low-load factor tariff. Specifically, NEP alleged the following:⁹

1. The Commission acted unreasonably and unlawfully by not considering **low-load factor** ratepayers when determining that the Stipulation as a package benefits ratepayers and the public interest
2. The Commission acted unreasonably and unlawfully by finding that its analysis of a stipulation is limited to whether the stipulation as a package benefits ratepayers and the public interest, and not whether a proposed modification benefits ratepayers and the public interest.
3. The Commission acted unreasonably and unlawfully by concluding that there was an “unknown impact” of the **low-load factor tariff** on customer bills.
4. The Commission acted unreasonably and unlawfully by finding that the analysis on the **low-load factor tariff** was “very limited”.
5. The Commission acted unreasonably and unlawfully by not requiring a **low-load factor tariff**.

⁸ Entry at ¶ 16 (December 21, 2021).

⁹ See NEP’s Application for Rehearing at 1-2 (December 17, 2021) (emphasis added).

6. The Commission acted unreasonably and unlawfully by concluding that there was an “unknown impact” of the **low-load factor pilot** on customer bills and that the pilot should be rejected because of that “unknown impact”.
7. The Commission acted unreasonably and unlawfully by finding that the analysis on the **low-load factor pilot proposal** was “very limited”.
8. The Commission acted unreasonably and unlawfully by not approving a **low-load factor pilot**.

Curiously, NEP also argued that “the Commission did not conduct *any* analysis of how the proposed demand-based rate schedule in the [Stipulation] would impact low-load factor customers.”¹⁰ Contrary to NEP’s assertions, the Commission’s November 17, 2021 Order contained an entire section, over four and half pages, addressing NEP’s and other parties’ arguments based on the evidentiary record before it, and the Commission considered both arguments for and against NEP’s low-load factor proposals.¹¹ After a full analysis of the issues, the Order set forth two reasons for denying NEP’s proposals: 1. NEP failed to properly address the Commission’s three-part test for evaluating stipulations as the question is whether the Stipulation, as a package, benefits ratepayers and the public interest, not whether a different package would be better or would provide benefits; and 2. NEP’s underlying analysis of the proposals was very limited and inadequate as it was only based on four accounts that are not representative of the various types of low-load factor accounts.¹² Given the lack of record evidence to support NEP’s analysis and proposals, the Commission explained that it was “greatly concerned about the unknown impact of the low-load factor tariff and pilot proposals on customer bills,” and, therefore, declined to adopt NEP’s proposals.¹³

¹⁰ NEP’s Application for Rehearing at 5 (December 17, 2021) (emphasis added).

¹¹ See Order at 53-57 (November 17, 2021).

¹² *Id.* at ¶ 140.

¹³ *Id.*

R.C. 4903.09 requires the Commission to explain the reasoning and factual grounds for its decisions. As the Supreme Court of Ohio has held, “[a]t bottom, PUCO’s order ‘must show, in sufficient detail the facts in the record upon which the order is based, and the reasoning followed by the [commission] in reaching its conclusion.’”¹⁴ The Commission’s Order clearly satisfies the requirements of R.C. 4903.09 by addressing both the facts in the record related to NEP’s proposals and its underlying rationale and then expressly providing the reasoned rationale for rejecting the proposals. While NEP may be dissatisfied with the outcome of the Commission’s analysis based on the record before it (or lack thereof), that fact alone does not constitute a legal error.

Finally, NEP cites the Commission’s Entry on Rehearing in Case Nos. 10-2376-EL-UNC, et al. for the misguided proposition that the Commission erred “by not considering” low-load factor customers upon its adoption of the Stipulation.¹⁵ In the 2010 unrelated case with different facts and circumstances, Case No. 10-2376-EL-UNC, the Commission determined on rehearing that signatory parties failed to demonstrate that a settlement benefited customers and was in the public interest after customers filed in the case record actual bills that were substantially higher than the bill estimates that a utility had initially provided as evidence in support of the settlement.¹⁶ In the case decided almost 10 years ago, the Commission simply was acting on the unique evidentiary record before it and determined that new information changed the weight it should afford to prior evidence. In the above-captioned proceeding, there is no new information or evidence to evaluate regarding low-load factor proposals or customers. The Commission already evaluated NEP’s

¹⁴ *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*, Slip Opinion No. 2021-Ohio-3630 (quoting *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312, 513 N.E.2d 337 (1987)).

¹⁵ NEP’s Application for Rehearing at 6-7 (December 17, 2021).

¹⁶ *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case Nos. 10-2376-EL-UNC, et al., Entry on Rehearing ¶ 19 (February 23, 2012)

analysis, or lack thereof, in support of its proposals and found it to be unpersuasive and that the record did not support NEP's conclusions.¹⁷ Consequently, there is no need for the Commission to revisit or second guess its evaluation of NEP's low-load factor proposals when the evidentiary record remains unchanged from when it issued its Order on November 17, 2021.

B. NEP Has Failed to Substantiate its Low-Load Factor Proposals.

NEP's Application for Rehearing repeatedly stated that NEP Witness Rehberg's testimony and analysis in support of the low-load factor proposals were undisputed.¹⁸ This is an inaccurate characterization of the evidentiary record. As the Commission correctly noted in its Order, "[t]he analysis on which the low-load factor tariff and pilot proposals is based is very limited and the four accounts selected do not represent a broad base of the types of low-low factor accounts, as the Signatory Parties emphasize."¹⁹ Kroger and other Signatory Parties successfully challenged Mr. Rehberg's testimony in many respects at the evidentiary hearing and in their post-hearing briefs, including Mr. Rehberg's lack of qualifications,²⁰ the sample size of the analysis,²¹ the sampling methods used in the analysis,²² and the lack of analysis of the proposals' impact on non-low-load factor customers and AEP.²³ There is no need to repeat the challenges to Mr. Rehberg's testimony and credentials. As such, Kroger hereby incorporates the arguments in its Initial Post-Hearing Brief and Post-Hearing Reply Brief addressing Mr. Rehberg's qualifications and the

¹⁷ Order at ¶ 140 (November 17, 2021).

¹⁸ See, e.g., NEP's Application for Rehearing at 5 (December 17, 2021).

¹⁹ Order at ¶ 140 (November 17, 2021).

²⁰ See Tr. VI. IV at 656-684 and 737 (cross-examination of Rehberg).

²¹ *Id.* at 743-744.

²² *Id.* at 760.

²³ *Id.* at 742.

various deficiencies with Mr. Rehberg’s testimony and sampling methodology and size as if fully rewritten herein.²⁴

C. NEP’s Application for Rehearing Misconstrues the Commission’s Three-Part Test and Related Precedent.

As the Commission is aware, the second part of the three-part test specifically requires that the Commission evaluate the Stipulation as a package.²⁵ NEP’s Application or Rehearing fails to address the Stipulation that was before the Commission *as a package*, but rather focuses on a single issue: its low-load factor proposals in an attempt to modify or add to the filed Stipulation. To be clear, these proposals were never part of the Stipulation filed with the Commission and thus were never part of any settlement package presented to the Commission for consideration and approval.

In describing the second-prong of the three-part test, the Commission has determined that, “[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 ratepayers and the public interest.”²⁶

It is evident that, contrary to Commission precedent, NEP believes that its low-load factor proposals are mechanisms that should be adopted because they may provide additional benefits to the Stipulation. NEP seems to disregard the foregoing precedent by stating “the Commission repeatedly erroneously claimed that the only issue is whether the Stipulation as presented benefited ratepayers....”²⁷ NEP also fails to recognize that the Commission stated that NEP’s proposals

²⁴ See Kroger’s Initial Post-Hearing Brief (June 14, 2021); Kroger’s Post-Hearing Reply Brief (July 7, 2021).

²⁵ *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).

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 NEP Application for Rehearing at 11 (December 17, 2021).

were not supported by the record before it as NEP's analysis was insufficient and failed to explain how its proposals may impact other customers, which could cause the Stipulation to not be beneficial to ratepayers or the public interest. While NEP cited to various instances where the Commission modified settlements based on the evidentiary record before it,²⁸ the Commission specifically determined that NEP's low-load factor proposals were unsupported by the evidentiary record in the above-captioned proceeding as NEP's analysis was insufficient and flawed.²⁹ Therefore, it would be unjust and unreasonable and inconsistent with Commission precedent for the Commission to adopt NEP's proposals that were not a part of the Stipulation package and that lack an adequate basis in the evidentiary record.

D. Adopting NEP's Low-Load Factor Proposals Will Jeopardize the Benefits to AEP Customers and the Public that the Stipulation Secures.

The Stipulation was carefully crafted over the course of several months and balances the interests of fourteen parties with distinct interests.³⁰ The package submitted to the Commission is the result of serious concessions from the Signatory Parties, each of whom places varying degrees of value on the individual provisions contained in the Stipulation.³¹ By virtue of the settlement process, no individual Signatory Party was able to secure all of the provisions that they believe to be in their best interest. However, the Stipulation that was ultimately adopted by the Commission on November 17, 2021, as a package, is indeed a just and reasonable outcome for AEP's customers and the public collectively.

Rather than accepting these fundamental aspects of the settlement process, NEP remains dead set on forcing its wish list of low-load factor proposals on the Signatory Parties and the

²⁸ *Id.*

²⁹ See Order at ¶ 140 (November 17, 2021).

³⁰ OCC Exhibit 1, Willis Testimony at 5.

³¹ AEP Exhibit 6, Moore Testimony at 16.

Commission. Based on the evidentiary record, there is reason to believe that NEP's low-load factor proposals will shift costs on to non-low-load factor customers or result in reduced revenue for AEP.³² At an absolute minimum, as the Commission recognized in its November 17, 2021 Order, the impact of the low-load factor proposals on customer bills is unknown and NEP's supporting analysis of these proposals is deficient.³³ It is then foreseeable that tacking these unsubstantiated provisions onto the Stipulation at the eleventh hour will cause Signatory Parties to reevaluate whether a modified stipulation is in their best interest. The withdrawal of any number of Signatory Parties from the Stipulation is likely to lead to prolonged litigation and regulatory uncertainty, and risk all of the tangible benefits to customers included in the Stipulation.³⁴ Accordingly, the Commission should deny NEP's Application for Rehearing, once again reject NEP's low-load factor proposals, and affirm its adoption of the Stipulation as filed in its entirety.

³² See, e.g., Tr. VI. IV at 742 (Cross-Examination of Rehberg).

³³ See Order at ¶ 140 (November 17, 2021).

³⁴ AEP Exhibit 6, Moore Testimony at 17-18.

III. CONCLUSION

For the aforementioned reasons, the Commission should deny NEP's Application for Rehearing and preserve the Stipulation's benefits for AEP's customers and the public by affirming its adoption of the Stipulation as filed in its entirety.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on December 30, 2021 upon the parties listed below.

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Summary: Memorandum Contra Nationwide Energy Partners, LLC's Application for Rehearing electronically filed by Mrs. Angela Whitfield on behalf of The Kroger Co.