

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Power Company for Authority to Establish)
a Standard Service Offer Pursuant to) Case No. 23-23-EL-SSO
Section 4928.13, Revised Code, in the Form)
of an Electric Security Plan)

In the Matter of the Application of Ohio)
Power Company for Approval of Certain) Case No. 23-24-EL-AAM
Accounting Authority)

**CONSTELLATION ENERGY GENERATION LLC
AND
CONSTELLATION NEWENERGY INC.'S
MEMORANDUM CONTRA
THE MOTION TO STRIKE OF OHIO POWER COMPANY**

I. Introduction

The Ohio Power Company (“AEP Ohio”) motion to strike the entirety of the Direct Testimony of Muralikrishna Indukuri in Opposition to the Stipulation and Recommendation or, alternatively, to strike six portions of that testimony is based on flawed arguments and should be denied. Opposing parties are not required to frame their testimony as AEP Ohio claims and it would not be fair to require such in this proceeding. Mr. Indukuri’s testimony addresses an important issue to the Commission and should be heard. To strike it would thwart the purpose of the hearing, which is to allow all parties the opportunity to address the issue resolution presented in the Stipulation and Recommendation (“Stipulation”). Furthermore, the specific portions of the testimony that AEP Ohio claims are inadmissible as hearsay either do not qualify as hearsay, or fall within a well-recognized exception to the hearsay rule or are within Mr. Indukuri’s own knowledge based on his active involvement in competitive procurements. Constellation Energy Generation LLC and Constellation NewEnergy Inc. (collectively, “Constellation”) urges the

Commission or the Attorney Examiners to deny AEP Ohio's motion to strike as it relates to Mr. Indukuri's testimony.

II. Mr. Indukuri's September 20, 2023 testimony should not be stricken.

AEP Ohio claims that Mr. Indukuri's entire opposition testimony should be stricken because Mr. Indukuri's testimony is "completely unrelated" to the Commission's three-part test for evaluating settlements¹ and because Mr. Indukuri does not address the stipulation "as a package."² AEP Ohio's claims are wrong and should be rejected for multiple reasons. First, testimony in opposition to a stipulation is not required to be framed in either of the ways AEP Ohio claims. Notably absent from AEP Ohio's motion is any citation to a rule or case precedent that requires opposing testimony to be limited solely to the "settlement test" or to be focused only on the stipulation as a package. The reason there is no citation is because it is not required. Rather, parties to a proceeding where a stipulation has been filed are allowed to "offer evidence and/or argument in opposition." Ohio Adm.Code 4901-1-30. The Attorney Examiner's August 16, 2023 Entry (at ¶16) directing parties in this proceeding to file testimony also does not contain such limitations or requirements on the testimony. Moreover, AEP Ohio ignores case precedent in which the Commission has modified a stipulation based on evidence from opposing parties about specific aspects of a settlement.³

¹ The Commission has used the following criteria for considering the reasonableness of a stipulation:

- (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?

² AEP Ohio Motion to Strike at 4-5.

³ For example, in *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Includes in the Power Purchase Agreement Rider, etc.*, Case Nos. 14-1493-EL-RDR et al., the Commission modified various stipulated terms/conditions in response to opposition party arguments, including adding limits on the amounts recoverable under a PPA rider, precluding recovery of costs associated with converting/retiring certain generation plants and precluding the transfer of costs to an energy efficiency rider. Opinion and Order at 81-82, 90-92 (March 31, 20216). Other modifications were made on rehearing as well. Second Entry on Rehearing (November 3, 2016). Also, in *In the Matter of the Application of Ohio Power Company*

Second, and importantly, it is the Commission that makes the determination as to whether a stipulation, as a package, benefits the public interest. In making that determination, the Commission will consider all relevant evidence. In this proceeding, that includes considering Mr. Indukuri's testimony because it presents relevant information and recommendations on an issue of importance to the Commission in the very case in which a competitive bidding process ("CBP") would be established for the term of AEP Ohio's fifth electric security plan ("ESP 5"). Mr. Indukuri presents facts regarding the CBPs in Ohio and elsewhere. His testimony is based on his extensive knowledge and expertise because of his involvement in the competitive auctions in multiple jurisdictions. He explains at page 10-11 of his testimony how the Stipulation will do little more than retain the status quo for AEP Ohio's CBP for four more years, because "the Stipulation falls short of addressing the most serious issues that exist with the CBP as structured today and, instead proposes to perpetuate the issues that impact risks to SSO suppliers and impact rates for customers." Mr. Indukuri's recommended changes are responsive, timely and consistent with the Commission's repeated statements that the Commission is interested in changing AEP Ohio's CBP.⁴

Third, striking Mr. Indukuri's testimony in its entirety would thwart the purpose and necessary due process aspect of the Commission's hearing. AEP Ohio (along with other Signatory Parties) is recommending that the Commission adopt a certain CBP for the ESP 5. On September 11, 2023, AEP Ohio prefiled the testimony of Ms. Mayhan to support that recommendation.

for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan, etc., Case Nos. 16-1582-EL-SSO et al., the Commission modified stipulated terms/conditions in response to opposition party arguments, including precluding cost recovery under the now-known as retail reconciliation rider and associated credit rider. Opinion and Order at 98 (April 25, 2018).

⁴ See *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Ohio Power Company, etc.*, Case Nos. 17-2391-EL-UNC et al. Entry (January 3, 2023) and *In the Matter of the Proposed Modifications to the Electric Distribution Utilities' Standard Service Offer Procurement Auctions*, Case No. 23-781-EL-UNC, Entry (July 26, 2023).

Constellation – through the testimony of Mr. Indukuri filed on September 20, 2023 – is presenting evidence to demonstrate that AEP Ohio’s recommended CBP should be modified. Providing evidence for the Commission to evaluate whether the recommended CBP terms should be adopted as presented or if some other conclusion should be reached (such as, the recommended changes included in Mr. Indukuri’s testimony) is precisely the point of the hearing in this proceeding. AEP Ohio is seeking to preclude testimony that directly addresses an issue of importance to the Commission and an issue that AEP Ohio itself is proposing to resolve in this proceeding.

Lastly, AEP Ohio’s argument that the opposition testimony does not focus on the Stipulation as a “package” should also be rejected because it would be a drastic and unfair change in Commission policy and practice. If accepted (which it should not be), the non-signatory parties who seek to oppose this stipulation would have had to have known to address all aspects of the stipulation – the “package” – in their witness testimony. As noted above, there is no such requirement or notice imposed by rule or by the Attorney Examiner in this proceeding. And, AEP Ohio’s “package” argument would have non-signatory parties who seek to oppose this stipulation being required to address every aspect of the stipulation regardless of their interests in the case.⁵ The Commission has not required opposition testimony to address all issues addressed in a stipulation. The Commission also has not required an opposition party to contest every aspect of a stipulation on brief. Nothing in this proceeding warrants the drastic and unfair change in Commission policy or practice regarding testimony in response to a stipulation for which AEP Ohio is advocating.

⁵ AEP Ohio’s argument would also require parties who present a witness in support of a stipulation to address all aspects of a stipulation. The Commission has not required a supporting witness to do that.

Mr. Indukuri's opposing testimony should not have to be limited solely to the "settlement test" or focused only on the stipulation as a package. AEP Ohio's arguments for striking Mr. Indukuri's testimony in its entirety should be rejected.

III. None of the parts of Mr. Indukuri's September 20, 2023 testimony identified by AEP Ohio should be stricken because they are not inadmissible hearsay.

AEP claims, if Mr. Indukuri's testimony is not stricken entirely, that six parts of his testimony should be stricken because they are hearsay.⁶ Hearsay is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.⁷ AEP Ohio further asserts that Mr. Indukuri lacks personal knowledge and violates Evidence Rule 703. As explained below, the six parts of Mr. Indukuri's testimony should not be stricken. They either do not constitute hearsay or they fall within an exception to the hearsay rule. Moreover, the facts and data in these parts of Mr. Indukuri were perceived by him as part of his active involvement in the auction procurement process in multiple jurisdictions and, therefore, are within his personal knowledge as an expert of competitive procurements.

AEP Ohio's motion presumes that Mr. Indukuri cannot know about the competitive procurements that are discussed in his testimony. AEP Ohio ignores Mr. Indukuri's background and experience as stated in his testimony at page 1, which demonstrates his extensive involvement and knowledge of the competitive procurements from start to finish:

I am a Portfolio Manager for CEG. In this role, I am responsible for Constellation's participation in competitive utility default service (also referred here as the standard service offer or "SSO") auctions in PJM and ISO-NE, including competitive procurements in Ohio, Pennsylvania, Delaware, New Jersey, Maryland, District of Columbia, Massachusetts, Rhode Island, Connecticut, New Hampshire and Maine. In this role, I lead all the internal and external processes associated with participating in default service procurements, namely: filing the

⁶ AEP Ohio Motion to Strike at 5-8.

⁷ Evidence Rule 801(C).

necessary applications and pre-bid collateral to qualify to bid in default service procurements; obtaining necessary internal approvals; **submitting final binding bids and/or leading real-time participation in live auctions; and negotiating and executing Master SSO Supply Agreements and Transaction Confirmations.** Having participated in and served default service load across multiple ISOs, states, procurement formats (sealed bid versus descending clock) and product structures, I have a unique perspective of the risks associated with participating in default service procurements and the advantages/disadvantages of the various procurement/product structures from a customer, SSO supplier and market standpoint.

(Emphasis added.)

Direct responses to each of the six parts of Mr. Indukuri's testimony that are subject to AEP Ohio's motion are addressed below:

- Page 15, lines 3-5 contains testimony regarding the percentage change in Ohio of residential aggregation customers in 2022. This is information from the Commission's public records regarding electric Choice activity on its website,⁸ which is an exception to the hearsay rule per Ohio Evidence Rule 803(8). Moreover, as an expert witness, Mr. Indukuri properly relied on this information in presenting his testimony.
- Page 18, line 14, through Page 19, line 12 describes generally how the Ohio auction procurement results in 2022-2023 compare with those in other states. This is information of which Mr. Indukuri has direct knowledge because of his involvement in the auctions conducted in those states. His background (set forth on page 1 of his testimony) confirms his extensive involvement. As a result, this testimony is Mr. Indukuri's expert opinion on how AEP Ohio's default service auction results compare to procurements in other states in which he has worked relying on facts or data perceived by Mr. Indukuri in his personal capacity.
- Page 20, lines 4-8 includes Mr. Indukuri's recommendation to implement mitigation thresholds similar to another state's mitigation threshold, of which he is familiar based on his involvement in the auctions in that state. This testimony is not hearsay because it is Mr. Indukuri's own statement (a recommendation from an expert) and is not someone else's statement.
- Page 25, lines 1-7 describes other states' default service procurement structures, of which Mr. Indukuri is familiar based on his involvement in

⁸ See the Commission's Ohio Customer Choice Activity webpage containing "interactive dashboards," including "Electric Choice Aggregation Activity" at: <https://puco.ohio.gov/utilities/electricity/resources/ohio-customer-choice-activity>.

the auctions in those states. This testimony presents information based on facts known to Mr. Indukuri based on his work in those jurisdictions. This is not hearsay because it is Mr. Indukuri's own statement based on his own knowledge. It is not someone else's descriptions of the different states' procurement structures.

- Page 25, lines 22-23 introduces a comparison of auction clearing prices in Ohio and Pennsylvania in 2022, of which Mr. Indukuri is familiar based on his involvement in the auctions in those states. He also prepared Figure 3 upon which the testimony is based – and AEP Ohio has not established anything to the contrary. As a result, this information is facts or data collected by, perceived by and interpreted by Mr. Indukuri. Moreover, the auction results are information derived from public records, and therefore the data is an exception to the hearsay rule, per Ohio Evidence Rule 803(8).
- Page 26, Figure 3 is a comparison of auction clearing prices in Ohio and Pennsylvania in 2022, of which Mr. Indukuri is familiar based on his involvement in the auctions in that state. Mr. Indukuri prepared this table and AEP Ohio has not established anything to the contrary. As a result, this information is facts or data perceived by Mr. Indukuri. Moreover, the auction results are information derived from public records, and therefore the data is an exception to the hearsay rule, per Ohio Evidence Rule 803(8).

There are no indicia of unreliability with Mr. Indukuri's testimony – these parts of his testimony either are not hearsay, fall within a recognized exception to the hearsay rule, or are within Mr. Indukuri's personal knowledge because of his extensive experience and involvement in competitive procurements in multiple states. As such, these AEP Ohio arguments and requests to strike the specified portions of Mr. Indukuri's testimony should be rejected.

IV. Conclusion

AEP Ohio's motion to strike all or portions of Mr. Indukuri's opposition testimony is based on erroneous arguments, for all of the reasons set forth above. The motion to strike as to Mr. Indukuri's testimony should be denied.

Respectfully submitted,

/s/ Michael J. Settineri

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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 certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on this 10th day of October 2023 upon all persons listed below:

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Summary: Memorandum Contra The Motion to Strike of Ohio Power Company electronically filed by Mr. Michael J. Settineri on behalf of Constellation Energy Generation LLC and Constellation NewEnergy Inc..