

**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	)	Case No. 23-0023-EL-SSO
Pursuant to §4928.143, Ohio Rev. Code,	)	
In the Form of an Electric Security Plan	)	

In the Matter of the Application of	)	
Ohio Power Company for Approval of	)	Case No. 23-0024-EL-AAM
Certain Accounting Authority	)	

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**CALPINE RETAIL HOLDINGS LLC’S MEMORANDUM CONTRA  
INTERSTATE GAS SUPPLY LLC’S MOTION TO STRIKE DIRECT TESTIMONY**

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Interstate Gas Supply LLC’s (IGS) motion to strike testimony that has not been proffered has no merit and must be denied. Calpine Retail Holdings, LLC (Calpine) is entitled to present direct testimony filed in accordance with the case schedule.

This is a proceeding for approval of an electric security plan under R.C. 4928.141/.143. AEP Ohio filed its Application and direct testimony in January 2023, intervenors (including Calpine) filed testimony on June 9, 2023, and a non-unanimous Stipulation was filed on September 6, 2023. IGS asks the Attorney Examiners to “strike and prevent the admission of all irrelevant testimony filed before the Stipulation was submitted,” claiming this testimony “is largely no longer relevant to this proceeding as it was filed concerning AEP’s initial application and does not necessarily reflect the outcome recommended in the Stipulation.” (IGS Mem. Supp. at 2, 3.)

First things first: no testimony filed to date has been offered into evidence. “Only when a witness is sworn in at the hearing does he or she adopt the prefiled testimony under oath. It is at this point that the written testimony becomes evidence, not at the time of filing.” *In re Application of Black Fork Wind Energy, L.L.C.*, 2013-Ohio-5478, ¶ 15, 138 Ohio St. 3d 43, 47. The Attorney Examiners cannot “strike” testimony that has not been offered at hearing. Moreover, IGS has not identified what testimony it wants the Attorney Examiners to strike. IGS claims that “much of” the

pre-Stipulation testimony “is no longer relevant” but concedes that “there may be parts of the pre-filed intervenor testimony that may still be relevant,” and leaves it at that. (IGS Mem. Supp. at 3, 5.) The inability to identify specific witnesses or portions of testimony because “a complete witness list has not been finalized” (*id.* at 5) is precisely the point: the motion is premature. The motion basically asks the Attorney Examiners to comb through the pre-Stipulation testimony and figure out for themselves what they believe “is no longer relevant” and what “may still be relevant,” and that is asking too much.

IGS’s motion previews an argument likely to be repeated at hearing: that the Stipulation frames the issues in this proceeding and is therefore the benchmark for “relevance.” This is not so. AEP’s filing and R.C. Chapter 4928 define the scope of the relevant issues, not a settlement document purporting to resolve those issues.

In SSO proceedings, “[t]he commission shall set the time for hearing of a filing under section [] 4928.143 of the Revised Code” and “[t]he burden of proof in the proceeding shall be on the electric distribution utility.” R.C. 4928.141(B); 4928.143(C)(1). The “filing” as issue here is AEP’s Application, not the Stipulation. Every procedural entry issued in this case recognizes that the scope of the proceeding involves “consideration of AEP Ohio’s ESP application and related matters [.]” (*See, e.g.*, June 27, 2023 Entry ¶ 5; August 16, 2023 Entry ¶ 5.) The Stipulation itself recommends, “consistent with the Application and supporting testimony,” that the Commission “adopt the Application in this case as modified by this Stipulation [.]” (Stipulation III.A.) The Stipulation does not make the issues raised in the Application go away, as IGS mistakenly claims.

A stipulation to resolve the issues raised in the Application does not render the Application itself “irrelevant.” “It is well established that a stipulation entered into by the parties is a recommendation made to the Commission and is in no sense legally binding upon the Commission.” (*Matter of SmartEnergy Holdings, LLC*, Case No. 23-601-EL-UNC, August 22,

2023 Opinion and Order ¶ 8, p. 6.) Stipulation or no stipulation, the Commission must ultimately decide the issues raised in the Application in accordance with the statutory requirements for electric security plans. “The commission may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing.” *Consumers' Couns. v. Pub. Util. Comm.*, 1992-Ohio-122, 64 Ohio St. 3d 123, 125–26. The filing of a stipulation in no way relaxes AEP’s burden of proof or the Commission’s obligation to decide this case in accordance with the evidence and governing law.

Each party to this proceeding will decide for itself what evidence to offer at hearing; IGS does not get to make this decision for them. IGS is free to object to testimony at the time it is offered, but it is not entitled to an order that would effectively preclude “AEP Ohio, Signatory Parties, and other intervenors” (IGS Mem. Supp. at 3) from offering testimony in the first instance. Some of these parties may elect to not offer the testimony IGS is complaining about, but that cannot be known until the hearing. The motion thus raises an issue that is not only premature, but very likely to become moot for some parties.

As applicable to Calpine, there is no question that the testimony of its witness, Becky Merola, is relevant to matters raised in the Application. The testimony addresses the direct testimony of four AEP witnesses concerning transmission-related issues. Although the Stipulation purports to address the Signatory Parties’ issues and concerns with the Application, it does not resolve Calpine’s. Calpine is entitled to offer Ms. Merola’s testimony at hearing to establish facts that will be cited in its brief. This testimony is responsive to the “filing” referenced in R.C. 4928.141(B). Nothing in the August 16, 2023 Entry regarding a deadline for filing testimony opposing the Stipulation prevents Calpine or any other intervenor from offering previously-filed testimony at hearing. Nor may anyone claim prejudice by the offering or admission of testimony disclosed to all parties over four months ago.

IGS's insistence that the Stipulation renders previously filed testimony "irrelevant" does not make it so. Testimony responsive to the Application—the "filing" that the Stipulation asks the Commission to approve—is relevant. To the extent the Stipulation requires modifications or corrections to testimony, this may be addressed at hearing or in briefs. In the meantime, the motion to strike should be overruled.

Dated: October 5, 2023

Respectfully submitted,

/s/ Mark A. Whitt

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was filed on October 5, 2023. Parties of record will receive notification of this filing through DIS. Courtesy copies have been served this date to the following:

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/s/ Mark Whitt

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Summary: Memorandum Memorandum Contra IGS Motion to strike electronically  
filed by Mr. Mark A. Whitt on behalf of Calpine Retail Holdings LLC. electronically  
filed by Docketing Staff on behalf of PUCO Staff.