

**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 Section ) Case No. 23-23-EL-SSO  
4928.143, 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. )

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**REPLY BRIEF OF ONE ENERGY ENTERPRISES INC.**

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Ohio Power Company (“AEP Ohio”) **STILL HAS NOT** satisfied its burden of proof, and apparently does not think it has to satisfy the important procedural and evidentiary requirements governing this proceeding. As set forth in the post-hearing brief of One Energy Enterprises Inc. (“One Energy”), and again below, AEP Ohio is wrong. This failure on the part of AEP Ohio prevents the Public Utilities Commission of Ohio (the “Commission”) from even getting to the three-part analysis of contested stipulations, warranting rejection of the Stipulation in its entirety.

Making matters worse, the contested Stipulation contains a non-bypassable transmission rider (the “BTCR”) which violates Ohio law, and neither AEP Ohio, nor the other signatories acknowledge this fact. This also warrants rejection of the stipulation; or, at minimum, modification of the Stipulation to make the BTCR bypassable.

## **I. LEGAL ARGUMENT**

### **A. AEP Ohio conveniently ignores its burden of proof in this case - a burden it has not met.**

While One Energy has already meticulously laid out AEP Ohio's burden of proof requirements in its initial post hearing brief, it is worth repeating that AEP Ohio bears the burden of proof in this proceeding. R.C. 4928.143(C); *In the Matter of the Application of Columbia Gas of Ohio*, Case No. 21-637-GA-AIR et al. (Opinion and Order at ¶ 60, January 26, 2023). In fact, the Commission Staff acknowledges this on page 5 of its post-hearing brief, stating: "When the Commission reviews a contested stipulation, as is the case here, the Court has also been clear that the requirement of evidentiary support for the provisions of the stipulation remains in place." (citing to *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992)). Ironically, the words "burden of proof" do not appear in AEP Ohio's post-hearing brief; however, AEP Ohio does conclude, without support or citation, on page 1 of its initial brief that the "evidentiary record demonstrates that the Stipulation satisfies both the three-part test and the MRO test." Nothing could be further from the truth. In reality, AEP Ohio has not (and cannot) satisfy its burden of proof in this case because of the intentional decisions it made at the evidentiary hearing.

At that hearing, AEP Ohio admitted that: (i) the Application is "not being admitted into the evidentiary record for the truth of the matter asserted or to litigate all the issues that were presented with the original Application," and (ii) the direct testimony of its witnesses filed along with the Application is "not part of the evidentiary record." (Tr. 20, 156.) In other words, the heart of the contested Stipulation is an Application that itself is not in the evidentiary record, and for which there is no direct supporting testimony. As a result, the Commission cannot determine if the Application, as modified by the Stipulation in this case, is a "just and reasonable resolution of all

issues in this proceeding”, as the signatory parties incorrectly claim it is, based on the evidentiary record before it. Joint Stipulation and Recommendation at 2.

At the end of the day, One Energy agrees with the statement of Calpine Retail Holdings LLC (“Calpine”) on page 1 of its initial brief that “the Stipulation and Recommendation... filed in this case is not a substitute for AEP Ohio’s burden of proof.” None of the three-prongs often referenced in the initial briefs of AEP Ohio and signatory parties to the Stipulation can be used to guide the Commission unless and until the procedural and evidentiary support requirements are properly satisfied. And neither the procedural nor evidentiary support requirements have been satisfied here. As a result, the vast majority of the arguments raised in the initial briefs of AEP Ohio and the other parties supporting the contested Stipulation and focused solely on the three-pronged analysis are improper.

**B. AEP Ohio’s unreasonable efforts to limit the information considered by the Commission are improper.**

AEP Ohio seems to take the position that only *testimony* from parties opposing a contested stipulation can defeat it. See e.g., AEP Ohio Initial Brief at 17. But, that is inconsistent with the fact that it is AEP’s burden to establish the propriety and legality of the Stipulation, as discussed above. Moreover, AEP’s attempt to impose a testimonial hurdle on opponents like One Energy is inconsistent with Commission regulations. As Constellation Energy Generation, LLC and Constellation New Energy, Inc. (collectively “Constellation”) highlighted on page 11 of their initial post-hearing brief, OAC 4901-1-30 provides that “[n]o stipulation shall be considered binding upon the commission” and “[p]arties that do not join the stipulation may *offer evidence and/or argument in opposition*.” (Emphasis added). Accordingly, the determination of whether a stipulation is just and reasonable can and, in most cases, should include the consideration of evidence (or the lack of it) and arguments in opposition—even assuming *arguendo* that AEP Ohio

had met its threshold burden of proof. Therefore, the Commission should reject AEP Ohio's misguided statements suggesting that a party must file testimony in order to advance arguments against a contested stipulation.

**C. The Stipulation must be rejected or modified because the BTCR violates Ohio law when applied as a non-bypassable transmission rider to shopping customers.**

Even if the Commission improperly holds that AEP Ohio satisfied its burden of proof, the Stipulation still fails as a matter of law. Specifically, the Stipulation fails the third prong of the test by which the Commission evaluates contested stipulations – namely, whether the Stipulation violates any regulatory principle or practice. The reality is that it clearly and unambiguously violates Ohio law.

**1. AEP Ohio fails to prove that the continuation of a non-bypassable BTCR does not violate Ohio law and important regulatory principles.**

In its initial post-hearing brief, AEP Ohio improperly concludes that “the record in this case does not support a conclusion that the current BTCR violates any important regulatory principle or practice.” (AEP Ohio Initial Post-hearing Brief at 18, 88, & 91).

AEP Ohio ignores the biggest elephant in the room in reaching this conclusion—the fact that the BTCR violates Ohio law. To quickly summarize, R.C. 4928.143(B)(2)(g) provides the Commission with limited discretion to authorize (assuming the evidence allows) a standard service offer (“SSO”) containing transmission provisions. There is nothing in R.C. 4928.143, however, that authorizes the Commission to approve an SSO containing a transmission provision that makes shopping (non-SSO) customers captive to such a provision. In fact, R.C. 4928.143 specifically identifies some unavoidable or non-bypassable provisions that may be included in an SSO, and a non-bypassable SSO transmission provision is not one of them. R.C. 4928.143(B)(2)(b).

Further, the Commission's own rules implementing R.C. Chapter 4928 require transmission cost recovery riders to be bypassable, upon customer election, for customers obtaining generation service from a CRES provider. Specifically, OAC 4901:1-35-03(C) requires that an ESP proposing a transmission cost recovery rider satisfy the requirements of Rule Chapter 4901:1-36. And, OAC Rule 4901:1-36-04(B) states that "[t]he transmission cost recovery rider **shall** be avoidable by all customers who choose alternative generation suppliers." (emphasis added). As a result, AEP Ohio ignores the fact that a non-bypassable transmission rider (here, the BTCR) is not permitted by statute and the Commission's rules.

When AEP Ohio Witness Ms. Kelso was asked at hearing if "compliance with the law applicable to AEP Ohio (and other Electric Distribution Utilities ("EDUs")) is an important regulatory principle" she simply and correctly answered, "yes." Tr. 881-882. As demonstrated here, AEP Ohio's BTCR does violate Ohio law. As a result, the Stipulation authorizing the BTCR should be rejected for violating both Ohio law and important regulatory principles.

**2. The arguments for keeping the BTCR as a non-bypassable rider must be rejected.**

**a. AEP Ohio arguments are vague and unpersuasive.**

AEP Ohio claims that this is not the right time to adopt a bypassable BTCR due to the following five arguments, which One Energy addresses in turn:

First, AEP Ohio argues that making the BTCR bypassable is a major rate design methodology change that would potentially result in a variance and it is unknown how such a variance would be allocated to AEP shopping and non-shopping customers. AEP Ohio Initial Post-hearing Brief at 89. This argument merely speculates on what may or may not happen as a result

of a potential change. AEP Ohio's current methodology<sup>1</sup> under the BTCR results in a variance without regard to cost causation principles. The fact that adopting a bypassable BTCR may result in a variance is not a valid reason for continuing to violate Ohio law. In fact, moving to a bypassable BTCR and allocating CRES provided transmission costs through a 1CP methodology could potentially result in a smaller variance for non-shopping customers.

Second, AEP Ohio claims that the 1CP rate design is inherently less stable for individual customers. *Id.* at 89. This argument ignores the benefits of a 1CP rate design. Utilizing the 1CP methodology better aligns with cost causation principles for shopping customers and their transmission costs. As a result, shopping customers would have the opportunity to better respond to price signals and manage transmission costs efficiently. Under the current BTCR, shopping customers who manage their transmission usage subsidize the remainder of AEP Ohio customers.

Third, AEP Ohio claims that a bypassable BTCR could add complexity to the price to compare (PTC) for shopping customers. *Id.* at 90. The cost complexities of adding transmission costs into the PTC are overstated. AEP Ohio already makes available to the public a spreadsheet that clearly delineates what the transmission costs are, along with the PTC. Using this information to shop for generation service would be just as simple as it is today. A bypassable BTCR would provide greater transparency into transmission costs and give control of transmission costs back to shopping customers through proper 1CP management.

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<sup>1</sup> In her testimony in support of the Stipulation, AEP Ohio Witness, Ms. Kelso, confirmed that AEP Ohio's actual transmission service cost through PJM is based on a 1CP allocation method, and such cost is combined with the PJM 1CP transmission costs of other AEP operating companies before being rebilled (by AEPSC) to AEP Ohio using a 12CP allocation method. AEP Ohio Exhibit 9 at 7. This disconnect – 1CP to 12CP is critical, as Ms. Kelso noted that, in the past, this structure created a variance that was pushed to non-shopping customers and that AEP Ohio is concerned about adopting a bypassable BTCR because it is unsure whether the same type of variance would be created. *Id.* at 7. But, the reality is that any variance is being created solely by AEP through its assigning of transmission service cost responsibility without regard to cost causation principles— specifically, AEPSC's rebilling of its combined affiliates' actual cost of PJM transmission service (as determined by the 1CP) to AEP Ohio and its affiliates based on a 12 CP allocation factor.

Fourth, AEP Ohio argues that it is unknown how the FERC-approved AEP East Transmission Agreement (“TA”) will be affected by a bypassable BPCR and whether it will lead to a substantially different cost for non-shopping customers. *Id.* at 90-91. Again, AEP Ohio and its customers have been in this position before under the previous transmission rider. The change to 1CP allocation methodology should have minimal impact on the TA because CRES allocated transmission costs would be allocated in a similar fashion as the rest of the AEP affiliates resulting in better alignment with cost causation principles for shopping customers.

Lastly, AEP Ohio argues that making the BPCR bypassable will cause the Commission to modify the Stipulation and could result in “the settlement being unwound.” AEP Ohio Initial Post-hearing Brief at 91. In other words, AEP Ohio is afraid that a reasonable modification (making the BPCR bypassable) might impact the Stipulation because of the “withdrawal upon modification” language AEP Ohio itself chose to insert into the Stipulation.<sup>2</sup> AEP Ohio Initial Post-hearing Brief at 91 (“Calpine’s [and One Energy’s] recommendation would be a modification of the Stipulation that is unjustified and could result in the settlement being unwound”). This argument is a direct warning to the Commission to avoid upsetting the proverbial apple cart. Inserting this type of language in a brief is an increasingly common tactic AEP Ohio and other EDUs are using to bully the Commission (and other parties) to shy away from modifying stipulations to make them lawful and in the public interest. As Constellation pointed out, the Commission has “routinely modified stipulations to ensure they are in the public interest,” while citing prior Commission decisions.

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<sup>2</sup> One Energy fully supports Constellation’s argument regarding the “withdrawal upon modification” language increasingly being used in contested stipulations. As Constellation persuasively argues on pages 10-11 of its initial post-hearing brief, “The Commission’s approach to reviewing and approving stipulations has created an incentive for parties (especially utilities) to ignore certain intervenor proposals in order to get a stipulation filed. Once submitted, the signatory parties can ignore intervenor proposals outside of the stipulation (no matter how good the arguments are that such proposals are in the public interest) because any signatory party can withdraw from the stipulation if any of those proposals are adopted by the Commission.” The Commission should reject any attempt to use this language as justification for allowing the BPCR to remain an unlawful, nonbypassable transmission rider.

Constellation Initial Post-hearing Brief at 37. Here, it is also in the public interest to align the BTCR with Ohio law and applicable regulatory principles. The Commission should ignore AEP Ohio's threats and modify the Stipulation to make the BTCR bypassable.

**b. The conclusory statement of Interstate Gas Supply LLC ("IGS") regarding the BTCR carries no weight.**

As a signatory to the Stipulation, IGS offers only a conclusory statement that making the BTCR bypassable "would unjustly and unreasonably add costs that suppliers don't have embedded in their retail contracts and ultimately harm the competitive market." (IGS Initial Brief at pp. 12-13). Other suppliers in this case (e.g., Calpine) support making the BTCR bypassable, and IGS seems to forget that there previously was a transition from a bypassable transition cost recovery rider ("TCRR") to a non-bypassable transmission rider (the BTCR) that required suppliers to adjust their business and presumably amend their contracts. Case No. 13-2385-EL-SSO, Feb. 25, 2015 Opinion and Order. Here, if the BTCR became bypassable as a result of this proceeding, suppliers could (and presumably would) invoke "change in law/regulation provisions" within their contracts to address any issues that may arise during a potential transition period. As a result, IGS' argument should be ignored.

## **II. CONCLUSION**

For the reasons set forth in One Energy's briefs, the Commission should reject the Stipulation or, at minimum, modify the BTCR to make it bypassable.



Respectfully submitted on behalf of  
ONE ENERGY ENTERPRISES INC.

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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 Reply Brief of One Energy Enterprises Inc. was served upon the parties of record listed below this 22nd day of December, 2023 via email.

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