

**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)	

REPLY BRIEF OF CALPINE RETAIL HOLDINGS LLC

INTRODUCTION

The interests of Calpine Retail Holdings, LLC (Calpine) in this proceeding are generally limited to the harm caused to retail electric competition and customer choice from Rider BTCR and the BTCR Pilot. The Stipulation (Joint Ex. 1) proposes to continue Rider BTCR on a nonbypassable basis and expand the BTCR Pilot. As Calpine explained in its Initial Brief, the Commission should not only reject these provisions; it should also restore CRES suppliers' and other Load Serving Entities' (LSE) rights and obligations under the PJM OATT (Open Access Transmission Tariff), including the right and obligation to be directly billed by PJM, by ending any assignment of PJM billing line items to AEP. The Stipulation should be modified accordingly to satisfy the second and third prongs of the three-part test for assessing the reasonableness of settlements.¹

¹This three-part test is: "[W]hether the settlement is a product of serious bargaining among capable, knowledgeable parties; whether the settlement, as a package, benefits ratepayers and the public

This Reply Brief responds primarily to AEP and Staff. Calpine’s criticisms of Rider BTCR and the BTCR Pilot are based largely on the testimony of Ms. Becky Merola, the company’s Director, Regulatory/Government Affairs. (Calpine Ex. 1.) The fact that these criticisms were raised in response to AEP’s Application rather than the Stipulation does not render this testimony “irrelevant” or otherwise improper, as both AEP and Staff mistakenly claim. (*See* AEP Br. at 86-88; Staff Br. at 17-18.) The testimony was not only timely filed and properly admitted into evidence but responded to by AEP in rebuttal. (AEP Ex. 9.) AEP’s rebuttal witness expressed opposition to adopting a bypassable transmission rider because “it would be a modification to the Stipulation” and because “there are many unknowns that should be resolved before making such a decision [.]” (*See* AEP Br. at 17; 91.) AEP and the Signatory Parties’ decision to ignore Calpine’s position while negotiating the Stipulation is no excuse for not conforming AEP’s transmission cost recovery rider to the requirements of Commission rules, which specify that such riders “shall be avoidable” by shopping customers. O.A.C. 4901:1-36-04(B).

RESA and IGS also support the BTCR provisions of the Stipulation. Given the special privileges they receive from the BTCR Pilot, this is to be expected. Expanding the pilot program to confer these privileges to additional suppliers and customers exacerbates the discriminatory impact of this program. Restoring all CRES providers’ rights and obligations as an LSE under the PJM OATT and allowing shopping customers to bypass Rider BTCR would eliminate the need for a pilot and place all stakeholders on equal footing, without the need for ratepayer-funded subsidies or cost-shifting.

interest; and whether the settlement package violates any important regulatory principles or practices.” *In re Application of E. Ohio Gas Co.*, 2023-Ohio-3289, ¶ 11, __ Ohio St.3d __, __ N.E.3d __, quoting *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 2006-Ohio-4706, 110 Ohio St.3d 394, ¶ 16, 853 N.E.2d 1153.

A. Reply to AEP and Staff

AEP complains that Calpine's testimony "completely fails to address the three-part test for adoption of contested settlements and merely advances Calpine's original litigation position. To the extent the Merola Direct Testimony is considered at all by the Commission, it should be rejected." (AEP Br. at 17.) Likewise, "Staff is generally in agreement with the Company that the scope of the evidentiary hearing was limited to determining whether the Stipulation should be adopted, and that testimony not addressing the ESP proposal as modified by the Stipulation is not relevant, and, therefore, should not be admitted." (Staff Br. at 17 fn. 46.) These procedural objections are baseless.

In testimony filed with the Application in this proceeding in January 2023, AEP proposed to continue, "without change," numerous "non-statutory riders," including Rider BTCR, and to continue the BTCR Rider, subject to a new 1,000 MW annual cap. (Mayhan Direct (filed Jan. 6, 2023) at 22-24.) Numerous intervenors, including Calpine, filed testimony responsive to AEP's application in June 2023, in accordance with the procedural entry issued March 2, 2023. (Entry ¶ 6 (b).) Ms. Merola specifically objected to the continued nonbypassability of Rider BTCR and the proposal to expand the BTCR Pilot without addressing or examining "lessons learned" from the pilot to date. (Calpine Ex. 1 at 4.) Thus, Calpine's position on these issues was made known to all parties well before the Stipulation was entered and filed.

The August 9, 2023 procedural entry stated that "Upon execution of a stipulation, the parties should file the stipulation on the docket and testimony in support of the stipulation, by any party, should be filed within three business days of the filing of the stipulation." (Entry ¶ 21(c).) The Entry also states: "Testimony in opposition to the stipulation should be filed within 10 business days of the filing of the stipulation." (*Id.* ¶21(d).) Although Calpine certainly *could* have

filed another round of testimony specifically opposing the Stipulation per the August 9 Entry, the Entry did not specifically mandate such testimony, and under the circumstances, such testimony would have served little purpose. Again, Calpine had previously made its position known on AEP proposals that the Stipulation later adopted.

The purpose of procedural statutes and rules is to ensure that parties have fair notice of the claims and evidence of opposing parties. The Stipulation adopted the BTCR provisions proposed in AEP's Application. Rule 4901-1-30(D) expressly provides that "[p]arties that do not join the stipulation may offer evidence and/or argument in opposition," and Calpine offered its previously filed direct testimony as evidence. Whether Calpine should have interpreted the "should" language in the August 9 Entry as "shall" and directed its counsel to ghost write testimony on behalf of Ms. Merola opining on a legal standard applicable to settlements is, at this stage, a moot point. Calpine's direct testimony was admitted into evidence, opposing parties were afforded an opportunity for cross, and AEP responded to this testimony in rebuttal. Calpine's Initial Brief relies on these facts for legal arguments, and parties may respond to these arguments as well. Calpine's testimonial evidence and legal arguments have been timely and properly disclosed, and no one has been sandbagged.

Contrary to AEP's insistence, neither the Revised Code nor Administrative Code specify different standards or procedures for "stipulation hearings" and "litigation hearings," as the Supreme Court of Ohio has reminded the Commission more than once. In a case involving AEP, no less, the Court stated:

The commission appeared to believe that the requirement that its findings be based on record evidence is somehow lessened when the commission is reviewing a stipulation. For example, the commission stated in its entry on rehearing that “in a litigated case,” it “would have required more information to find that AEP–Ohio had met its burden of proof.” Contrary to the commission’s statement, this *was* “a litigated case”—IEU contested the stipulation. When the commission reviews a contested stipulation, the requirement of evidentiary support remains operative. While the commission “may place substantial weight on the terms of a stipulation,” it “must determine, *from the evidence*, what is just and reasonable.” (Emphasis added.)²

Thus, lay testimony offering a legal opinion about whether the three-part test has been satisfied is not appropriate or credible “evidence” to sustain a Commission decision. “The agreement of *some* parties is no substitute for the many procedural protections reinforced by the evidentiary-support requirement.”³

The level of evidentiary support required for an ESP is spelled out in the Revised Code and Commission rules. “The stipulation of some of the parties to this proceeding is, in itself, insufficient to satisfy this burden.”⁴ The utility must “file an application” and the Commission must hold a hearing on the “filing.” R.C. 4928.143(A) and (C)(1). Commission rules make clear that “[a]n application for an ESP or MRO is *incomplete* without a complete set of direct testimony of the electric utility personnel or other expert witnesses written in question and answer format supporting all schedules and significant issues identified by the electric utility.” O.A.C. 4901:1-35-03(A) (emphasis added). The rules similarly require a “complete description of the ESP and testimony explaining and supporting each aspect of the ESP. (*Id.* at (C)(1).) These statutes and

² *In re Application of Columbus S. Power Co.*, 2011-Ohio-2383, ¶¶ 18-19, 129 Ohio St. 3d 46, 49, 950 N.E.2d 164, 168, quoting *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 126, 592 N.E.2d 1370.

³ *Id.*

⁴ *Indus. Energy Consumers of Ohio Power Co. v. Pub. Utilities Comm'n*, 1994-Ohio-435, 68 Ohio St. 3d 559, 562–63, 629 N.E.2d 423, 426.

rules promote transparency and, when followed, supply an evidentiary record that enables the Commission to evaluate a stipulation based on something other than representations made in the settlement document. These requirements were *not* followed here.

Like most stipulations, the Stipulation here contains a boilerplate recital that it is “supported by adequate data and information,” and the Signatory Parties ask the Commission to “adopt the Application in this case as modified by this Stipulation.” (Joint Ex. 1, p.1.) The 25-page Application is part of the record (AEP Ex. 1), but this document merely consists of a summary of schedules, workpapers, and direct testimony that were *not* offered into the evidentiary record, as AEP acknowledges. (Tr. at 156 (“It’s not part of the evidentiary record.”); *see also* Tr. at 149-52.) This hide-the-ball approach prevented parties from cross-examining witnesses about the underlying data and information allegedly supporting AEP’s proposals, either as-filed with the Application or as-modified by the Stipulation. As a result, the Commission has virtually no evidentiary record to work with. “When the Commission reviews a contested stipulation, the requirement of evidentiary support remains operative.”⁵

Thus, when it comes to matters of procedure, it is AEP who does not have its house in order, not Calpine. “Sound regulatory policy” dictates that stipulations be accompanied by actual evidence, not boilerplate assertions that this evidence is out there somewhere and the Signatory Parties can vouch for it. This very same lack of transparency is what led to the adoption of Rider BTCR and the pilot program in the first place. Rider BTCR was first approved as part of AEP’s ESP III proceeding, Case No. 13-2385-EL-SSO (Feb. 25, 2015 Finding and Order). AEP promoted the rider to “align AEP Ohio’s transmission cost recovery mechanism with the other electric

⁵ *Id.* at ¶ 50, quoting *In re Application of Columbus S. Power Co.*, 2011-Ohio-2383, ¶ 19, 129 Ohio St.3d 46, 950 N.E.2d 164.

distribution utilities in Ohio” (*id.* at 65), but the Exeter Report in FirstEnergy’s pending proceedings details what these mechanisms have led to: cost shifting, out-of-control transmission spending, and a market where stakeholders willing to go along with these mechanisms receive special privileges.⁶ The promise of the Signatory Parties to commission a future audit of the BTCR pilot merely begs the question of why this has not already been done, as promised in Case No. 16-1852-EL-SSO, where the pilot was extended based on assurances in a stipulation that “transmission rates will be reevaluated at that time utilizing the information and experience gained during the pilot program.”⁷ No such reevaluation was presented in AEP’s next rate proceeding (Case No. 20-585-EL-AIR) but the pilot was extended nonetheless.⁸

As Calpine explained in its Initial Brief, the BTCR Pilot is not just or reasonable, and the audit is not a viable substitute for restoring full competition for wholesale transmission service. Nor is continuation of Rider BTCR as a nonbypassable surcharge appropriate, as the Commission’s own rules recognize. Approval of these parts of the Stipulation would violate the second and third prongs of the Commission’s three-part test for reviewing contested stipulations and should therefore be rejected.

B. Reply to RESA and IGS

As Signatory parties to the Stipulation, RESA and IGS support the BTCR provisions in the Stipulation. The parties are certainly entitled to have an opinion on these issues, but it should be made clear that they do not speak for Calpine. Nor are they similarly-situated to Calpine. As noted by RESA, “Today, the BTCR Pilot is offered to signatory parties of AEP Ohio’s ESP IV as well as

⁶ *Review of the Non-Market-Based Service Riders Established by Ohio Edison Co., et al.*, Case No. 22-391-EL-RDR, Report of Exeter Assoc., Inc. (filed July 17, 2023)

⁷ Case No. 16-1852-EL-SSO, Finding and Order (Apr. 25, 2018) at ¶ 95.

⁸ Case No. 20-585-EL-AIR, Finding and Order (Nov. 17, 2021) at ¶ 203.

several customers with reasonable arrangements, and allows participants to be billed transmission service based on NSPL.” (RESA Br. at 12.) The advantages of NSPL-based billing relative to demand-based billing (applicable to non-pilot participants) could be available to *all* shopping customers if Rider BTCR were bypassable, as was the case until less than 10 years ago.⁹ Limiting this benefit to customers of Signatory Parties and other insiders is overtly discriminatory, and hardly consistent with ratepayer benefits or sound regulatory policy.

IGS argues that “if transmission is made bypassable, it would unjustly and unreasonably add costs that suppliers don’t have embedded in their retail contracts and ultimately harm the competitive market.” (IGS Br. at 12.) A variation of this argument was made in the very proceeding Rider BTCR was adopted, where IEU-Ohio argued that assigning CRES suppliers PJM billing line items to AEP would disrupt existing contracts. The Commission rejected this argument, finding that “CRES contracts tend to include provisions to address regulatory changes, which is particularly common for commercial and industrial customers.”¹⁰ Supplier contracts do not impose the barrier that IGS claims. To the contrary, the ability of Calpine and similarly situated suppliers to offer innovative products and services in Ohio is severely hampered by the Rider BTCR cost recovery construct, as Ms. Merola explained. This construct should be dismantled. AEP witness Kelso acknowledged that CRES providers who might have a superior approach to managing transmission costs are precluded from utilizing those approaches in Ohio. (Tr. at 853.)

The continued imposition of the BTCR as a non-bypassable charge creates an unlevel playing field and market power. It unfairly rewards certain market participants’ business plans and limits other participants’ service offerings, as well as removing customers’ choices. At a time

⁹ This also undermines AEP’s claim that Rider BTCR should not be bypassable because the consequences of doing so are “unknown.” (See AEP Br. at 91).

¹⁰ Case No.13-2385-EL-SSO Finding and Order (Feb. 25, 2015) at p. 68.

when it is estimated that transmission spending from investor-owned utilities is rapidly growing, there needs to be more competition in managing these costs not less. Not only does Rider BTCR limit the current competitive choices in the market, it removes any incentive and opportunity to create customized products and services that are, or potentially could be, formulated to assist Ohio's businesses in addressing these ever changing transmission costs without burdening all non-participating customers with needless additional costs. Competitive discipline for transmission costs is removed and CRES providers are disincentivized to risk their own capital to meet the wholesale transmission needs of their customers. (Calpine Ex. 1 at p. 4.)

As Calpine has explained, if a customer decides to use a CRES provider (including an AEP affiliate), then it should be the CRES provider's full responsibility to manage and be direct billed by PJM for its own load's PJM transmission costs, as is the case throughout the remainder of the PJM territory. CRES providers should not be allowed to sign Principal Agent Declarations of Authority or execute Bill Line Item transfers of their demand-based PJM charges to AEP, which removes their risk and responsibility as well as their ability as an LSE to proactively manage, control and bill for their own wholesale business risks as they relate to their own unique PJM demand-based costs as a LSE under PJM's OATT in order to serve their loads behind AEP. (Calpine Ex. 1 at 4-6.) The Commission should undo the anti-competitive rent-seeking behavior that Rider BTCR creates for utilities and certain favored CRES providers.

CONCLUSION

Much has changed since the BTCR Rider and Pilot were approved, including FERC Order 841 in 2018 (directing PJM and other RTOs to remove barriers to the participation of energy storage resources) and FERC Order 2222 in 2020 (requiring RTOs to amend their tariffs to allow Distributed Energy Resources to fully participate in the wholesale electricity markets.) Yet Ohio continues to move in the opposite direction, and the Stipulation proposes to accelerate this

movement. The Commission should modify the Stipulation to make Rider BTCR bypassable for shopping customers, set a definite expiration date for the BTCR Pilot, and require CRES providers to take full responsibility, including direct billing by PJM, for their own wholesale transmission costs.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed on December 22, 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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