

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION'S
CONSIDERATION OF A SETTLEMENT
AGREEMENT BETWEEN DIRECT ENERGY
SERVICES, LLC AND THE COMMISSION'S
STAFF.

CASE NO. 22-583-GE-UNC

OPINION AND ORDER

Entered in the Journal on April 17, 2024

I. SUMMARY

{¶ 1} The Commission adopts the amended joint stipulation and recommendation entered into by Staff and Direct Energy Services, LLC.

II. PROCEDURAL BACKGROUND

{¶ 2} Direct Energy Services, LLC (Direct Energy) is an electric services company as defined in R.C. 4928.01 and a retail natural gas supplier as defined in R.C. 4929.01; is certified to provide competitive retail electric service (CRES) under R.C. 4928.08 and to supply competitive retail natural gas service (CRNGS) under R.C. 4929.20; and is subject to the jurisdiction of this Commission pursuant to R.C. 4928.16 and R.C. 4929.24. Accordingly, Direct Energy is required to comply with the Commission's minimum CRES standards set forth in Ohio Adm.Code Chapter 4901:1-21, as well as the minimum CRNGS standards set forth in Ohio Adm.Code Chapter 4901:1-29.

{¶ 3} Ohio Adm.Code 4901:1-23-04(A) provides that, if Staff and a CRES provider reach agreement regarding the violation of a rule within Ohio Adm.Code Chapter 4901:1-21, the violation of a Commission order, a proposed corrective action or remedy, or the amount of a forfeiture or other payment, the agreement must be reduced to writing in a settlement agreement and filed with the Commission for approval. Similarly, Ohio Adm.Code 4901:1-34-05(A) provides that, if Staff and a retail natural gas supplier reach agreement regarding the violation of a rule within Ohio Adm.Code Chapters 4901:1-27

through 4901:1-29, the violation of any provision of R.C. Chapter 4929, the violation of a Commission order, a proposed corrective action or remedy, or the amount of a forfeiture or other payment, the agreement must be reduced to writing and filed with the Commission for approval.

{¶ 4} On June 10, 2022, Direct Energy and Staff (Signatory Parties) filed a joint stipulation and recommendation (Stipulation). Attached to the Stipulation was a notice of probable noncompliance (Notice Letter) issued by Staff on June 9, 2021, to Direct Energy with respect to certain record keeping, marketing and enrollment practices, and billing issues. In its Notice Letter, Staff proposed corrective actions to address the issues of probable noncompliance. The Stipulation, as proposed, would resolve all of the issues identified by Staff in the Notice Letter. The Stipulation notes that the Signatory Parties engaged in numerous discussions to address the issues raised in the Notice Letter and reached a resolution after such discussions.

{¶ 5} On July 1, 2022, the Office of the Ohio Consumers' Counsel (OCC) filed a motion to intervene.

{¶ 6} July 18, 2022, Direct Energy filed a memorandum contra the motion to intervene. OCC filed a reply to Direct Energy's memorandum contra on July 25, 2022.

{¶ 7} By Entry dated September 16, 2022, the attorney examiner granted OCC's motion to intervene.

{¶ 8} On September 21, 2022, Direct Energy filed a request to certify to the Commission an interlocutory appeal of the decision to grant OCC's motion to intervene in the September 16, 2022 Entry.

{¶ 9} On September 26, 2022, OCC timely filed a memorandum contra Direct Energy's interlocutory appeal.

{¶ 10} By Entry dated June 20, 2023, the attorney examiner denied certification of Direct Energy's interlocutory appeal and established a procedural schedule directing the parties to file initial comments by July 12, 2023, and reply comments by July 26, 2023.

{¶ 11} Initial comments were filed by Direct Energy on July 12, 2023, and reply comments were filed by OCC on July 26, 2023. In its initial comments, Direct Energy supports the Stipulation and generally argues that it satisfies the Commission's standards for such agreements. In its reply comments, OCC does not state opposition to the Stipulation but submits that several provisions of the Stipulation should be modified to better protect retail consumers.

{¶ 12} On February 1, 2024, by Entry, the attorney examiner established a new procedural schedule in the case, with testimony due on March 12, 2024, and a hearing to occur on March 19, 2024.

{¶ 13} On March 8, 2024, Staff, Direct Energy, and OCC filed a joint motion to extend the deadline for testimony from March 12, 2024, to March 15, 2024. The attorney examiner granted this motion by Entry issued on March 11, 2024, extending the deadline for testimony to March 15, 2024.

{¶ 14} On March 15, 2024, Direct Energy filed an amended and restated joint stipulation and recommendation (Amended Stipulation), which purports to resolve all issue in the case and address all concerns raised by Staff.

{¶ 15} Also on March 15, 2024, Direct Energy filed the testimony of Bryce McKenney.

{¶ 16} On March 18, 2024, OCC filed a letter in this case docket indicating that it neither opposes nor supports the Amended Stipulation.

{¶ 17} On March 19, 2024, a hearing was held in this matter, during which the parties stipulated to the admission of the Amended Stipulation (Joint Ex. 1), the testimony

of Bryce McKenney (Direct Energy Ex. 1), a redlined copy of the Amended Stipulation (Direct Energy Ex. 2), and OCC's March 18, 2024 letter (Direct Energy Ex. 3), all of which were admitted into the record during the hearing (Tr. at 5-8.)

III. DISCUSSION

A. *Summary of the Amended Stipulation*

{¶ 18} As previously stated, Signatory Parties filed an Amended Stipulation on March 15, 2024. The Amended Stipulation is intended by the Signatory Parties to resolve all outstanding issues in this proceeding. Below is a summary of the major provisions agreed to by the Signatory Parties contained in the Amended Stipulation. However, this summary is not intended to replace or supersede the Amended Stipulation.

{¶ 19} Direct Energy has implemented/provided or will implement the actions set forth below as soon as is practicable after the Commission approves the Amended Stipulation:

- (1) Has provided Staff with a plan to come into compliance with Commission rules. The plan should address, at least, enrollment practices, an auditing process for enrollments, and any corrective actions to be implemented by Direct Energy.
- (2) Has submitted to Staff a list of all vendors, contact information, and agents that have marketed on behalf of Direct Energy for the period of December 1, 2020, through May 31, 2021. Also include the number of attempted enrollments for the identified agents along with the number of successful enrollments.
- (3) Has reviewed all door-to-door enrollments completed within the three months preceding the Notice Letter, and has taken/will take the following actions:

- (a) Review each contract, third-party verification, and other enrollment documentation for completeness, accuracy, and customer consent.
 - (b) Contact each customer where enrollment documents are not complete or the customer's consent is not certain.
 - (c) Give each customer contacted in (3)(b). above, the option to cancel without any penalties or to re-enroll with Direct Energy, in which case, new enrollment and consent must be obtained in accordance with Ohio Adm.Code 4901:1-21-06 and/or 4901:1-29-06.
 - (d) Review all customer complaints that noted similar issues with the sales representatives to determine patterns of misleading and deceptive practices.
- (4) Has provided Staff with telemarketing calls for the period of January 31, 2021, through February 6, 2021, including a listing of all vendors.
- (5) Has reviewed all marketing and sales scripts for compliance with rules and has submitted updated versions of these documents to Staff for review. If Direct Energy modifies its scripts in the 12 months following the Commission's approval of the Amended Stipulation, Direct Energy will submit the updated scripts to Staff.

(Joint Ex. 1 at 3-4.)

{¶ 20} Direct Energy agrees to make a one-time donation of \$100,000 to the Dollar Energy Fund to fund grants to be used for bill payment assistance programs for Ohio consumers (Joint Ex. 1 at 4).

{¶ 21} For a period of 12 months commencing with approval of the Amended Stipulation, when enrolling customers in Ohio, Direct Energy agrees to not use the digital third-party verification option authorized for it in the September 26, 2019 Entry in Case No. 18-832-GE-WVR and extended in the February 21, 2024 Finding and Order in Case Nos. 17-1843-EL-ORD, et al. (Joint Ex. 1 at 4-5).

{¶ 22} Signatory Parties agree to the following process concerning the release by Staff of any document or information marked as confidential. Three days' prior, a notice of intent to disclose shall be provided to the party claiming confidentiality. Three days after such notice, Staff may disclose or otherwise make use of such documents or information for any lawful purpose, unless the Commission receives a request for a protective order pertaining to such documents or information within the three-day notice period. The three-day notice period will be computed according to Ohio Adm.Code 4901-1-07. (Jt. Ex. 1 at 5.)

{¶ 23} The process set forth in the August 1, 2022 Protective Agreement between Direct Energy and OCC applies to the release by OCC of any document or information marked as confidential (Jt. Ex. 1 at 5).

{¶ 24} Direct Energy agrees to pay a forfeiture of \$275,000 upon approval of this Amended Stipulation by the Commission. The payment shall be paid within 30 days of the Order approving this Amended Stipulation and shall note the docket number assigned to this matter. (Jt. Ex. 1 at 5).

{¶ 25} Concerning procedural matters within the Amended Stipulation, Direct Energy and Staff agree that the Amended Stipulation is not an admission or finding of a violation or liability, shall not be cited in future proceedings outside of enforcement of its terms, and resolves all issues in the case as presented by Staff's June 9, 2021 Notice Letter.

Further, the Amended Stipulation is expressly conditioned on its adoption by the Commission in its entirety without material modification and provides the Signatory Parties the right to withdraw from the Amended Stipulation in such an event, after the filing and denial of an application for rehearing. Finally, the Signatory Parties agree to support the Amended Stipulation if it is contested and agree to not oppose an application for rehearing designed to defend its terms.

B. Consideration of the Amended Stipulation

{¶ 26} Ohio Adm.Code 4901-1-30 authorizes two or more parties to Commission proceedings to enter into a written stipulation concerning the issues presented in the proceeding. Although not binding upon the Commission, the terms of such an agreement are accorded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978).

{¶ 27} The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994); *In re Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT, Opinion and Order (Mar. 30, 1994); *In re Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al., Opinion and Order (Dec. 30, 1993); *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Jan. 31, 1989); *In re Restatement of Accounts and Records*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the Signatory Parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

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?

{¶ 28} The Supreme Court of Ohio has endorsed the Commission's analysis using these criteria to resolve cases in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 629 N.E.2d 423 (1994). The Supreme Court of Ohio stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

{¶ 29} Direct Energy and Staff urge the Commission to approve the Amended Stipulation in its entirety. OCC offers neither support nor opposition to the Amended Stipulation. The Commission addresses the parties' specific arguments in the context of the three criteria for evaluating the reasonableness of the Amended Stipulation below.¹

1. IS THE STIPULATION THE PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES?

{¶ 30} The Signatory Parties represent that the Amended Stipulation is a comprehensive settlement of issues raised by parties with diverse interests, all of whom participated in an open process while being represented by able counsel and technical experts experienced in regulatory matters before the Commission (Joint Ex. 1 at 2). Direct Energy submits that OCC does not dispute that the Amended Stipulation is the product of serious bargaining among capable and knowledgeable parties where its March 18, 2024

¹ While the parties may not have explicitly organized their respective arguments under each prong of the Commission's three-part test for analyzing the reasonableness of a settlement agreement, we have discussed each argument raised within this framework.

letter indicates that it does not oppose the Amended Stipulation. (Direct Energy Ex. 1 at 4-5, 8; Direct Energy Ex. 3.)

{¶ 31} We find that the first part of the three-part test is satisfied here. Direct Energy witness Bryce McKenney testified that the Amended Stipulation follows an extensive investigation and results from extensive discussion and negotiation of the issues with all parties, including OCC. Further, the evidence demonstrates that, during the settlement process, all parties were adequately represented by knowledgeable counsel, who have extensive experience practicing before the Commission in utility matters. Finally, the Commission notes that this is an amended and restated stipulation following a comment period, which is the culmination of additional negotiations by the parties to resolve issues in the proceeding. (Direct Energy Ex. 1 at 4-6, 8-9; Joint Ex. 1 at 1.)

2. DOES THE STIPULATION, AS A PACKAGE, BENEFIT RATEPAYERS AND THE PUBLIC INTEREST?

{¶ 32} Direct Energy believes the Amended Stipulation, viewed as a package, benefits customers and the public interest. Direct Energy avers that the various components of the Amended Stipulation satisfy or otherwise address each of the issues raised during Staff's investigation, conditions which Staff has agreed to by signing the Amended Stipulation and that OCC has not opposed. As such, Direct Energy submits that the Amended Stipulation fulfills the second prong of the settlement test. (Direct Energy Ex. 1 at 4, 8-9, Joint Ex. 1 at 2.)

{¶ 33} Direct Energy submits that the key components of the Amended Stipulation address each issue raised in Staff's Notice Letter. Further, through the Amended Stipulation, Direct Energy confirms that it has or will, after the Commission adopts the Amended Stipulation, undertake numerous actions which reflect the corrective actions recommended by Staff. Further, Direct Energy submits that it has provided Staff with a plan under which it will come into compliance with Commission regulations. Specifically,

Direct Energy asserts that the plan addresses enrollment practices, an auditing process for enrollments, and other corrective actions. Next, Direct Energy avers that it has agreed to refrain from using the digital third-party verification option authorized for it by the Commission in Case No. 18-382-GE-WVR, which authorization was extended in the Commission's February 21, 2024 Finding and Order in Case Nos. 17-1843-EL-ORD, et al. *See, e.g., In re Direct Energy Business, LLC and Direct Energy Services, LLC*, Case No. 18-382-GE-WVR, Entry (Sept. 26, 2019); *In re the matters of the Commission's Review of Chapters of the Ohio Administrative Code*, Case Nos. 17-1843-EL-ORD, et al., Finding and Order (Feb. 21, 2024). Finally, Direct Energy submits that through the Amended Stipulation, it agrees to pay a proposed forfeiture of \$275,000 and to make a donation of \$100,000 to the Dollar Energy Fund, which funds bill payment assistance programs for Ohio consumers. Direct Energy believes that these key terms of the Amended Stipulation show that as a package, it is to the benefit of ratepayers and the public interest. (Direct Energy Ex. 1 at 4-5, 8-9.)

{¶ 34} We find that the second part of the three-part test is satisfied here. Direct Entry witness Bryce McKenney testified to the various conditions of the Amended Stipulation and how each shows either that Direct Energy has already taken corrective actions based on Staff's raising of concerns about certain enrollments, or that Direct Energy, under its plan to come into compliance and in accordance with the Amended Stipulation, has committed to remedial measures that show its understanding of the gravity of the issues raised by Staff and the importance of compliance with the Commission's rules. (Joint Ex. 1 at 2, 3-5, Direct Energy Ex. 1 at 8-9.)

3. DOES THE STIPULATION VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE OR PRACTICE?

{¶ 35} Direct Energy and Staff submit that the Amended Stipulation does not violate any important regulatory principle or practice. Further, Direct Energy witness Bryce McKenney testified to the various segments of the Amended Stipulation, which he opines

does not violate any regulatory principle or practice. (Joint Ex. 1 at 1, Direct Energy Ex. 1 at 9.)

{¶ 36} We find that the third part of the three-part test is satisfied here. The Amended Stipulation, through its numerous terms, does not violate any regulatory principle or practice. Instead, the Amended Stipulation requires Direct Energy to comply with the Commission's regulations, correct issues raised by Staff, pay a forfeiture, donate to utility payment assistance funds for Ohio consumers, and, for a period of 12 months, refrain from utilizing digital third-party verification. (Joint Ex. 1 at 3-5.)

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 37} On June 10, 2022, Staff and Direct Energy filed the Stipulation, which purported to resolve all issues raised by Staff in its Notice Letter.

{¶ 38} July 1, 2022, OCC filed a motion to intervene in this proceeding, which motion was fully briefed. The attorney examiner granted OCC's motion to intervene on September 16, 2022.

{¶ 39} On June 20, 2023, the attorney examiner established a procedural schedule, setting a comment period ending on July 12, 2023, and a reply comment period ending on July 26, 2023. The Commission received initial comments from Direct Energy, and reply comments from OCC.

{¶ 40} On February 1, 2024, the attorney examiner issued an Entry establishing a new procedural schedule, which set testimony to be due by March 12, 2024, and a hearing to occur on March 19, 2024.

{¶ 41} On March 8, 2024, Direct Energy, OCC, and Staff filed a joint motion to extend the testimony deadline to March 15, 2024. The attorney examiner granted the joint motion on March 11, 2024.

{¶ 42} On March 15, 2024, Direct Energy filed the Amended Stipulation and the direct testimony of Bryce McKenney.

{¶ 43} On March 19, 2024, a hearing was held during which Direct Energy presented evidence in support of the Amended Stipulation, and the Signatory Parties presented the Amended Stipulation.

{¶ 44} The Amended Stipulation is reasonable and should be adopted, as it (1) is a product of serious bargaining among capable, knowledgeable parties;; (2) as a package, benefits ratepayers and the public interest;; and, (3) does not violate any important regulatory principle or practice.

V. ORDER

{¶ 45} It is, therefore,

{¶ 46} ORDERED, That the Amended Stipulation between Staff and Direct Energy be approved, as further described in this Opinion and Order. It is, further,

{¶ 47} ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

COMMISSIONERS:

Approving:

Jenifer French, Chair
Daniel R. Conway
Lawrence K. Friedeman
John D. Williams

JMD/mef

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Case No(s). 22-0583-GE-UNC

Summary: Opinion & Order that the Commission adopts the amended joint stipulation and recommendation entered into by Staff and Direct Energy Services, LLC electronically filed by Ms. Donielle M. Hunter on behalf of Public Utilities Commission of Ohio.