

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of) Case No. 23-0023-EL-SSO
Ohio Power Company for Authority to)
Establish a Standard Service Offer)
Pursuant to §4928.143, Ohio Rev. Code,)
in the Form of an Electric Security Plan.)

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

**RETAIL ENERGY SUPPLY ASSOCIATION'S MEMORANDUM CONTRA
TO THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
APPLICATION FOR REHEARING**

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.

Technician SL Date Processed MAY 13 2024

Matthew R. Pritchard (Reg. No. 0088070)
(Counsel of Record)
Avery L. Walke (Reg. No. 102682)
MCNEES WALLACE & NURICK LLC
250 West Street, Suite 550
Columbus, OH 43215
Telephone: (614) 719-2842
Telecopier: (614) 469-4653
mritchard@mcneeslaw.com
awalke@mcneeslaw.com
(Willing to accept service via email)

May 13, 2024

**COUNSEL FOR THE RETAIL ENERGY SUPPLY
ASSOCIATION**

PUCO

2024 MAY 13 PM 4:51

RECEIVED - DOCKETING DIV

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of) Case No. 23-0023-EL-SSO
Ohio Power Company for Authority to)
Establish a Standard Service Offer)
Pursuant to §4928.143, Ohio Rev. Code,)
in the Form of an Electric Security Plan.)

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

**RETAIL ENERGY SUPPLY ASSOCIATION'S MEMORANDUM CONTRA
TO THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
APPLICATION FOR REHEARING**

I. Introduction

The Retail Energy Supply Association ("RESA") respectfully requests that the Public Utilities Commission of Ohio ("Commission") reject the Office of the Ohio Consumers' Counsel's ("OCC") first assignment of error in their application for rehearing as it is completely meritless. OCC argues that in exchange for support of the Joint Stipulation that parties including competitive retail electric service ("CRES") providers received pet projects akin to cash payments.¹ The two "pet projects" OCC ascribes to CRES providers is (1) a provision that protects customers from future costs by specifying minimum standards by which AEP Ohio's new billing system could be viewed as prudent, and (2) a provision addressing a residential smart thermostat demand response program that RESA opposed in its testimony in this case prior to the

¹ OCC Application for Rehearing at p. 5 (May 3, 2024).

multiparty settlement being reached in the proceeding.² OCC provides absolutely no analysis on how either of these two items uniquely benefit CRES providers. And, OCC offers no analysis on how either of these provisions are unlawful or unreasonable on their own or as part of the Stipulation. Moreover, the Commission has consistently rejected OCC's similar arguments in the past where it has alleged that any provision that in any way benefits any party to the proceeding should be viewed as unlawful on its face.³ The Commission should again reject OCC's meritless argument.

II. Argument

In this proceeding, as in many past proceedings, OCC alleges that a Stipulation is unlawful because OCC did not join the settlement. OCC's arguments have taken both explicit and implicit formats. Explicitly, OCC has argued in past cases that prong 1 of the 3-part settlement test effectively cannot be met if OCC is not a signatory party.⁴ Implicitly, OCC has argued, as it does here, that any settlement provision that provides a benefit to any party where OCC is not also a signatory party renders the entire

² *Id.*

³ *FE ESP IV*, Case No. 14-1297-EL-SSO, Opinion and Order at 44 (Mar. 31, 2016); DP&L Grid Mod, Case Nos. 18-1875-EL-GRD, et al., Opinion and Order at 75 (June 2, 2021).

⁴ OCC has argued that settlements require a diversity of signatory party support, further arguing that only OCC should be viewed as representing the interests of residential customers. The Commission has rejected, repeatedly, OCC's request to give it a de facto veto power of settlements. See, e.g., *In re Ohio Power Co.*, Case Nos. 14-1693-EL-RDR, et al. Opinion and Order at 52.

The three-prong test utilized by the Commission and recognized by the Ohio Supreme Court does not incorporate the diversity of interest component, as presented by OCC and APJN. We reject OCC/APJN's attempt to revise the test to evaluate stipulations based on the diversity of signatory parties (OCC Ex. 36 at 2; OCC Ex. 33 at 3). OCC also seeks to hold itself out as the only party speaking for the interests of residential consumers. The Commission has repeatedly determined that we will not require any single party, including OCC, to agree to a stipulation, in order to meet the first prong of the three-prong test. *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 13-1571-GA-ALT, Opinion and Order (Feb. 19, 2014) at 10; *In re FirstEnergy*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012) at 26, citing *Dominion Retail, Inc. v. The Dayton Power and Light Co.*, Case No. 03-2405-EL-CSS, et al., Opinion and Order (Feb. 2, 2005) at 18, Entry on Rehearing (Mar. 23, 2005) at 7-8.

stipulation unlawful and unreasonable.⁵ OCC's arguments have repeatedly been rejected as they have no basis in law and do not aid the Commission in its statutory duty to ensure that its orders are lawful and fall within the zone of reasonableness.⁶

Utility rates, and by extension the Commission's actions in regulating public utilities, must be just and reasonable.⁷ To aid in the just and reasonableness determination in a proceeding where the parties seek to resolve the matter by stipulation and recommendation, the Commission employs a 3-part test to determine if the outcome recommended in the settlement is lawful and reasonable.

In this case, OCC argues that the Commission's Opinion and Order is unlawful and unreasonable because Signatory Parties to the settlement "lined up to support the

⁵ While OCC chastises other parties for being engaged in the obvious pursuit of their own best interests, OCC is quick to undertake the same efforts it complains of, including OCC's direct pursuit of financial benefits for its client. For example, OCC joined a settlement that resulted in moving off the cost of service allocations to customer classes for an explicit reduction to cost allocations to residential customers in exchange for OCC's signature on a settlement:

On April 7, 2016, Signatory Parties filed a Stipulation in this docket ("gridSMART Phase II Stipulation"). On December 21, 2016, Signatory Parties filed a Joint Stipulation in several proceedings including Case No. 10-2929-EL-UNC ("Global Settlement"). In accordance with that Settlement, the Office of the Ohio Consumers' Counsel ("OCC") and AEP Ohio file the following statement as agreed within seven days of the execution of the Global Settlement.

Based on the integrated package of terms and conditions in the Global Settlement and without precedential effect, OCC agreed in Paragraph IV.E of the Global Settlement not to contest the gridSMART Phase II Stipulation. OCC's agreement not to contest the gridSMART Phase II Stipulation was conditioned on the annual audit for prudence and a review of the operational cost savings credit (as set forth in Paragraph 6 of the gridSMART Phase II Stipulation) being retained by the Commission in adopting the gridSMART Phase II Stipulation. Upon adoption of both the Global Settlement and the gridSMART Phase II Stipulation, residential customers will be allocated 45% of the gridSMART Phase II costs (which is less than the allocation of 62.4% proposed in the gridSMART Phase II Stipulation) on a going forward basis and for the remainder of gridSMART Phase II recovery. The remaining 55% of the gridSMART Phase II costs will be allocated to other rate schedules in proportion to the existing allocation.

AEP Ohio smartGrid 2, Case Nos. 13-1939-EL-RDR, et al., Correspondence of OCC (Dec. 28, 2016).

⁶ *FE ESP IV*, Case No. 14-1297-EL-SSO, Opinion and Order at 44 (Mar. 31, 2016); *DP&L Grid Mod*, Case Nos. 18-1875-EL-GRD, et al., Opinion and Order at 75 (June 2, 2021).

⁷ R.C. 4905.22; see R.C. 4905.13.

utility's plan in exchange for their pet projects."⁸ OCC's entire "analysis" in its first assignment of error on the issue is as follows:

An electric security plan can only be approved if the PUCO finds that the plan is more favorable in the aggregate as compared to the expected results that would otherwise apply under a market rate offer. The burden of proving that an ESP is more favorable than a Market Rate Offer ("MRO") under R.C. 4928.142 falls upon the utility. Additionally, the PUCO is statutorily obligated to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service." Ultimately, the PUCO's Order must support its decision with "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact" and provide sufficient details to enable a court to determine how the PUCO reached that decision.

Many went along with AEP's plan. This should come as no surprise, as many obtained pet projects in return. The Citizens Utility Board, Ohio Environmental Council, and the Environmental Law & Policy Center got so-called energy efficiency programs (such as smart thermostats) paid for by residential consumers. The Ohio Energy Leadership Council and Ohio Energy Group got their interruptible rate programs, funded by other customers, including the residential consumers OCC represents. And competitive retail electric service providers got smart thermostat demand response programs, functionality in AEP's Customer Information System, and a working group to discuss time-of-use rates paid for with consumer dollars. But pet projects, that look a lot like cash payments (or their equivalent), are not enough to approve the Settlement or protect consumers.⁹

Specific to CRES providers, OCC offers nothing to link either the settlement provisions addressing AEP Ohio's new CIS/billing systems or the smart thermostat demand response program to an unlawful or unreasonable outcome. The prior paragraph discusses the ESP v. MRO test, but OCC makes no link between any of the items it flags as "pet projects" and the costs and benefits that the Commission is statutorily mandated to review under the test. After the "pet project" paragraph OCC moves on and discusses whether other settlement provisions are likely to improve

⁸ OCC Application for Rehearing at 1.

⁹ OCC Application at 4-5 (internal citations omitted).

reliability. On this issue, however, OCC offers nothing to demonstrate any provision is unlawful or unreasonable, in general or in the context of the Commission's 3-part analysis. A party's failure to support an argument with analysis warrants outright rejection of the issue.¹⁰ Moreover, OCC's position is entirely meritless.

At the outset, RESA's litigation position (or at least a portion thereof) in this case is a matter of public record and is reflected in the prefiled RESA witness testimonies that were docketed before the Stipulation was reached. RESA witness Pulliam's prefiled testimony recommended that AEP Ohio's entire portfolio of energy efficiency and demand response programs (*i.e.* inclusive of demand management programs) be rejected because they could and should be offered through the competitive marketplace.¹¹ RESA witness Smith who addressed the settlement provisions also testified that implementation of the smart thermostat demand response program needed to be measured and carefully monitored to ensure that it did not negatively affect the competitive market and that additional details needed to be figured out to ensure that there was not a disruption of competitively offered products.¹² The Stipulation was entered into a package by all parties including RESA, but OCC's insinuation that the smart thermostat demand response program was something either being advocated for by RESA or somehow the equivalent of a cash payment to RESA to get RESA to join the settlement is belied by the public record in this proceeding.

¹⁰ R.C. 4903.13, 4903.09 (Commission cannot rule without record support); *In re Columbus S. Power Co.*, 2011-Ohio-2638 at ¶ 19 (it is not the role of the court to develop a party's argument, and the failure to support an argument generally constitutes a waiver of the argument) *In re Duke Energy Ohio, Inc.*, 2018-Ohio-5536 at ¶ 23 (Commission must respect its precedent and cannot deviate unless the new path is substantively lawful and reasonable and the reason for the deviation is explained).

¹¹ Prefiled Direct Testimony of J. Pulliam on behalf of RESA at 14-15 (June 9, 2023).

¹² RESA Witness Smith at 4-8.

The other “pet project” OCC insinuates CRES providers received was related to the CIS/billing system. In its Application and testimony, AEP Ohio explained that it was becoming increasingly difficult and costly to upgrade its existing CIS/billing systems as they had been designed decades ago and at a time where there was no customer choice.¹³ AEP Ohio indicated it was developing a new CIS/billing system for all AEP jurisdictions (including those that had customer choice and those that did not).¹⁴ Against this backdrop, the Stipulation includes a number of provisions designed to avoid or minimize the issues AEP Ohio is currently having with upgrading its legacy CIS/billing system (upgrade costs ultimately born by all customers). The Stipulation provides:

- Ensure that the new system maintains no less functionality than what is available under the current systems and no less functionality than what AEP Ohio agreed to in Paragraphs III. N and P in the Stipulation approved in Case No. 19-1475-EL-RDR.
- Ensure that the new systems are flexible enough to allow for the introduction of new rate, product, and service offerings without the need for substantial additional investment in IT systems.
- Ensure that AEP Ohio’s customers can continue to directly access their interval customer data (15-minute interval) at any time through their customer portal.
 - i. At least 24 months of energy usage data in 15-minute, 30-minute, or 60-minute intervals made available on a best efforts basis within 24 hours of performing industry-standard validation, estimation, and editing (VEE) processes and no later than thirty (30) days after the end of each meter cycle.
 - ii. At least 24 months of detailed billing history data, including breakdown of all billing line item charges.
 - iii. Flexible views (for non-residential customer with multiple accounts) with options to (a) select individual account, (b) group accounts by defined criteria, or (c) access full account list.
 - iv. Tariff and rebate program information (if applicable).
 - v. The foregoing data shall be able to be downloaded by the customer into either an .xlsx or.csv format.
 - vi. No additional fees shall be charged to customers directly accessing or requesting their own data.

¹³ AEP Ohio Application; Prefiled Direct Testimony of Stacey Gabbard.

¹⁴ *Id.*

- Ensure that the new system will have the functionality to accommodate supplier consolidated billing (SCB) without any Signatory Party agreeing to continue providing supplier consolidated billing. AEP Ohio will not implement changes unless it receives Commission approval for a SCB tariff outlining the process.
- Ensure that the new CIS can provide authorized CRES providers and third parties, *i.e.*, with customers' consent, with access to interval customer data (15-minute interval) for all customers with meters capable of recording interval data. Such data should be made available through both manual actions by an authorized CRES provider or third party and through EDI transactions. As part of its next base distribution rate case, AEP Ohio will evaluate the costs, if any, and propose a tariff charge for each method (manual and EDI) as applicable for CRES providers and third parties that request 15-minute data. The data and information used to evaluate the costs associated with this provision will be shared with Staff as part of the rate case review. As products and services that utilize the 15-minute interval data are developed by CRES marketers and third parties, the Signatory Parties offering such products and services will share updates with the gridSMART Collaborative, once they are publicly available.
- Ensure that the CIS is capable of allowing large commercial and industrial customers to switch on an accelerated basis (3-days), subject to reasonable limits approved by the Commission regarding the number of times a customer can shop within a billing period.
- Ensure that the CIS is capable of allowing residential and small commercial customers to switch to or from the SSO default service on an accelerated basis.
- Ensure that the new system can account for negative loads of both shopping and non-shopping customers, that the negative load data would be properly accounted for and reportable to PJM (consistent with PJM settlement and billing procedures) such that individual customers could participate in net metering and other market programs and their supplier could obtain value for the customer's behind the meter generation in the PJM markets.
- Ensure that CIS is capable of allowing customers that relocate within AEP Ohio's service territory can keep their existing CRES provider when they move to a new location provided that AEP Ohio continues to perform billing for the customer, if and when AEP Ohio's operational plan is approved in Case No. 19-2141-EL-EDI.
- Ensure that the new CIS can calculate banked usage for net metering customers.
- The new CIS system will incorporate secure data sharing functionality. Upon receiving evidence of all necessary customer consent, AEP Ohio's CIS system will be capable of providing to CRES providers and third-party aggregators available customer data sufficient to allow them to enroll residential accounts to participate in the PJM ancillary services market, including but not limited to the customer's peak load contribution. AEP

Ohio will evaluate the costs of providing such service, if any, and propose charges, as applicable, for this service in its next rate case.

- AEP may propose tariff charges to be billed to third parties that utilize the AEP Ohio bill to charge for non-jurisdictional items/services. The revenue for those tariff services shall be credited to help offset any charges for data transfer and bill format costs. Signatory Parties reserve their rights to contest the proposed tariff changes.
- AEP Ohio will ensure that it shows past due non-jurisdictional charges separately from AEP Ohio past due regulated charges on its bill through a bill format application within 60 days of executing the Stipulation.¹⁵

Many of these provisions provide explicit and direct benefits to customers. For example, the Stipulation mandates that AEP Ohio's new system allow customers to "directly access their interval customer data." The Stipulation will also ensure that residential customers who install solar panels and generate excess power can receive compensation for providing that power to the grid, an issue that has existed under the legacy systems. And, without these requirements there is no guarantee that AEP Ohio would have designed its next system in such a manner to provide customers with these direct and indirect benefits outlined above. Instead, parties' remedies would have largely been relegated to arguing for a disallowance if something was imprudent or requesting AEP Ohio add additional functionality at customer's expense. OCC also ignores the potential costs for redesigning an IT system once fully developed and implemented. Most telling, perhaps, is that OCC fails to allege that any of these specific requirements are individually, or collectively, unlawful or unreasonable.

While OCC is quick to criticize others for joining the Stipulation, OCC fails to recognize that the Stipulation advances litigation positions made by both RESA and OCC. The Stipulation continues competitive auctions to secure generation service for Standard Service Offer ("SSO") customers, an outcome that OCC has advocated for

¹⁵ Stipulation at 7-11.

and ascribes benefits to in this and other proceedings. The Stipulation, consistent with OCC's advocacy, also removed the vast majority of AEP Ohio's proposed energy efficiency and peak demand reduction portfolio plan. The Stipulation also provides other very important customer benefits. In the prefiled testimony of RESA witness Dr. J. Lesser, Dr. Lesser demonstrated that the proposed Government Aggregation Standby Rider ("GASR") was unlawful and unreasonable.¹⁶ The Stipulation provides that the GASR was withdrawn with prejudice.¹⁷ The Stipulation achieved benefits vis-à-vis AEP Ohio's Application, including provisions that benefit residential and other customers and the competitive marketplace. RESA believes its advocacy played a large part in the Stipulation obtaining these improvements over AEP Ohio's Application, benefits that were guaranteed by agreement in the settlement package and not subject to the uncertainty of litigation. OCC's unfounded and unexplained claims do not render the settlement unlawful or unreasonable and the argument must therefore be rejected.

III. Conclusion

For the reasons stated, the Commission should reject OCC's arguments that certain provisions in the Stipulation are the result of parties trading pet projects for their support of the Stipulation. Rather, the settlement package produces concrete benefits for residential and other customers, enhances the competitive marketplace, seeks to minimize future customer costs, and eliminates potentially costly and unlawful charges like the GASR. Despite its accusations, OCC offers no analysis to the contrary with respect to its pet project claims.

¹⁶ Testimony of RESA Witness Dr. J. Lesser (June 9, 2023).

¹⁷ Stipulation at 6.

Respectfully submitted,



Matthew R. Pritchard (Reg. No. 0088070)

(Counsel of Record)

Avery L. Walke (Reg. No. 102682)

MCNEES WALLACE & NURICK LLC

250 West Street, Suite 550

Columbus, OH 43215

Telephone: (614) 719-2842

Telecopier: (614) 469-4653

mritchard@mcneeslaw.com

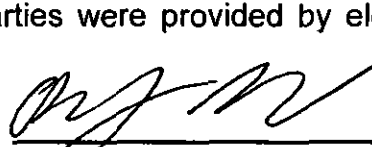
awalke@mcneeslaw.com

(Willing to accept service via email)

**COUNSEL FOR THE RETAIL ENERGY SUPPLY
ASSOCIATION**

CERTIFICATE OF SERVICE

In accordance with Ohio Adm.Code 4901-1-05, the Commission's e-filing system will electronically serve notice of the filing of this document upon the interested parties, this 13th day of May, 2024. The following parties were provided by electronic mail a copy of this document:


Avery Walke

Service List:

aasanyal@vorys.com
ahaque@bakerlaw.com
Angela.Obrien@occ.ohio.gov
bojko@carpenterlipps.com
brian.gibbs@nationwideenergypartners.com
bryce.mckenney@nrg.com
cgrundmann@spilmanlaw.com
christopher.miller@icemiller.com
Connor.Semple@occ.ohio.gov
cpirik@dickinsonwright.com
ctavenor@theoec.org
dborchers@brickergraydon.com
dwilliamson@spilmanlaw.com
Donald.kral@occ.ohio.gov
dproano@bakerlaw.com
dparram@brickergraydon.com
dromig@armadapower.com
dstinson@bricker.com
dwilliamson@spilmanlaw.com
easley@carpenterlipps.com
egallon@porterwright.com
emcconnell@elpc.org
eprouy@bakerlaw.com
fdarr2019@gmail.com
gkrassen@nopec.org
gpetrucci@vorys.com
Hogan@lito.hio.com
jdunn@oneenergyllc.com
joe.oiliker@igs.com
jkylercohn@BKLLawfirm.com
jlang@calfee.com
jlaskey@norris-law.com
KBoehm@BKLLawfirm.com

knordstrom@theoec.org
kshimp@dickinsonwright.com
ktreadway@oneenergyllc.com
little@lito.hio.com
michael.nugent@igs.com
MJSettineri@vorys.com
mjschuler@aep.com
MKurtz@BKLLawfirm.com
nbobb@keglerbrown.com
paul@carpenterlipps.com
pwillison@bakerlaw.com
rdove@keglerbrown.com
rkelter@elpc.org
rmains@bricker.com
slee@spilmanlaw.com
stacie.cathcart@igs.com
stnourse@aep.com
tdougherty@theoec.org
todonnell@dickinsonwright.com
trent@hubaydougherty.com
whitt@whitt-stutevant.com
wilcox@carpenterlipps.com
william.michael@occ.ohio.gov
werner.margard@ohioattorneygeneral.gov
ambrosia.wilson@OhioAGO.gov
ashley.wnek@OhioAGO.gov

Attorney Examiners:

david.hicks@puco.ohio.gov
greta.see@puco.ohio.gov