

FILE

10

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

RECEIVED-DOCKETING DIV

2003 DEC -1 PM 5:15

In the Matter of the Application of)
the Monongahela Power Company)
for Approval of a Market-Based)
Standard Service Offer and)
Competitive Bidding Process)

Case No. 03-1104-EL-ATA

PUCO

MONONGAHELA POWER COMPANY'S MEMORANDUM CONTRA
INDUSTRIAL ENERGY USERS-OHIO'S
APPLICATION FOR REHEARING

On November 21, 2003, Industrial Energy Users-Ohio ("IEU") filed an application for rehearing of the Commission's Finding and Order issued in this proceeding on October 22, 2003 ("Order"). IEU asks the Commission to grant rehearing for the purpose of "clarifying its Order so that it is clear that Mon Power's ETP Stipulation did not establish a schedule to end the MDP on December 31, 2003 but only permitted an accelerated end date after Commission approval and provided the statutory requirements were met." IEU App. For Rehearing at 4. The Commission should deny IEU's request because the "clarification" sought is an unlawful attempt to rewrite the Stipulation, which, ironically, IEU agreed to, signed, and advocated for adoption by the Commission. Simply put, IEU's position on rehearing cannot be squared with either the facts of Monongahela Power Company's ("Mon Power") ETP case, § IV of the Stipulation, or IEU's past statements and actions. In addition to rejecting IEU's request on its merits, IEU is barred by the doctrines of *res judicata* and collateral estoppel from advancing its argument on 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 Am Date Processed 12/2/03

I. Contrary To IEU's New Position, The Stipulation And Resulting ETP Order Dictate That The MDP For Large Commercial And Industrial Customers Ends On December 31, 2003.

In Mon Power's ETP proceeding, Mon Power, the staff, and representatives of all customer classes, including representatives of commercial and industrial customers, and IEU, agreed to resolve all issues regarding Mon Power's proposed transition plan through their Stipulation. A principle provision of the parties' agreement stated that the MDP for the large commercial and industrial customers would end December 31, 2003:

For customers on the Company's Rate Schedule C with a demand greater than 300 kw, Rate Schedules CSH, D, K, P, and street lighting, *the market development period shall be a three year period and end December 31, 2003.*

Case No. 00-02-EL-ETP, Joint Exhibit 1, Stipulation and Recommendation, at § IV (filed June 22, 2000)(the "Stipulation") (emphasis added). Attachment 1 to Mon Power's App. For Rehearing.¹

Section IV of the Stipulation recognized that R.C. 4928.40(B)(2) provides that the MDP may not end earlier than December 31, 2005, unless, upon application by the electric utility, the Commission authorizes an earlier termination date for one or more customer classes based upon either a finding of a 20 percent switching rate of load by the customer class or that effective competition exists in the utility's certified territory. In § IV of the Stipulation, Mon Power made the application that R.C. 4928.40(B)(2) required to end the MDP early for large commercial and industrial customers:

By this Stipulation, Monongahela Power, supported by the other Signatory Parties [, including IEU], applies to the Commission for authorization of a market development period termination date for

¹ The news release the Commission issued reporting that its staff had reached agreement with Mon Power and other parties in the ETP case states that "[u]nder the terms of the agreement the market development period ends for large customers (industrial and large commercial) on December 31, 2003." Attachment 2 to Mon Power's App. For Rehearing.

industrials and large commercial customers of December 31, 2003,
*based upon the agreement to forego the recovery of transition
costs beyond that date (see Ohio Revised Code § 4928.38).*²

(Emphasis added.)

Mon Power's application in § IV to shorten the MDP for those customers was supported by the signatory parties to the Stipulation, including the Commission's staff and representatives of the large commercial and industrial customers affected by the early termination of the MDP, and, importantly, IEU.³ IEU's support for the early end of the MDP in § IV of the Stipulation was unequivocal: "The Stipulation provides for early termination of the market development period for industrial and large commercial customers on December 31, 2003, promoting early and effective competition and the development of an effective, functioning competitive electric generating market in Ohio." IEU's Brief supporting the Stipulation and Recommendation, at page 2, Case No. 00-02-EL-ETP (filed July 24, 2000). Attachment 3 to Mon Power's App. For Rehearing.

In § IV of the Stipulation, the signatory parties specifically agreed that Mon Power's "agreement to forego the recovery of transition costs beyond [December 31, 2003]" was a sufficient basis to meet the requirements of, and for the Commission to approve the application under, R.C. 4928.40(B)(2). In addition to specifying in § IV that basis for approval of the R.C. 4928.40(B)(2) application, the Stipulation also states at the outset, at pages 1-2, that it "is supported by adequate data and information."

² Mon Power also agreed to forego a generation transition charge during the MDP and to forego most of its regulatory transition assets as part of an overall package presented to the Commission.

³ No party to the ETP proceeding opposed any aspect of the Stipulation, including § IV. In addition, in § XVIII of the Stipulation, each of the signatory parties agreed to support the reasonableness of the Stipulation both before the Commission and in any appeal from the Commission's adoption or enforcement of the Stipulation. IEU's position on rehearing is contrary to § XVIII of the Stipulation.

Accordingly, and contrary to IEU's assertion on rehearing, the Stipulation unequivocally stated the signatory parties' consensus that the MDP for large commercial and industrial customers would end on December 31, 2003, that there was an adequate basis under R.C. 4928.40(B)(2) for ending the MDP early, and that the Commission should adopt the Stipulation's consensus on those matters.

On October 5, 2000, the Commission issued its Opinion and Order in Case No. 00-02-EL-ETP ("ETP Order") in which it reviewed the Stipulation and Mon Power's transition plan. The Commission accepted the parties' consensus on shortening the MDP for large commercial and industrial customers, found that the Stipulation complied with S.B. 3 and did not conflict with any applicable legal principle, and approved the three-year MDP for large commercial and industrial customers. At page 10 of its Order, the Commission specifically noted that the Stipulation modified the transition cost recovery portion of Mon Power's transition plan by *ending* both the MDP and regulatory transition charges for industrial and large commercial customers on December 31, 2003.

Also at page 10, the Commission reiterated its understanding "that the Stipulation eliminates the company's claim for stranded generation costs, and it substantially reduces the amount of regulatory assets that the company will recover through its RTC." The Commission then approved the Stipulation's modifications to the transition cost recovery plan. *See id.* And, at Finding 10, at page 15 of its ETP Order, the Commission specifically found that "[t]he Company's transition plan, as modified by the Stipulation, satisfies the requirements of S.B. 3 and is approved to the extent set forth herein."⁴ Nothing in the ETP Order made termination of

⁴ The Commission's news release that accompanied its ETP Order approving Mon Power's ETP observed that, "[u]nder the terms of the Stipulation, which was adopted in the Order, the market development period ends for large customers (industrial and large commercial) on December 31, 2003 and for small customers (residential and commercial) on December 31, 2005." Attachment 5 to Mon Power's App. For Rehearing.

the MDP for large commercial and industrial customers contingent upon any further proceedings or future findings by the Commission, as IEU's application suggests. See IEU's App. For Rehearing at 4.

By approving the Stipulation and Mon Power's ETP (as modified by the Stipulation), the Commission approved Mon Power's application in § IV of the Stipulation to end the MDP for large commercial and industrial customers on December 31, 2003.⁵

The Commission made its approval of the transition plan and the Stipulation subject to final approval of Mon Power's compliance tariffs. In accordance with the Commission's directive in its ETP Order, Mon Power distributed its compliance tariffs to all parties, including IEU, and the staff for their informal review. The tariff sheets defined "Market Development Period" as follows:

A five-year period ending December 31, 2005 for Service provided under Rate Schedules "A" and "B", and Customers served under Rate Schedule "C" with a billing demand not to exceed 300 kilowatts in any Month, providing the Market Development Period may be terminated at any time by the Company making a filing with the Commission showing a 20% switching rate or effective competition as set forth in Section IV of the Stipulation and Recommendation approved by the Commission in Case No. 00-02-EL-ETP. *The Market Development Period for all other Service provided under this Tariff and special contracts, unless otherwise provided for therein, shall be a three-year period ending December 31, 2003.*

⁵ Section IV of the Stipulation noted that it was not shortening the MDP for small (300kW and below) commercial customers, and that in order to end the MDP for such customers early Mon Power would have to make a separate application in the future under R.C. 4928.40(B)(2): "For either Schedule B customers and/or Schedule C customers having demands of 300 kW and below, the market development period can be terminated at any time by the Company making a filing with the Commission showing a 20% switching rate or effective competition." Thus, the parties made clear, by their specific treatment of the small commercial customers that there would be no further application by Mon Power or approval by the Commission under R.C. 4928.40(B)(2) before ending the MDP for the large commercial and industrial customers on December 31, 2003. Additionally, Mon Power's largest industrial customer has a special contract that extends through and then terminates on August 31, 2004.

Attachment 6 to Mon Power's App. For Rehearing (emphasis added). Thus, Mon Power's compliance tariffs specifically provided that default retail electric service at the frozen, below-market rate is available only through December 31, 2003 for large commercial and industrial customers, and IEU, although given the opportunity, did not raise any objection to this definition of the MDP.

Subsequently, on November 16, 2000 and December 18, 2000, Mon Power filed its compliance tariffs and applied for their approval. The Commission approved the compliance tariffs by an Entry issued on December 21, 2000. Thus, the definition above has been in effect since the beginning of the MDP.⁶

The Commission was mindful of the approaching end of the MDP when it permitted Mon Power to proceed with the issuance of its RFP process in this case. By its July 24, 2003 Finding and Order, the Commission observed that "there is a definite need, as a result of the stipulation in Mon Power's Transition Plan case, to have some rates and tariffs in place in time for the currently expected end of the MDP." July 24, 2003 Finding and Order, at Finding 4, page 3 (citing the ETP Stipulation). And it follows that the Commission noted in its October 22, 2003 Finding and Order that the MDP "was scheduled to end on December 31, 2003." Thus, contrary to IEU's rehearing position, the Commission did not mischaracterize Mon Power's Stipulation; instead, the Commission accurately stated the term of the MDP, which it approved in its October 5, 2000 Opinion and Order in Mon Power's ETP Case, Case No. 00-02-EL-ETP ("ETP Order").

Because IEU negotiated, agreed to, signed, and advocated for approval of the Stipulation by the Commission, then reviewed the compliance tariffs without objecting to the tariff's

⁶ Any action by the Commission that alters the term of the MDP would be a contractual impairment and arguably *ex post facto*, which both are unlawful under Ohio law. Mon Power has detrimentally relied upon the Commission-approved MDP because it has no generation and must procure its power for these customers from the market.

definition of MDP, IEU's current position is incredulous. In fact, even as it advances its argument on rehearing, IEU's website states that "[t]he MDP may end earlier for some EDUs pursuant to negotiated transition plan agreements approved by the PUCO." Attachment 4 to Mon Power's App. For Rehearing. As discussed above, the Commission approved Mon Power's transition plan as modified by the Stipulation in its ETP Order, and, as a result, the MDP for large commercial and industrial customers ends early (December 31, 2003). This is the exact instance IEU describes on its web site, yet it oddly takes issue with on rehearing.

Common sense, the law, and principles of fairness dictate that a signatory party to a settlement agreement cannot rewrite the agreement by way of a "clarification" three years after the fact. Here, IEU seeks to alter a principle component of the Stipulation — the end of the MDP for large commercial and industrial customers — based upon a tortured interpretation of § IV of the Stipulation.⁷ Put differently, IEU wants the Commission to revise the parties' bargained-for-exchange for IEU members' short-term advantage.

Because IEU's rehearing position conflicts with the facts of Mon Power's ETP case, § IV of the Stipulation, and IEU's past statements and actions, the Commission should reject IEU's attempt to rewrite the Stipulation and deny its application for rehearing.

II. IEU Is Barred By *Res Judicata* and Collateral Estoppel From Relitigating The MDP Term For Large Commercial and Industrial Customers.

The doctrines of *res judicata* and collateral estoppel preclude a party that litigated, or had the opportunity to litigate, claims or issues against another party in a prior proceeding, from relitigating the claims or issues in a subsequent proceeding. *See State, ex rel. Ohio Water*

⁷ Notably, IEU appears to be the only party unclear about when the MDP for Mon Power's large commercial and industrial customers ends under the Stipulation. The Commission accurately stated in its Order that the MDP "was scheduled to end on December 31, 2003." Order at 1.

Service Co. v. Ohio Mahoning Valley Sanitary District (1959), 169 Ohio St. 31, 157 N.E. 2d 116, Syllabus at 1. These doctrines apply to administrative adjudications as well as to decisions in civil actions. See *Superior Brand Meats, Inc. v. Lindley* (1980), 62 Ohio St. 2d 133, 403 N.E. 2d 996. And the Supreme Court of Ohio has specifically held that the doctrines apply to litigation before the Commission. *Consumers' Counsel v. Pub. Util. Comm'n* (1985), 16 Ohio St. 3d 9, 475 N.E. 2d 782. The Supreme Court of Ohio has also held that the doctrines apply with the same force to matters resolved through settlement agreements as to matters resolved through a fully litigated judgment or decision. See *Wyatt v. Wyatt* (1992), 65 Ohio St. 3d 268, 602 N.E. 2d 1166; *In re Gilbraith* (1987), 32 Ohio St. 3d 127, 512 N.E. 2d 956.

Here, as explained above, the issue of the end of the MDP for large commercial and industrial customers was squarely before the Commission in Mon Power's ETP case. It was an important issue that the parties — including IEU — resolved in § IV of the Stipulation, and the Commission approved in its ETP Order. The issue was also explicitly framed by Mon Power's compliance tariffs, which Mon Power circulated to the parties in accordance with the Commission's ETP Order and the Commission approved. The doctrines of *res judicata* and collateral estoppel bar IEU from relitigating this issue now. The Commission, consequently, should reject IEU's attempt to do so, and deny its application for rehearing.

III. Conclusion.

The Commission should reject IEU's rehearing position because, simply put, the "clarification" IEU seeks is flat wrong. The MDP for large commercial and industrial customers, as the Commission stated correctly in its Order, "was scheduled to end December 31, 2003." Order at 1. Further, the doctrines of *res judicata* and collateral estoppel bar IEU from relitigating this issue. Thus, the Commission should deny IEU's application for rehearing.

Respectfully submitted,

Gary A. Jack (ACE)

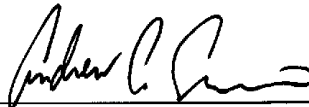
Gary A. Jack (Trial Attorney)
Senior Attorney
Monongahela Power Company
1310 Fairmont Avenue
Fairmont, West Virginia 26554
(304) 367-3423 Phone
(304) 367-3157 Fax

Daniel R. Conway
Andrew C. Emerson
Porter Wright Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215
(614) 227-2270 Phone
(614) 227-2100 Fax

Attorneys for Monongahela Power Company

CERTIFICATE OF SERVICE

I certify that I served a copy of Monongahela Power Company's Memorandum Contra IEU's Application for Rehearing in Case No. 03-1104-EL-ATA upon the following parties by First Class U.S. Mail, postage prepaid, this 1st day of December, 2003.



Andrew C. Emerson

Thomas G. Lindgren
Assistant Attorney General
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215

Ann Hotz, Esq.
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485

Samuel C. Randazzo, Trial Attorney
Gretchen J. Hummel
Lisa Gatchell
McNees Wallace & Nurick LLC
Columbus, Ohio 43215-4228
(Attorneys for Industrial Energy Users-Ohio)

W. Jonathan Airey
Attorney at Law
52 East Gay Street
PO Box 1008
Columbus, Ohio 43216
(Attorney for Constellation New Energy, Inc.)