

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Commission's Review	:	
and Adjustment of the Fuel and Purchased	:	Case No. 07-723-EL-UNC
Power and System Reliability Tracker	:	
Components of Duke Energy Ohio, Inc. and	:	
Related Matters.	:	
	:	
In the Matter of the Application of Duke	:	
Energy Ohio, Inc. to Establish its 2008	:	Case No. 07-975-EL-UNC
System Reliability Tracker of its Market	:	
Based Standard Service Offer.	:	

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**POST-HEARING BRIEF  
SUBMITTED ON BEHALF OF THE STAFF OF  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**Marc Dann**  
Ohio Attorney General

**Duane W. Luckey**  
Section Chief

**Werner L. Margard III**  
**Thomas W. McNamee**  
Assistant Attorneys General  
Public Utilities Section  
180 E. Broad St., 9<sup>th</sup> Floor  
Columbus, OH 43215  
614.466.4397 (telephone)  
614.644.8764 (fax)  
[werner.margard@puc.state.oh.us](mailto:werner.margard@puc.state.oh.us)  
[thomas.mcnamee@puc.state.oh.us](mailto:thomas.mcnamee@puc.state.oh.us)

**Attorneys for the Staff of the  
The Public Utilities Commission of Ohio**

**January 4, 2008**

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**ARGUMENT**

The Commission previously approved the System Reliability Tracker (SRT) and Fuel and Purchased Power (FPP) components of Duke Energy Ohio's (Duke) standard service offer.<sup>1</sup> The SRT is intended to recover fixed or capacity costs of forward reliability purchases. Costs related to the energy component of those contracts are intended to be recovered through the FPP tracker. The Commission required that Duke file an application by September 1<sup>st</sup> of each year to establish the SRT and FPP levels for the following year.<sup>2</sup> Duke did so, initiating these cases on September 4, 2007.

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<sup>1</sup> *In re Cincinnati Gas & Electric Co.*, Case No. 03-93-EL-ATA (Entry on Rehearing at 10) (November 23, 2004).

<sup>2</sup> *Id.*

In approving the SRT and FPP trackers, The Commission reserved to itself the ability to review the amounts sought to be sure that only reasonable costs are recovered.<sup>3</sup> The Commission ordered that the filings be audited.<sup>4</sup> The filings were audited and the expenditures were found to be real and correctly reflected.<sup>5</sup>

Some but not all of the parties to these cases submitted a stipulation and recommendation resolving or preserving all of the issues identified in the course of the audit of the company's filings. Only the Ohio Consumers' Counsel opposed the stipulation. The company, Ohio Partners for Affordable Energy, and the Commission Staff all approved the stipulation. Neither the Industrial End Users nor the Ohio Energy Group opposed the agreement.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings.<sup>6</sup> The ultimate issue for the Commission's consideration is whether the agreement is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

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<sup>3</sup> *In re Cincinnati Gas & Electric Co.*, Case No. 03-93-EL-ATA (Entry on Rehearing at 11) (November 23, (2004).

<sup>4</sup> *In re Duke Energy Ohio*, Case No. 07-723-EL-UNC (Entry on Rehearing at 2) (June 27, 2007).

<sup>5</sup> Staff Ex. 1.

<sup>6</sup> See, e.g., *Ohio-American Water Co.*, Case No. 99-1038-WW-AIR (Opinion and Order) (June 29, 2000); *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (Order on Remand) (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (Opinion and Order) (March 39, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR et al. (Opinion and Order) (December 30, 1993); *Cleveland Electric Illuminating Co.*, Case No. 88-160-EL-AIR (Opinion and Order) (January 31, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (Opinion and Order) (November 26, 1985).

- (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?

This test has been endorsed by the Court as an efficient and proper means to evaluate the reasonableness of less than unanimous settlements.<sup>7</sup> The court has stated that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.<sup>8</sup>

**1. The settlement is a product of serious bargaining among capable, knowledgeable parties.**

This criterion was obviously satisfied. The Commission has clearly articulated the standard for this criterion:

In considering whether there was serious bargaining among capable and knowledgeable parties, the Commission evaluates the level of negotiations that appear to have occurred and takes notice of the experience and sophistication of the negotiating parties.<sup>9</sup>

The Commission's standard does not require one hundred percent cooperation or participation. The signatory and non-opposing parties represent a diversity of interests. Those interests include the company, industrial and commercial consumers, the

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<sup>7</sup> *AK Steel Corp. v. Pub. Util. Comm'n* (2002), 95 Ohio St.3d 81; *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm'n* (1994), 68 Ohio St. 3d 559; *Consumers' Counsel v. Pub. Util. Comm'n* (1992), 64 Ohio St.3d 123, 125, 592 N.E.2d 1370.

<sup>8</sup> *Id.*

<sup>9</sup> *Dayton Power & Light Company*, Case No. 05-276-EL-AIR (Opinion and Order) (December 28, 2005) at 6.

company's low-income customers, and the Commission Staff. All parties were invited to participate in settlement discussions. Multiple bargaining sessions, open to all parties, took place before commencement of the hearing.

Moreover, the parties have been actively involved in regulatory matters before the Commission for many years. The parties have time and again demonstrated their capacity to grasp, evaluate, make recommendations on and help to even resolve the many complex issues considered by this Commission.

It is equally without question that the parties are knowledgeable. These parties have participated in numerous regulatory proceedings before the Commission. Each party that entered an appearance in this case was represented by counsel who amply and ably advocated their respective interests.

Even though the negotiations were brief, there is no indication that the bargaining was not serious, either in process and result. As company witness William Don Wathen Jr. testified, all negotiations were open to all parties. All parties were invited to participate. Company Ex. 8 at 3-4. The uncontroverted evidence of record demonstrates that serious bargaining did occur between capable and knowledgeable parties. The first prong of the Commission's test for approval of stipulations is clearly satisfied.

**2. The settlement, as a package, benefits ratepayers and the public interest.**

The stipulation benefits both ratepayers and the public interest.

First, the stipulation addressed all of the recommendations made by the auditors. In at least two instance issues raised by the auditor was left open to permit the parties to more thoroughly develop or investigate them prior to completion of the next audit. But in

all other instances issues raised by the auditor, and recommendations made by it, were fully and reasonably addressed by the stipulation.

Furthermore, implementation of Rider SRT on January 2, 2008, affords appropriate recovery and financial stability to Duke. Consumers, in turn, benefit by having a reliable firm generation service at their disposal for a reasonable market price. Protracted litigation would only result in price increases for consumers who will have the costs spread over fewer months of cost recovery.

**3. The settlement package does not violate any important regulatory principle or practice.**

In approving the SRT and FPP trackers, the Commission established a process of review for future filings. That process was carefully and completely followed in this case. The record fails to show that any important regulatory principle or practice was violated in this case.

### **CONCLUSION**

Duke has made a *prima facie* showing that the expenditures were reasonable. To the extent that that showing was controverted by the independent audit ordered by the Commission to evaluate the reasonableness of the company's request, all issues raised by the auditor have either been resolved or preserved. No testimony to the contrary has been submitted.

The record is clear, convincing, and only points to the reasonableness of the stipulation. The Staff recommends that the stipulation be approved.

**Marc Dann**  
Ohio Attorney General

**Duane W. Luckey**  
Section Chief

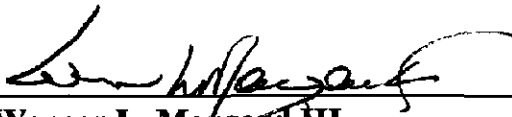
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**Werner L. Margard III**  
**Thomas W. McNamee**  
Assistant Attorneys General  
Public Utilities Section  
180 E. Broad St., 9<sup>th</sup> Floor  
Columbus, OH 43215  
614.466.4397 (telephone)  
614.644.8764 (fax)  
[werner.margard@puc.state.oh.us](mailto:werner.margard@puc.state.oh.us)  
[thomas.mcnamee@puc.state.oh.us](mailto:thomas.mcnamee@puc.state.oh.us)

**Attorneys for the Staff of the Public  
Utilities Commission of Ohio**

## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Post-Hearing Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio was served by regular U.S. mail, postage prepaid, hand-delivered, and/or delivered via electronic message to the following parties of record, this 7<sup>th</sup> day of January, 2008.

  
\_\_\_\_\_  
**Werner L. Margard III**  
Assistant Attorney General

### Parties of Record:

Paul A. Colbert  
Cincinnati Gas & Electric Company  
139 East Fourth Street, 25<sup>th</sup> Floor  
Atrium II Building  
Cincinnati, OH 45201-0960  
[pcolbert@cinergy.com](mailto:pcolbert@cinergy.com)

David C. Rinebolt  
Ohio Partners for Affordable Energy  
231 West Lima Street  
P.O. Box 1793  
Findlay, OH 45839-1793  
[drinebolt@aol.com](mailto:drinebolt@aol.com)

Joseph M. Clark  
McNees, Wallace & Nurick  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, OH 43215-4228  
[jclark@mwncmh.com](mailto:jclark@mwncmh.com)

Ann M. Hotz  
Jeffrey Small  
Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Oh 43215  
[hotz@occ.state.oh.us](mailto:hotz@occ.state.oh.us)  
[small@occ.state.oh.us](mailto:small@occ.state.oh.us)

Michael Kurtz  
Boehm, Kurtz & Lowry  
36 East Steven Street, Suite 1510  
Cincinnati, OH 45202  
[mkurtzlaw@aol.com](mailto:mkurtzlaw@aol.com)