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PUCOBEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review and)	
Adjustment of the Fuel and Purchased Power and)	
System Reliability Tracker Components of Duke)	Case No. 07-723-EL-UNC
Energy Ohio, Inc. and Related Matters.)	
)	
In the Matter of the Application of Duke Energy)	
Ohio, Inc. to Adjust and Set its 2008 System)	Case No. 07-975-EL-UNC
Reliability Tracker.)	

 REPLY POST-HEARING BRIEF
 BY
 THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

A. Prefatory Comments

The Public Utilities Commission of Ohio ("Commission" or "PUCO") should adjust proposals and procedures of Duke Energy Ohio, Inc. ("Duke Energy" or the "Company," including its predecessor organization the Cincinnati Gas and Electric Company) as the result of the audit process that the PUCO initiated. The audit procedures set in place by the Commission were undertaken, in the PUCO's words, "to consider the reasonableness of expenditures" regarding the fuel and economy purchased power ("FPP") and system reliability tracker ("SRT") charges because "[i]t is not in the public interest to cede this review."¹ As part of the Commission's review in the above-captioned cases, the recommendations submitted by Liberty Consultants, Inc. ("Liberty"

¹ *In re Post-MDP Service Case*, Case No. 03-93-EL-ATA, et al., Entry at 10 (November 23, 2004).

or the “Auditor”)² should be seriously considered and not bypassed as the result of these proceedings.

B. Procedural History

The procedural history of the above-captioned cases are described in the Initial Post-Hearing Brief by the Office of the Ohio Consumers’ Counsel (“OCC’s Brief”) filed on January 7, 2008. Initial post-hearing briefs were also filed on that date by the signatories to the Stipulation and Recommendation that was filed on December 13, 2007 (“Stipulation”). These briefs were filed by Duke Energy (“Duke Energy’s Brief”), the Ohio Partners for Affordable Energy (“OPAE’s Brief”), and the PUCO Staff (Staff’s Brief”). The Staff’s Brief provided only a cursory review of the criterion for approval of a partial stipulation.³

II. ARGUMENT

A. Contrary to Duke Energy’s Representation, the Stipulation Does Not Adopt Many of Liberty’s Recommendations.

The failure of the Stipulation to adopt many of the major recommendations contained in the Liberty Report was discussed extensively in the OCC’s Brief. The PUCO Staff recognizes that the “negotiations were brief,” so much so that Duke Energy showed no flexibility in the terms of a settlement that did not adopt many of Liberty’s recommendations (as advocated by the OCC).

² PUCO Ordered Ex. 1 (“Liberty Report”). PUCO Ordered Ex. 1(A) is the redacted version of the Liberty Report. PUCO Ordered Ex. 1 and 1(A) have different page numbering for the same discussions as the result of the redactions. All page references in this brief are to PUCO Ordered Ex. 1, the unredacted version.

³ Staff’s Brief at 3-5. Staff’s Brief was transmitted via U.S. Mail, rather than electronically, and postmarked January 9, 2007.

OPAE, while a signatory to the Stipulation, does not appear to have contributed a single word to the document.⁴ Staff's Brief would also have the Commission consider the non-contributions to the text of the Stipulation by non-signatories as support for a diversity of interests behind the settlement.⁵ As stated in the OCC's Brief, the Stipulation was supported by the Company, the PUCO Staff, and OPAE (a corporation whose members provide bill payment and weatherization programs to actual customers).⁶ Customer interests lie at the core of the audit recommendations, and are not represented in a settlement that does not adopt key recommendations by the Commission-appointed outside expert.

The following responds in greater detail to the briefs filed by other parties, and particularly to the Duke Energy's false claim that it adopted "all but one of Liberty's Recommendations."⁷

1. A key recommendation in Liberty's chapter two regarding coal procurement and contracts was not adopted.

Duke Energy states that "Liberty's recommendations with regard to coal procurement and contracts are *addressed* within the Stipulation,"⁸ which is not the same as the *adoption* of the recommendations. Liberty recommended:

⁴ OCC's Brief at 13, citing Tr. Vol. II at 10 (December 14, 2007).

⁵ Staff's Brief at 3 ("the signatory and non-opposing parties represent a diversity of interests").

⁶ OCC's Brief at 13.

⁷ Duke Energy's Brief at 10.

⁸ Duke Energy's Brief at 11, mirroring Provision 6 within the Stipulation. Stipulation at 4, ¶6. The PUCO Staff also states that the "stipulation *addressed* all of the recommendations made by the auditors." Staff's Brief at 4 (emphasis added); also Staff's Brief at 5 ("addressed by the stipulation"). The PUCO Staff does not allege or support the Company's claim that the Stipulation adopted all but one of the Liberty recommendations.

Demonstrate the economic effectiveness of Active Management as a condition to its continued use by Duke Energy Ohio.⁹

Duke Energy's Brief, repeating the words in the Stipulation itself, states in response to this recommendation that "the Company agreed to work with Commission's Staff to develop documentation permitting the auditing of active management transactions included within Rider FPP."¹⁰ Documentation is not the same thing as the "demonstration of economic effectiveness," and nothing in the Stipulation conditions continued active management upon such demonstration.

OPAE states its concern over Liberty Recommendation II-2, and states that "[b]ecause the Commission has determined that active management may continue at this point, OPAE believes that documentation must exist to facilitate the auditing of these transactions."¹¹ OPAE misses the point that the Company's active management has been the subject of two consecutive negative recommendations by auditors, and the Commission will *determine in this case* whether FPP costs have increased due to these activities such that they should not be borne by customers. The evidence for the audit period in the above-captioned cases shows that active management has resulted in negative margins (i.e. losses due to the added transactions).¹² Gains in previous audit periods were more than offset by losses in the current audit period.¹³ Based upon the

⁹ Liberty Report at ES-7. Hereinafter, the recommendations will be designated by chapter and number, such as "Recommendation II-2" for the second major recommendation within Chapter 2 of the Liberty Report.

¹⁰ Duke Energy's Brief at 11-12; also Stipulation at 4, ¶6.

¹¹ OPAE's Brief at 4.

¹² Liberty Report at II-13.

¹³ *Id.*

evidence, the Commission should not permit costs to be passed through the FPP that stem from the Company's active management activities.

2. The recommendation in Liberty's chapter three regarding supply management was not adopted.

Duke Energy states that it "intend[s] to *examine* its security measures regarding the transportation of coal to the laboratory,"¹⁴ which is less than recommended by Liberty. The Liberty Report recommended:

*Institute a security program to protect the integrity of coal samples from the time samples are bagged and ready for shipment until the samples arrive at the [laboratory].*¹⁵

The Company's current excuse for its failure to "institute" a security program -- *nine years after* recommended in an earlier Liberty audit¹⁶ -- is that Liberty "failed to offer any concrete suggestions as to what security measures it believed to be appropriate."¹⁷

The Liberty Report is clear regarding its recommendation: Liberty proposes the simple (and "concrete") improvement of placing coal samples under "lock and key" until tested.¹⁸

Liberty's "lock and key" recommendation is inexpensive, and could prevent tampering with coal samples that would be costly to the Company's customers who pay FPP charges. Duke Energy should stop hiding behind phrases like "economically

¹⁴ Duke Energy's Brief at 13 (emphasis added).

¹⁵ Liberty Report at ES-8 (emphasis added).

¹⁶ *In re CG&E EFC Proceeding*, Case No. 98-103-EL-EFC, Final Report: Management/Performance Audit at IV-5 (March 5, 1999). The Commission took administrative notice of this earlier Liberty audit report. Entry at 1 (January 2, 2008).

¹⁷ Duke Energy's Brief at 13.

¹⁸ Liberty Report at III-10.

efficient and responsible” security measures,¹⁹ and should purchase a few old fashion locks. In the absence of reasonable action by Duke Energy regarding coal sample security, the Commission should act to require protection for customers where the Company refuses to take effective actions that would protect against the potential for abuse regarding payments for coal.

3. Recommendations in Liberty’s chapter five regarding plant operations were not adopted.

Recommendation V-1 in the Liberty Report regarding the Zimmer outage is the only recommendation that Duke Energy readily admits that it has not adopted.²⁰ That recommendation states:

*Exclude replacement power costs associated with the Zimmer outage from FPP recovery.*²¹

This recommendation will be discussed at greater length in the next section.

Also located in Chapter Five in the Liberty Report is Recommendation V-3 regarding Beckjord budgets:

Do not reduce the 2009 capital and O&M budgets at Beckjord below budgeted level, and provide further budget support beyond 2008 for station maintenance if required.

Duke Energy’s Brief repeats the contents of the Stipulation that provides for Duke Energy to “fund all capital and O&M required to maintain reliability and safety at Beckjord.”²² Liberty offered a “concrete” recommendation (i.e. seemingly favored by the

¹⁹ Duke Energy’s Brief at 13.

²⁰ Id. at 14.

²¹ Liberty Report at ES-8 (emphasis added).

²² Duke Energy’s Brief at 14. The Stipulation states that “necessary” capital and O&M expenditures will be funded. Stipulation at 5, ¶10.

Company, according to its brief)²³ that budgets not be reduced at Beckjord, and Duke Energy undermined the recommendation with its “commitment” to a watered-down version of Liberty Recommendation V-3.

The Company did not “adopt” Recommendation V-3 as claimed by Duke Energy. Duke Energy Witness Wathen stated that Provision 10 in the Stipulation documented the Company’s “different view”²⁴ from that of Liberty regarding the power plant whose operations are the subject of considerable criticism by Liberty.²⁵ The Company’s assertion that it has adopted all but one of Liberty’s recommendations is refuted, therefore, by Duke Energy’s own witness who testified regarding the Stipulation.

B. The Commission Should Order That Which the Signatories Claim Will Result from the Stipulation.

The Commission’s ultimate order in these cases should clearly set forth the changes expected of Duke Energy as the condition for permitting the Company’s costs to flow-through the FPP rider. This will prevent the waffling that is evident in Duke Energy’s Brief whereby it states that the Company has agreed to all but one of Liberty’s recommendations, and also states that “[w]ith respect to the Rider FPP, DE-Ohio has agreed to adopt *many* of the auditor’s recommendations.”²⁶ The latter statement recognizes the circumstances described by the OCC above whereby the Company argues that it has agreed to the Auditor’s recommendations in order to gain PUCO approval, but the “four corners” of the Stipulation do not demonstrate that result.

²³ Duke Energy’s Brief at 13.

²⁴ Tr. Vol. II at 29 (December 14, 2007) (Wathen).

²⁵ Liberty Report at V-11 through V-12.

²⁶ Duke Energy’s Brief at 8 (emphasis added).

OPAE's Brief raises troublesome issues in connection with the preservation of the "Zimmer issue." Duke Energy has shown its willingness to argue in support of the Stipulation based upon alleged benefits to customers that are not contained within the Stipulation. Under these circumstances, the meaning of Provision 8 in the Stipulation regarding both the breadth of the next auditor's investigation into the outage and the calculation of the remedy for that outage is essential.

OPAE observes that "the auditor made no findings of the cost of the extended outage and no recommendation for a dollar amount" connected with the Zimmer outage.²⁷ The Liberty Report states that the calculation is very difficult, probably involving hourly pricing.²⁸ The Company could be ordered to provide the calculation in these cases as a matter of final compliance. In the alternative, the Commission should explicitly *order Duke Energy to provide the dollar value for the added purchased power costs during the Zimmer outage to the next auditor and to the parties to the FPP proceedings*. Without such treatment, the PUCO Staff and the parties may not have a critical portion of the story regarding the Zimmer outage with which to pursue the subject in the next audit proceeding.

The other matter regarding Recommendation V-1 is the nature of the matter preserved under the provisions of the Stipulation. OPAE notes that Duke Energy Witness Wathen's testimony supported an interpretation of the Zimmer provision in the

²⁷ OPAE Brief at 2.

²⁸ Liberty Report at V-4.

Stipulation²⁹ that broadly preserves the matter for the next auditor.³⁰ In response to an inquiry by an Attorney Examiner, Mr. Wathen stated: "I can't see a defined limit on what they can look at."³¹ Nonetheless, the Stipulation could be used by the Company to argue that the next auditor should "determine if the extended portion of the . . . outage was prudent" within the limited context of the outage extension once the problem was discovered. That is a more limited inquiry than that discussed in the Liberty Report, which inquired into the *cause* of the problem.³² In the event that Liberty Recommendation V-1 regarding the Zimmer outage is not adopted, the Commission should explicitly *order that all issues that could have been raised in the above-captioned cases are carried over in there entirety* for evaluation and quantification in the next audit.

III. CONCLUSION

The OCC supports the positions presented in the Liberty Report that contains the audit ordered by the Commission. Liberty's recommendations were not, as the result of the Stipulation, adopted by the Company to the extent stated in Duke Energy's Brief. The Commission's order in these cases should recognize the desirability of extending the reach of the Stipulation terms and/or clarifying the language to match the Company's greater representations at the hearing and in Duke Energy's Brief. The Commission's order should achieve a result for customers that, under the settlement criteria, provides benefits to them and comports with important regulatory principles and practices. The

²⁹ Stipulation at 5, ¶8.

³⁰ OPAE's Brief at 3, citing Duke Energy Ex. 8 at 5 (Wathen) and Tr. Vol. II at 21-25 (December 14, 2007).

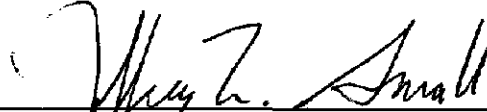
³¹ Id.

³² Liberty Report at V-4.

Auditor's serious appraisal and review of the Company's performance, in an effort to protect customers against unreasonable charges, warrants the adoption of the Auditor's recommendations.

Respectfully submitted,

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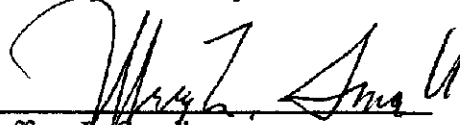


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply Post-Hearing Brief by the Office of the Ohio Consumers' Counsel has been served electronically (as instructed by the Attorney Examiners) upon the following attorneys this 15th day of January 2008.


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