

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Rates.)	Case No. 08-709-EL-AIR
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.)	Case No. 08-710-EL-ATA
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.)	Case No. 08-711-EL-AAM
)	
In the Matter of the Application of the Cincinnati Gas & Electric Company for Approval of its Rider BDP, Backup Delivery Point.)	Case No. 06-718-EL-ATA
)	

OPINION AND ORDER

The Commission, considering the above-entitled applications, the testimony, the applicable law, the proposed stipulation, and other evidence of record, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

Amy B. Spiller, Associate General Counsel, Rocco O. D'Ascenzo, Senior Counsel, and Elizabeth H. Watts, Assistant General Counsel, Duke Energy Business Services, Inc., 2500 Atrium II, 139 East Fourth Street, P.O. Box 960, Cincinnati, Ohio 45201-0960, and Kravitz, Brown & Dortch, by Michael P. Dortch, 145 East Rich Street, Columbus, Ohio 43215, on behalf of Duke Energy Ohio, Inc.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and Stephen Reilly, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Ann M. Hotz, Jeffrey L. Small, and Larry S. Sauer, Assistant Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215, on behalf of the residential utility consumers of Duke Energy Ohio, Inc.

David C. Rinebolt, Executive Director and Counsel, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839, and Colleen L. Mooney, Counsel, 1431 Mulford Road, Columbus, OH 43212, on behalf of Ohio Partners for Affordable Energy.

Boehm, Kurtz & Lowry, by David F. Boehm and Michael L. Kurtz, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of the Ohio Energy Group.

Chester Wilcox & Saxbe, LLP, by John W. Bentine, Mark S. Yurick, and Matthew S. White, 65 East State Street, Suite 1000, Columbus, Ohio 43215, on behalf of the Kroger Co.

Christensen, Christensen, Donchatz, Kettlewell, & Owens, by Mary W. Christensen, 100 E. Campus View Boulevard, Suite 360, Columbus, Ohio 43235, on behalf of People Working Cooperatively, Inc.

Douglas E. Hart, 441 Vine Street, Suite 4192, Cincinnati, Ohio 45202, on behalf of the Greater Cincinnati Health Council.

Bricker & Eckler LLP, by Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215, on behalf of the city of Cincinnati.

Vorys, Sater, Seymour & Pease, by Benita A. Kahn and Steven M. Howard, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43215-3108, and Hogan & Hartson, LLP, by Gardner F. Gillespie, 555 13th Street NW, Washington, DC 20004, on behalf of the Ohio Cable Telecommunications Association.

Pamela Sherwood, 4625 W. 86th Street, Suite 500, Indianapolis, Indiana 46268, on behalf of tw telecom of ohio llc.

Albert E. Lane, 7200 Fair Oaks Dr., Cincinnati, Ohio 45237, on his own behalf.

OPINION:

I. HISTORY OF THE PROCEEDINGS

The applicant, Duke Energy Ohio, Inc., (Duke or company) is an electric company, as defined by Section 4905.03(A)(4), Revised Code, and a public utility, as defined by Section 4905.02, Revised Code. Accordingly, the company is subject to the jurisdiction of this Commission pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code. Duke is engaged in the business of the production, transmission, distribution, and sale of electricity to approximately 690,000 consumers. Duke's current base rates were established by the Commission in Case No. 05-59-EL-AIR, Opinion and Order (December 21, 2005).

On June 25, 2008, Duke filed a notice of intent to file an application for an increase in rates for electric distribution service for its service territory. Duke requested that the test year begin January 1, 2008, and end December 31, 2008, and that the date certain be March 31, 2008. Also on June 25, 2008, the company requested waivers of various standard filing requirements contained in Rule 4901-7-01, Appendix A, Chapter II, Ohio Administrative Code (O.A.C.). By entry of July 23, 2008, the Commission approved the requested date certain and test year and granted the request for waivers. On July 25, 2008, the company filed, in Case Nos. 08-709-EL-AIR, 08-710-EL-ATA, and 08-711-EL-AAM (collectively, rate cases), an application to increase its electric distribution rates, effective April 1, 2009, and for approval of tariff amendments and approval of a change in accounting methods. In its application, Duke requested an increase of approximately \$86,000,000. By entry of August 12, 2008, a technical conference on the rate case and related applications was scheduled for August 21, 2008. Proofs of publication were filed on April 30, 2009. A motion for admission of the proofs of publication as an exhibit in the proceeding was filed with the proofs. Correspondence opposing the admission on various grounds not related to the veracity, relevance, or appropriateness of the admission was filed by Mr. Lane. The Commission finds that the motion is reasonable and should be granted.

On September 10, 2008, the Commission issued an entry that accepted the application for filing as of July 25, 2008. By entry of September 12, 2008, *In the Matter of the Application of the Cincinnati Gas & Electric Company for Approval of its Rider BDP, Backup Delivery Point*, Case No, 06-718-EL-ATA, was consolidated with the rate cases.

On December 22, 2008, Duke filed a motion for approval of a change in accounting methods to defer and create a regulatory asset for storm restoration costs stemming from the September 14, 2008, windstorm and incurred during the test year and for a recovery mechanism for storm restoration costs. By entry of January 14, 2009, the Commission approved Duke's application to modify accounting procedures to defer incremental operation and maintenance costs related to the windstorm service restoration expenses with carrying costs; however, the Commission stated that the reasonableness and recovery of said deferred amounts would be examined and addressed in a future proceeding.

On December 31, 2008, Mr. Albert E. Lane filed a letter in the docket, asking to be placed on the service list in these cases and providing several comments for consideration. On January 13, 2009, as corrected on January 15, 2009, Mr. Lane filed a motion to intervene in these proceedings, together with additional comments.

Pursuant to Section 4909.19, Revised Code, staff conducted an investigation of the matters set forth in the company's applications. On January 27, 2009, staff filed with the Commission its written report of investigation (staff report). By entry dated February 5, 2009, persons wishing to file objections to the staff report and those wishing to intervene

were directed to file objections pursuant to statutory requirements and motions to intervene by February 26, 2009. This entry also scheduled a prehearing conference for March 17, 2009, and the evidentiary hearing for March 31, 2009.

The Commission granted motions to intervene filed by Ohio Consumers' Counsel (OCC); Ohio Partners for Affordable Energy (OPAE); Ohio Energy Group; the Kroger Company (Kroger); People Working Cooperatively, Inc. (PWC); the Greater Cincinnati Health Council (GCHC); the city of Cincinnati; the Ohio Cable Telecommunications Association (OCTA); tw telecom of ohio, llc (TWTC); and Albert E. Lane. Additionally, motions to admit David C. Rinebolt, Gardner F. Gillespie, and Pamela H. Sherwood to practice *pro hac vice* before the Commission in this proceeding were granted on February 5, 2009.

On February 3, 2009, Mr. Lane filed objections to the staff report. On February 25, 2009, Mr. Lane filed corrections to certain aspects of his objections. On February 26, 2009, objections to the staff report were filed by Duke, Kroger, GCHC, OPAE, PWC, OCTA, and OCC.

On March 2, 2009, the attorney examiner issued an entry scheduling three local public hearings and ordered Duke to publish notice of the local public hearings. On May 1, 2009, proofs of publication of notice of the public hearings were filed in the docket.

On March 4, 2009, Mr. Lane filed a document posing 27 questions, directed at staff and Duke. On March 26, 2009, Mr. Lane filed an additional document, asking for answers to his 27 questions and posing supplemental issues for consideration.

Local public hearings were held on March 14, 16, and 24, 2009. The evidentiary hearing commenced on March 31, 2009. A stipulation and recommendation (stipulation), signed by all of the parties except TWTC and Mr. Lane, was also filed on March 31, 2009. Neither TWTC nor Mr. Lane was present at the hearing. Testimony in support of the stipulation was offered by one staff witness and one Duke witness and all parties present waived cross-examination of those witnesses. Thereafter, the testimony was admitted into the record. By entry of March 31, 2009, parties not present were given the opportunity to file a request to cross-examine the two witnesses; however, no requests were filed.

On May 1, 2009, as corrected on May 4, 2009, Mr. Lane filed a request for additional local public hearings, also discussing other issues.

On May 8, 2009, Duke filed a motion for admission of Schedule A-1 to the stipulation as a late-filed exhibit, explaining that it should have been included with the stipulation. Duke indicated that counsel for staff, OCC, city of Cincinnati, OCTA, OPAE, and GCHC had no objection to this document being admitted and that counsel for the

remaining parties did not respond to Duke. On May 12, 2009, Mr. Lane filed an objection to the admission of the Schedule A-1.

On May 19, 2009, Mr. Lane filed a copy of an e-mail that had previously been distributed to parties in these proceedings, as well as various legislative and media persons.

On May 29, 2009, all of the stipulating parties other than OCC filed a letter clarifying the meaning of the Schedule A-1 that was included with Duke's motion of May 8, 2009. On June 1, 2009, OCC filed a letter indicating that OCC would not oppose the May 29, 2009, letter.

By entry of May 29, 2009, parties were given the opportunity to file a request for a hearing on the proposed Schedule A-1 and the clarifying letter of May 29, 2009. On June 1, 2009, Mr. Lane filed a motion for an extension of the deadline for filing such a request, and for an extension of the proposed hearing date. He also requested that the hearing not be held until his previously posed 27 questions were answered by the Commission, staff, and Duke. On June 2, 2009, Duke filed a memorandum contra Mr. Lane's request for an extension, together with a motion to strike certain portions of Mr. Lane's filing. On June 2, 2009, Duke also filed a copy of its May 30, 2009, response to Mr. Lane's 27 questions. On June 3, 2009, the examiner issued an entry, rejecting the motion to extend the deadline to request a hearing but agreeing to continue the hearing date to June 17, 2009. On June 4, 2009, as corrected on June 8, 2009, and as further corrected on June 9, 2009, Mr. Lane filed a request for a hearing, together with a list of requested witnesses. Also on June 9, 2009, Duke filed a motion to strike Mr. Lane's witness list and to limit cross-examination at the hearing. On June 10, 2009, Mr. Lane filed a memorandum contra Duke's motion to strike. The Commission finds that there is no good cause to grant Duke's motion and that it should therefore be denied.

On June 17, 2009, a hearing was held with regard to the Schedule A-1 submitted by Duke, together with the clarifying letter of May 29, 2009. At that hearing, Mr. William Don Wathen, Jr., testified on behalf of Duke and was cross-examined by Mr. Lane. At the conclusion of the hearing, all parties who were present at the hearing indicated a desire not to file briefs in this matter.

II. SUMMARY OF THE EVIDENCE AND DISCUSSION

A. Summary of the Local Public Hearings

Three local public hearings were held in order to allow Duke's customers the opportunity to express their opinions regarding the issues in these proceedings. At the first public hearing, in the Union Township Civic Center Hall, on March 16, 2009, at 6:00 p.m., 22 witnesses testified. At the second public hearing, at Cincinnati City Hall

Council Chambers, on March 19, 2009, at 12:30 p.m., 18 witnesses testified. At the third public hearing, at the Lakota East High School Auditorium, on March 24, 2009, at 6:00 p.m., 11 witnesses testified. At these hearings, members of the public testified concerning issues such as high rates for service, riders, difficulties faced by consumers on fixed incomes, service quality, maintenance, the economy, executive salaries, business planning, competition, billing, and recovery for storm damage.

B. Intervenor Issues

Throughout the course of these proceedings, Mr. Lane raised a number of issues, through the filing of correspondence, comments, and questions. While he did not attend the initial evidentiary hearing in these proceedings, at which the stipulation was admitted, he did attend and cross-examine Duke's witness at the final hearing. Although the parties chose not to file post-hearing briefs that would have set forth their positions in a comprehensive fashion, we will address the relevant issues raised by Mr. Lane.

Mr. Lane raised the issue of Mr. Wathen's qualifications as an expert, pointing out that he is not a certified public accountant. (Tr. II at 26-28.) We would note that Mr. Wathen has testified in numerous proceedings before this Commission and that his qualifications as an expert were well-established in his testimony admitted at the initial evidentiary hearing in these proceedings and in numerous other proceedings involving Duke.

Mr. Lane cross-examined Mr. Wathen regarding the sources and meaning of the information set forth in Schedule A-1, especially focusing on the difference between the increases requested by Duke in the application, as compared with the amounts stipulated by the parties. He also questioned how the numbers in Schedule A-1 could be precise when they were calculated as averages. Mr. Wathen explained that Schedule A-1 was arranged in four columns. The first column duplicates the information set forth in the application, the second column is a numerical average of the high and low figures recommended in the staff report, the third column represents the position of OCC, and the fourth column shows the amounts agreed to by the parties to the stipulation. He also testified that the numbers in Schedule A-1 were from numbers in the staff report and that only some of the numbers in the stipulation column of Schedule A-1 were averages of the low and high ranges from certain numbers in the staff report; but, in any event, that all of the numbers were accurate and appropriately determined. (Tr. II at 14-20, 27-28, 73-80, and 92-93.) We believe that Duke's witness fully explained the sources and meaning of the information contained in Schedule A-1.

From an accounting standpoint, Mr. Lane questioned how Duke and its affiliates accurately determined the sharing of costs among themselves and whether air travel incurred in the preparation of the Schedule A-1 is included. He also cross-examined

Mr. Wathen regarding the source and accuracy of information used by Duke in its application and supplied by Duke to the Commission. Mr. Wathen confirmed that employees keep records of their time, indicating the nature of the work done and the affiliate for whom it was performed. He also noted that time spent in preparation of the Schedule A-1 was outside the test year and that, in any event, no air travel was involved in the preparation of the Schedule A-1. Although agreeing that Duke's information occasionally includes an error, he testified that Duke employees do review the information in an attempt to correct any such errors. He also agreed that Commission staff reviews Duke's information and further corrects any errors discovered. Finally, Mr. Wathen stated that Duke pays an annual fee to the Commission. (Tr. II at 28-41, 109-111.) We find that Duke's witness fully responded to Mr. Lane's questions in this area and that there are no outstanding matters related to accounting issues raised by Mr. Lane.

In various filings made by Mr. Lane prior to the second hearing, he referenced his opposition to the merger that gave rise to Duke, in *In the Matter of the Joint Application of Cinergy Corp., on Behalf of the Cincinnati Gas & Electric Company, and Duke Energy Holding Corp. for Consent and Approval of a Change of Control of The Cincinnati Gas & Electric Company*, Case No. 05-732-EL-MER (merger case). We would note that the merger case is not an open proceeding and that the time for opposing either the merger or the Commission's determination in that proceeding is long since past. Mr. Lane has also indicated his belief that Commissioners who voted in favor of approving the merger, in the merger case, have a current conflict of interest and should not vote in these proceedings. (E-mails docketed on March 26, 2009; May 1, 2009.) As to Mr. Lane's assertions regarding conflicts of interest, he provided no evidence or testimony to support his contention that any member of the Commission who voted in favor of the merger application should recuse himself from these proceedings.

Mr. Lane also requested that this case be consolidated with the proceeding in *In the Matter of the Commission Investigation into the Reliability of the Electric Distribution Service Provided by Ohio's Investor-Owned Electric Companies*, Case No. 08-1299-EL-UNC. The Commission believes that such a consolidation would likely extend the consideration of those cases in question and would combine cases unique to Duke with a generic proceeding applicable to all electric utilities. This would not be in the interest of administrative economy. In addition, we do not believe that there is any benefit to such a consolidation. Duke will be subject to the Commission's investigation and order in that case, as well as in these proceedings. Therefore, we do not find that it would be reasonable or appropriate to consolidate these cases and decline to do so.

An additional set of issues raised by Mr. Lane relates to various aspects of Duke's internal operations. In various filings, he raised issues relating to maintenance, tree trimming, reliability, and customer calls. Additionally, Mr. Lane called for an independent audit, by an outside accountant. (See filings dated December 31, 2008;

January 13, 2009; February 3, 2009.) These issues were addressed in the staff report. Mr. Lane presented insufficient evidence to convince us to reach different conclusions than were proposed by staff.

Mr. Lane was also concerned that one of the local public hearings was held without the presence of a Commissioner and while certain parties to the proceedings engaged in private settlement discussions. He asked that the Commission order Duke to pay for additional advertisements and hold new local public hearings. (Correspondence docketed May 19, 2009.) No Ohio statute or administrative rule requires the presence of a Commissioner at a local public hearing or prohibits the holding of such a hearing while settlement discussions are occurring or without public announcement of such discussions. The Commission finds no necessity for the holding of additional local public hearings.

Additionally, Mr. Lane raised a question regarding the timing of Duke's repairs after a recent windstorm and the appropriate accounting for the cost of those repairs. (Comments docketed December 31, 2008.) With regard to this issue, the Commission would point out that the stipulation in these proceedings addresses windstorm costs.

Mr. Lane has also raised several issues that are outside the Commission's jurisdiction, including more funding for OCC, beneficial effects of certain federal legislation that is no longer in effect, and recommended publications by media.

C. Summary of the Proposed Stipulation

As noted above, certain of the parties entered into a stipulation that was filed on March 31, 2009. Pursuant to the stipulation, the stipulating parties agreed, *inter alia*, that:

- (1) Duke shall receive a retail electric distribution revenue increase of \$55.3 million. For purposes of any riders that require a rate of return, the calculation of the rate of return shall be made on the basis of Duke's actual adjusted capital structure and a return on equity of 10.63 percent (which is the midpoint of staff's recommended return on equity).
- (2) The retail electric distribution revenue increase should be distributed as shown on Stipulation Attachment 1.
- (3) Duke's monthly residential service customer charge should be \$5.50 per bill for rates RS, ORH, and CUR.
- (4) Duke shall make its three-phase residential rate (Rate RS3P) available throughout its service territory to residential customers, where (A) building demand load exceeds standard

single-phase Duke equipment or the building is a multi-use building requiring three-phase service for the commercial space; (B) distribution lines are adjacent to the premises; (C) the building demand load requires three-phase service; and (D) additional distribution line extensions are not required as Duke's existing distribution facilities are capable of supporting three-phase distribution service. In other instances, Duke will make three-phase service available to residential customers at the customer's sole expense and pursuant to a three-year service agreement.

- (5) Duke's proposed rate design for nonresidential rates shall be implemented as set forth on the Stipulation Attachment 2.
- (6) Duke will implement new depreciation rates consistent with the staff report and as outlined by OCC in its objections to the staff report.
- (7) Duke's pole attachment (PA) rate shall be \$6.40 per wireline attachment. Duke's conduit occupancy rate shall be \$1.26 per linear foot as defined in the PA tariff appended to Stipulation Attachment 3. Duke agrees to the system inventory as recommended in the staff report. Duke also agrees to file a letter in this docket, upon completion of the inventory, affirmatively indicating that the baseline contemplated in Stipulation Attachment 3 has been established.
- (8) Rider DR shall be approved as a mechanism to recover reasonable and prudently incurred storm restoration costs relative to the September 2008 windstorm associated with Hurricane Ike only. Recovery shall be limited to the operating costs identified in paragraph 16 of Duke's December 22, 2008, motion for approval of a change in accounting methods, which motion was approved by the Commission on January 14, 2009. The rider shall initially be set at zero. Following the Commission's approval of this stipulation, Duke may file a separate application to establish the initial level of Rider DR and shall docket, with its Rider DR application, all supporting documentation. Duke will bear the burden of proof of demonstrating that the costs were prudently incurred and reasonable. Staff and any other interested parties may file comments on the application within 60 days after Duke docketed the application. If staff or any other interested party files an

objection that is not resolved in the opinion of the objecting party within 30 days thereafter, a hearing process, including an opportunity for discovery and presentation of testimony, will be established, in order to allow the parties to present evidence to the Commission.

- (9) The parties will not oppose Duke's request to eliminate its customer-owned street lighting rate SC tariff.
- (10) The parties will recommend to the Commission that Rider BDP (regarding backup delivery point capacity) shall be approved in accordance with the recommendations contained in the staff report, except that Rider BDP capacity reservation charges shall not apply to the Greater Cincinnati Health Council member hospitals' existing load through 2011, consistent with the stipulation in Case No. 08-920-EL-SSO et al. (ESP case).
- (11) The parties will support the withdrawal from this case of Duke's request to eliminate Rider SC and agree to the continuation of Rider SC as effective pursuant to the stipulation in the ESP case.
- (12) The parties will support the recommendation of staff, set forth in the staff report, to exclude the minimum load requirement and Duke's proposed changes to its brownfield development program. Customer credits applied pursuant to this tariff shall not be recoverable from customers.
- (13) Duke shall implement the rates authorized by the Commission in these proceedings on a services-rendered basis, effective upon Commission approval.
- (14) An electric distribution uncollectible expense rider (Rider UE-ED) will be created. Rider UE-ED shall recover incremental net uncollectible expense (above the baseline amount established in the test period as reflected on Stipulation Attachment 4) related to Duke's provision of electric distribution service and all percentage of income payment plan (PIPP) installment payments not recovered through the universal service fund rider (USR) or from the customer net of any unused low-income credit funds as described in paragraph 14 of the stipulation. The amounts in the rider, exclusive of PIPP, will only be collected from the class that created the bad debt expense. Bad debt expense associated with PIPP uncollectibles will be allocated in

the manner of the universal service fund rider. Duke may recover any installment payment amounts, not recovered through the USR or from the customer, through Rider UE-ED where Duke demonstrates that it has made reasonable attempts to collect said amounts. Rider UE-ED shall be set at zero in this proceeding and Duke's initial application to set the rider shall be filed in the second quarter of 2010 and shall include incremental net uncollectible expenses and eligible PIPP amounts above the baseline incurred after the effective date of the rate increase granted in these proceedings. Duke will not accrue carrying charges on the monthly unrecovered balance of incremental net uncollectible expense and PIPP installment payments for which recovery is sought through Rider UE-ED. Duke shall make annual filings for Rider UE-ED, which shall be subject to a review and true-up proceeding before the Commission. All interested parties will have the right to due process, including an opportunity for discovery, hearing, and Commission approval. If the Commission chooses to order an independent audit of the uncollectible expense, such audit will be conducted under the direction of staff and the cost of the audit will be recoverable through Rider UE-ED. Duke shall include, within the competitive retail electric service provider tariff, the formula it uses to determine the discount at which it purchases receivables from competitive retail electric service providers.

- (15) The agreement reached with Kroger, Inc., in the ESP case, shall be extended for an additional 90 days from the Commission's approval of the stipulation.
- (16) Duke and the city of Cincinnati will enter into a PA agreement that clarifies that the city of Cincinnati will not be responsible for paying PA fees for existing or new attachments that are made in accordance with the processes set forth in the stipulation. All other Ohio political subdivisions shall be exempt from paying attachment fees, provided that such municipalities timely remove life safety signs, equipment, and lights from Duke's utility poles, enter into PA agreements, or otherwise submit to an application and permit process for any future pole attachments; submit any existing, non-permitted attachments to an application and permit process; and timely correct any attachments that violate applicable regulations. The foregone revenue from these exemptions will not be recoverable from other customers.

- (17) Up to 10,000 electric customers who are at or below 200 percent of the federal poverty level and who do not participate in the PIPP program shall be entitled to receive electric service under rate RSLI (regarding residential low income) and receive a \$4.00 per month credit. All gas customers who are currently eligible for Duke's low income credit gas program will be automatically enrolled in Duke's low income electric program and will be credited the \$4.00 per month on their electric bill. To the extent that less than a total of \$40,000 is credited to customers during each month, the excess of the monthly proceeds shall be used to fund the payment of the amounts that would otherwise be collected through Rider UE-ED.
- (18) Duke shall provide \$200,000 per year for four years toward a study that PWC will design and manage, employing its proprietary tools, testing a range of home energy improvements and focusing on critical home repairs and energy efficiency, for eligible low-income residential consumers in Duke's service territory. PWC will report to Duke and other parties regarding the results of this project.
- (19) To assist with the implementation, administration, staffing, and outreach of its income credit program, Duke shall contribute a total of \$50,000 per year for four years, to be paid directly to identified agencies, with OPAE and such agencies agreeing to the amounts to be distributed to each agency. Such funding may also be used for the purchase or development of a market research database, in order to more effectively target participants for low-income programs in Duke's territory.
- (20) All other elements in Duke's applications in these proceedings shall be resolved as set forth in the staff report. Duke shall allow the payment of electric account deposits by residential customers in installments, over three consecutive months, and will not seek recovery from customers for the billing and or information technology costs associated with the change. Duke will use its best efforts to effectuate this change but will complete the process no later than December 31, 2009.
- (21) Duke will correct the phone number for OCC's call center on both gas and electric disconnect notices immediately.

D. Consideration of the Stipulation

Rule 4901-1-30, O.A.C., authorizes parties to Commission proceedings to enter into stipulations. Although not binding on the Commission, the terms of such agreements are accorded substantial weight. See *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, at 125 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155 (1978).

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, e.g., *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR et al. (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 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?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 547 (1994) (citing *Consumers' Counsel*, supra, at 126). The court 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 (*Id.*).

The signatory parties agree that the stipulation is supported by adequate data and information, represents a just and reasonable resolution of the issues that are proposed to be resolved by the stipulation in these proceedings, violates no regulatory principle, and is the product of lengthy, serious bargaining among knowledgeable and capable parties in a cooperative process undertaken by the parties to settle such contested issues. (Jt. Ex. 1, at 2.) David R. Hodgden, Capital Recovery and Financial Analysis Division, Utilities Department, testified that the settlement was a product of serious bargaining among capable, knowledgeable parties; the settlement, as a package, benefits ratepayers and is in the public interest; and the settlement does not violate any regulatory principle or practice.

He indicated that the parties involved in the negotiations of the stipulation included representatives of residential customers, industrial customers, and commercial customers. He also indicated that the parties in these proceedings have been involved in prior proceedings before the Commission and were knowledgeable and experienced in utility cases, generally, and in Duke rate setting matters, specifically. Mr. Hodgden noted that all the parties were invited to participate in the negotiations. According to his testimony, some participated in person and some by phone, while some chose not to participate directly but communicated their views by electronic mail. He indicated that the parties put forward and discussed a variety of proposals, that all parties had the ability to discuss the issues and present their views, and that the settlement reflected a consensus on the part of the signatories to the settlement. Mr. Hodgden also testified that the settlement is in the public interest because it allows Duke the ability to earn a reasonable rate of return while holding the rate increase to approximately three percent of Duke's current total retail revenue, while also providing funds to aid low-income customers who are not involved in the PIPP program and allowing customers to pay customer deposits over a three-month period. (Staff Ex. 2, at 2-5.)

Paul G. Smith, Duke's Vice President, Rates - Ohio and Kentucky, testified that the stipulation is the product of serious bargaining among capable, knowledgeable parties, does not violate any important regulatory principles or practice, and will benefit customers and the public interest. He indicated that the parties to the stipulation regularly participate in rate proceedings before the Commission, are knowledgeable in regulatory matters, and were represented by experienced, competent counsel. Mr. Smith testified that there were a total of four settlement conferences and that all parties were invited to attend all of the settlement discussions regarding the applications. He also noted that all of the issues in these cases were addressed during these meetings and that the stipulation is a compromise resulting from those discussions and represents a product of capable, knowledgeable parties. He indicated that the stipulation complies with all relevant and important principles and practices and is fully supported by all of the evidence presented in these cases. He further indicated that the stipulation is consistent with the principle of cost causation in rate design in that it reduces the subsidy/excess between nearly all rate classes in order to reduce or eliminate cross-subsidies between classes. Mr. Smith also stated that the stipulation provides numerous significant benefits across all customer groups, including the availability of three-phase residential service in areas beyond where it is currently offered, a reduced depreciation rate, a lower pole-attachment charge than supported in the application, a new tracking mechanism to recover uncollectible expenses, the establishment of two new low-income programs, and allowing residential customer deposits to be funded over a three-month period. (Duke Ex. 9, at 1; Duke Ex. 18, at 1-7.)

Upon review of the stipulation, we find that it is the product of serious bargaining among capable, knowledgeable parties. The Commission also finds that many items in the stipulation will benefit the ratepayers and the public interest. Specifically, the stipulation

in these proceedings, while allowing Duke the opportunity to earn a reasonable rate of return, holds the rate increase to approximately three percent of total retail revenue. It provides an additional benefit to residential customers by giving them the ability to fund deposits over a three-month period. In addition, it assists low-income customers through the establishment of new programs. Further, as noted by Mr. Smith, three-phase residential service is expanded, the depreciation rate is reduced, and the pole-attachment charge is established at a lower rate than was supported in the application. Further, the stipulation provides the important benefit of reducing or eliminating cross-subsidies between classes by being consistent with the principle of cost causation. Finally, with regard to our review of the stipulation,¹ there is no evidence that it violates any regulatory principle or precedent.

Accordingly, we find that the stipulation entered into by the parties should be approved and adopted. Duke shall have the necessary accounting authority to fulfill the terms of the stipulation.

III. RATE DETERMINANTS

As agreed to by the parties to the stipulation, the date certain value of Duke's property used and useful in the rendition of electric service is \$963,787,307. The Commission finds the rate base stipulated by the parties to be reasonable and proper, and adopts the valuation of \$963,787,307 as the rate base for purposes of these proceedings.

The stipulation recommends that rates be approved that would enable Duke to earn a rate of return of 8.61 percent. The Commission finds that a rate of return of 8.61 percent is fair and reasonable for Duke and should be authorized for purposes of these cases.

Applying a rate of return of 8.61 percent to the value of the used and useful property as of the date certain results in required operating income of \$82,962,087. Under the stipulation, the parties agreed that the adjusted operating income of Duke during the test year was \$47,759,653. This results in an operating income deficiency of \$35,222,434, which, when adjusted for uncollectibles and taxes, results in an income deficiency of \$55,300,000 and, therefore, a recommended revenue increase of \$55,299,335. Therefore, we find that a revenue increase of \$55,299,335 is reasonable and should be approved.

¹ We interpret the language of paragraph three of the stipulation to mean that Duke will implement depreciation rates set forth in the staff report, modified so that such rates do not reflect depreciation expense on plant that will be fully depreciated by the end of the test year, as set forth in OCC's objections.

EFFECTIVE DATE AND TARIFFS

As part of its investigation in this matter, the staff reviewed Duke's various rates and charges, and the provisions governing terms and conditions of service. As part of the stipulation, the parties filed proposed tariffs that reflect the rates, at the revenue requirement agreed to by the stipulating parties, as well as the remaining tariff matters agreed to by the parties. The Commission has reviewed the proposed tariffs and found that they correctly incorporate the provisions of the stipulation. Therefore, the Commission finds that Duke should file, in final form, four complete, printed copies of the final tariffs with the Commission's docketing division, consistent with this order. Duke shall also submit a proposed customer notice or notices. Duke shall review the customer notices with Commission staff and make whatever changes are recommended by staff. The effective date of the increase shall be a date not earlier than the date upon which final tariffs and the proposed customer notices are filed with the Commission. The new tariffs shall be effective for service rendered on or after such effective date.

FINDINGS OF FACT

- (1) Duke is an electric light company within the meaning of Sections 4905.03(A)(4) and 4928.01(A)(7), Revised Code, and, as such, is a public utility as defined by Section 4905.02, Revised Code, subject to the jurisdiction and supervision of the Commission. Duke is also an electric utility within the meaning of Section 4928.01(A)(6), Revised Code.
- (2) On June 25, 2008, Duke filed a notice of intent to file an application for an increase in rates for electric distribution service for its service territory.
- (3) Also on June 25, 2008, Duke requested waivers of various standard filing requirements contained in Rule 4901-7-01, Appendix A, Chapter II, O.A.C. Duke's waiver requests were granted on July 23, 2008.
- (4) Duke requested that the test year begin January 1, 2008, and end December 31, 2008, and that the date certain be March 31, 2008. By entry of July 23, 2008, the Commission approved the requested date certain and test year.
- (5) On July 25, 2008, Duke filed applications, in Case Nos. 08-709-EL-AIR, 08-710-EL-ATA, and 08-711-EL-AAM, to increase its electric distribution rates, effective April 1, 2009, for tariff approval, and for approval of a change in accounting methods.

- (6) By entry of August 12, 2008, a technical conference concerning the rate case and related applications was scheduled for August 21, 2008.
- (7) On September 10, 2008, the Commission issued an entry that accepted the applications for filing as of July 25, 2008.
- (8) On April 30, 2009, proofs of publication of the application were filed in the docket, together with a motion for admission as a late-filed exhibit.
- (9) By entry of September 12, 2008, Case No. 06-718-EL-ATA was consolidated with the rate cases.
- (10) On December 22, 2008, Duke filed a motion for approval of a change in accounting methods to defer and create a regulatory asset for storm restoration costs incurred during the test year and a recovery mechanism for storm restoration costs.
- (11) By entry of January 14, 2009, the Commission approved Duke's application to modify accounting procedures to defer incremental operation and maintenance costs related to the September 14, 2008, wind storm service restoration expenses with carrying costs; however, the reasonableness and recovery of said deferred amounts would be examined and addressed in a future proceeding.
- (12) On January 27, 2009, staff filed its staff report.
- (13) By entry dated February 5, 2009, persons wishing to file objections to the staff report and those wishing to intervene were directed to file motions to intervene by February 26, 2009. This entry also scheduled a prehearing conference for March 17, 2009, and the evidentiary hearing for March 31, 2009.
- (14) Intervention was granted to OCC, Kroger, PWC, GCHC, the city of Cincinnati, OCTA, TWTC, and Albert Lane.
- (15) Motions to admit David C. Rinebolt, Gardner F. Gillespie, and Pamela H. Sherwood to practice pro hac vice before the Commission in this proceeding were granted on February 5, 2009.
- (16) Objections to the staff report were filed by Mr. Lane on February 3, 2009, and by Duke, Kroger, Greater Cincinnati Health Council, OPAC, PWC, OCTA, and OCC on February 26, 2009.

- (17) A prehearing conference was held on March 17, 2009.
- (18) The evidentiary hearings were held on March 31, 2009, and June 17, 2009.
- (19) Three local public hearings were held at various locations from March 16, 2009, through March 24, 2009, pursuant to published notices. Approximately 51 members of the public attended the three public hearings and gave sworn testimony.
- (20) A stipulation was filed and admitted into evidence on March 31, 2009.
- (21) The value of all of the company's jurisdictional property used and useful for the rendition of electric distribution service to their customers affected by this application, determined in accordance with Section 4909.15, Revised Code, is not less than \$963,787,307.
- (22) The current net operating income for the 12-month period ended December 31, 2008, is \$47,759,653. The net operating income realized by Duke represents a rate of return of 4.96 percent. The stipulating parties have recommended a rate of return of 8.61 percent.
- (23) A rate of return of 4.96 percent is insufficient to provide Duke reasonable compensation for the service it provides.
- (24) A rate of return of 8.61 percent is fair and reasonable under the circumstances presented by these cases and is sufficient to provide Duke just compensation and return on the value of its property used and useful in furnishing electric distribution service to its customers.
- (25) A rate of return of 8.61 percent applied to the jurisdictional rate base of \$963,787,307 results in allowable net operating income of \$82,962,087. This results in an operating income deficiency of \$35,222,434, which, when adjusted for uncollectibles and taxes, results in a revenue increase of \$55,299,335.

CONCLUSIONS OF LAW

- (1) Duke's application to increase rates was filed pursuant to, and this Commission has jurisdiction of the application under, the provisions of Sections 4909.17, 4909.18, and 4909.19, Revised Code, and the application complies with the requirements of these statutes.

- (2) A staff investigation was conducted, reports of that investigation were duly filed and mailed, and public hearings were held, the written notice of which complied with the requirements of Sections 4909.19 and 4903.083, Revised Code.
- (3) The stipulation submitted by a majority of the parties, and supported by staff, is reasonable and, as indicated herein, shall be adopted in its entirety.
- (4) The existing rates and charges for electric distribution service are insufficient to provide Duke with adequate net annual compensation and return on its property used and useful in the provision of electric distribution service.
- (5) A rate of return of 8.61 percent is fair and reasonable under the circumstances of this case and is sufficient to provide Duke just compensation and return on its property used and useful in the provision of electric distribution services to its customers.
- (6) Duke is authorized to withdraw its current tariffs and to file, in final form, revised tariffs as approved by the Commission herein.

ORDER:

It is, therefore,

ORDERED, That the stipulation be adopted in its entirety. It is, further,

ORDERED, That the application of Duke for authority to increase its rates and charges for electric distribution service, and related applications considered herein, be granted to the extent provided in this opinion and order. It is, further,

ORDERED, That Duke be authorized to file in final form four complete copies of its tariffs consistent with this opinion and order, and to cancel and withdraw its superseded tariffs upon the effective date of the revised tariffs. One copy shall be filed with this case docket, one copy shall be filed with Duke's TRF docket, and the remaining two copies shall be designated for distribution to the rates and tariffs division of the Commission's utilities department. Duke shall also update its tariffs previously filed electronically with the Commission's docketing division. It is, further,

ORDERED, That Duke shall notify its customers of the changes to the tariffs via bill message or bill insert within 30 days of the effective date of the revised tariffs. A copy of this customer notice shall be submitted to the Commission's Service Monitoring and

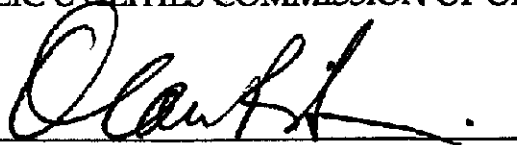
Enforcement Department, Reliability and Service Analysis Division, at least 10 days prior to its distribution to customers. It is, further,

ORDERED, That the effective date of the revised tariffs shall be a date not earlier than the date of this opinion and order, the date upon which four complete copies of final tariffs are filed with the Commission, and the date on which the proposed customer notice is filed with the Commission. The revised tariffs shall be effective for services rendered on or after such effective date. It is, further,

ORDERED, That Duke's motion for admission of proofs of publication be granted and that Duke's motion to strike be denied. It is, further,

ORDERED, That a copy of this opinion and order be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



Paul A. Centolella



Ronda Hartman Fergus



Valerie A. Lemmie

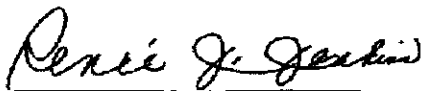


Cheryl L. Roberto

SEF/JWK:ct:geb

Entered in the Journal

JUL 08 2009



Renee J. Jenkins
Secretary