

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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|--|---|-------------------------|
| In the Matter of the Application of Duke | ) |                         |
| Energy Ohio, Inc. for an Adjustment to   | ) | Case No. 09-1849-GA-RDR |
| Rider AMRP Rates.                        | ) |                         |
|  | ) |                         |
| In the Matter of the Application of Duke | ) | Case No. 09-1850-GA-ATA |
| Energy Ohio, Inc. for Tariff Approval.   | ) |                         |

OPINION AND ORDER

The Public Utilities Commission of Ohio, having considered the record in these matters and the stipulation and recommendation submitted by the signatory parties, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

Amy B. Spiller, Associate General Counsel, and Elizabeth H. Watts, Assistant General Counsel, Duke Energy Ohio, Inc., 139 Fourth Street, Room 2500, Atrium II, Cincinnati, Ohio 45202, on behalf of Duke Energy Ohio, Inc.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and William L. Wright, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of Staff of the Commission.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Joseph P. Serio and Larry S. Sauer, Assistant Consumers' Counsels, 10 West Broad Street, Columbus, Ohio 43215-3485, on behalf of the residential utility consumers of Duke Energy Ohio, Inc.

OPINION:

I. Background

Duke Energy Ohio, Inc. (Duke) is a natural gas company as defined in Section 4905.03(A)(6), Revised Code, and a public utility under Section 4905.02, Revised Code. Duke supplies natural gas to approximately 425,000 customers in southwestern Ohio (Duke Ex. 1 at 1).

By opinion and order issued May 30, 2002, in *In the Matter of the Application of The Cincinnati Gas & Electric Company*<sup>1</sup> for an Increase in Rates, Case No. 01-1228-GA-AIR, et al., (CG&E Distribution Rate Case) the Commission approved a stipulation which, *inter*

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<sup>1</sup> Duke was formerly known as The Cincinnati Gas & Electric Company.

*alia*, included a provision establishing the Accelerated Main Replacement Program (AMRP) rider (Rider AMRP). The purpose of Rider AMRP was to recover the expenditures associated with the company's ten-year plan to replace all twelve-inch and smaller cast iron and bare steel gas mains in the company's distribution system. In accordance with the stipulation approved in the *CG&E Distribution Rate Case*, the rider was to be adjusted annually to account for any over- or under-recovery and the company was to file applications annually, supporting adjustments to the Rider AMRP rates.

By opinion and order issued May 28, 2008, in *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Rates*, Case No. 07-589-GA-AIR, et al., (*Duke Distribution Rate Case*) the Commission approved a stipulation that, *inter alia*, stated that the AMRP would be substantially completed by the end of 2019 and that the riser replacement program (RRP) would be completed by the end of 2012. In addition, the stipulation provided that Duke would file actual data to support a Rider AMRP adjustment for the last nine months of 2007 and that the revenue requirement for 2008 rates would be modified to include deferred curb-to-meter and riser expenses, net of maintenance savings, for calendar year 2007. Furthermore, the stipulation allowed Duke to recover the deferred expense in any annual AMRP filing, as long as the recovery does not exceed the cumulative residential rate caps of \$2.60, \$3.90, and \$5.20, for 2009, 2010 and 2011, respectively. Moreover, the stipulation further defined the process for consideration of the periodic adjustments to Rider AMRP. In accordance with the stipulation, by November 2008, and annually thereafter, Duke will file a prefiling notice to implement adjustments to Rider AMRP. Subsequently, Duke will file its application and an update of year-end actual data by the following February 28 of each year. The stipulation provides that Staff and other parties then may file comments and that Duke has until April 1 of each year to resolve the issues raised in the comments. If the issues raised in the comments are not resolved, then the stipulation requires that a hearing be held. The goal of the process set forth in the stipulation is for the proposed amendment to Rider AMRP to be effective by the first billing cycle of May.

In accordance with the AMRP provisions of the stipulation in the *Duke Distribution Rate Case*, Duke filed its prefiling notice on November 27, 2009, in the instant cases. On February 26, 2010, Duke filed its application in these cases, requesting an adjustment to Rider AMRP.

By entry issued March 5, 2010, the attorney examiner granted the motion to intervene in these cases filed by the Ohio Consumers' Counsel (OCC). In addition, the examiner required that Staff and intervenors file comments on the application by March 26, 2010, and that Duke file a statement, by March 31, 2010, informing the Commission whether the issues raised in the comments have been resolved. Furthermore, in the

event all of the issues raised in the comments had not been resolved, the entry set the hearing in this matter for April 7, 2010.

On March 12, 2010, OCC filed a motion for an extension of the procedural schedule. By entry issued March 19, 2010, the attorney examiner modified the procedural schedule to require that Staff and intervenors file comments on the application by April 2, 2010, and to require that Duke file a statement, by April 7, 2010, informing the Commission whether the issues raised in the comments have been resolved. The hearing in this matter was rescheduled for April 19, 2010.

On April 2, 2010, Staff and OCC filed comments raising issues regarding Duke's application in these cases. On April 7, 2010, Duke filed a report stating that the parties in these cases had not yet discussed the issues raised by Staff and OCC.

The hearing in this matter was conducted, as rescheduled, on April 19, 2010, at the offices of the Commission. At the hearing, Duke submitted a stipulation and recommendation (stipulation) signed by Duke, Staff, and OCC (Jt. Ex. 1). In addition, at the hearing, the following exhibits were admitted into the record without objection: Duke's application filed on February 26, 2010 (Duke Ex. 1) and the testimony of its witnesses (Duke Exs. 2-4); OCC's comments filed on April 2, 2010 (OCC Ex. 1); and Staff's comments filed on April 2, 2010 (Staff Ex. 1).

Pursuant to Rule 4901-1-31, Ohio Administrative Code (O.A.C.), upon motion of any party or upon their own motion, the Commission or the attorney examiner may permit or require the filing of briefs at any time during a proceeding. At the hearing held on April 19, 2010, the attorney examiner denied OCC requests to call for briefs in this proceeding. In contravention of the examiner's ruling, on April 22, 2010, OCC filed a document titled "Post-hearing Brief in Support of the Stipulation." The Commission notes that this is a fully stipulated case and OCC is a signatory party to the stipulation. Accordingly, the Commission finds that OCC has disregarded the examiner's ruling regarding the filing briefs in this case by improperly filing a brief; therefore, OCC's April 22, 2010, filing will not be considered in this case.

## II. Summary of the Comments

According to the comments filed by Staff, Duke reported that, prior to the commencement of the AMRP in 2001, Duke had approximately 1,200 miles of cast iron and bare steel mains; by the end of 2009, Duke had replaced approximately 66 percent, or 792 miles, of these mains. In addition, Staff notes that Duke reported that it has replaced approximately 73,250 main-to-curb service lines. Furthermore, Staff confirmed with Duke that the company continues to competitively bid out the work for the AMRP and the RRP. (Staff Ex. 1 at 6-7.)

According to Staff, Duke proposes that, beginning with the first billing cycle in May 2010, the total annual revenue requirement for the AMRP would be \$27,791,740.28 and, for the RRP, it would be \$2,149,412.42, for a total of \$29,941,152.70. Staff points out that Duke used the allocation percentages and determinants for the AMRP and the RRP that were established in the *Duke Distribution Rate Case* and proposed that Rider AMRP rates be set at \$3.69 for residential customers, \$29.30 for general service and firm transportation customers, and \$0.14 per thousand cubic foot (Mcf) for interruptible transportation customers. (Staff Ex. 1 at 10-11.)

In its comments, Staff recommends two adjustments to Duke's proposal. First, Staff recommends correction of an error it found in the calculation of the provision for depreciation in the riser replacement calculation resulting in a Staff recommendation of an increase in rate base amount of \$5,719. Second, Staff recommends that Duke's Gas Maintenance Account Savings be adjusted to reflect the savings that occurred in the two categories that achieved savings, in the amount of \$316,930.37, resulting in a reduced revenue requirement of \$27,474,809.91. These recommendations would result in Rider AMRP rates of \$3.66 for residential customers, \$28.97 for general service and firm transportation customers, and \$0.14 per Mcf for interruptible transportation customers. (Staff Ex. 1 at 10-11.)

OCC, in its comments, objects to three aspects of Duke's proposal. First, OCC echoes Staff's position regarding maintenance savings. Specifically, OCC voices concern that Duke has proposed no maintenance savings to pass back to consumers. OCC suggests that, to address this concern, the Commission should establish a minimum level of maintenance savings that Duke should be required to pass back to consumers. However, in the present case, OCC asserts that maintenance savings should be adjusted to \$316,931, as recommended by Staff. Second, OCC asserts that Integrity Management Program (IMP) expenses included in the application for recovery do not relate to the AMRP, as they do not relate to the replacement of distribution lines. Therefore, OCC recommends the removal of \$276,515 in IMP expenses from the 2007 AMRP baseline, and \$350,273 in IMP expenses from the 2009 test year. Finally, OCC requests that Duke be required to document its efforts to obtain funding under the American Recovery and Reinvestment Act of 2009. (OCC Ex. 1 at 3-9.)

### III. Summary of the Stipulation

As stated previously, a stipulation, signed by Duke, Staff, and OCC, was submitted on the record, at the hearing held on April 19, 2009. The stipulation was intended by the signatory parties to resolve all outstanding issues in these proceedings. The stipulation includes, *inter alia*, the following provisions:

- (1) The annual revenue requirement for the AMRP shall be \$27,463,510.28 and for the RRP it shall be \$2,150,079.83, for a total

annual revenue requirement for Rider AMRP of \$29,613,590.11. This annual revenue requirement would result in Rider AMRP rates of \$3.65 for residential customers, \$28.96 for general service and firm transportation customers, and \$0.14 per Mcf for interruptible transportation customers.

- (2) The revenue distribution, billing determinants, and calculated accelerated AMRP charges shall be as set forth in Jt. Ex. 1 at Ex. 1.
- (3) The calculation of the Provision for Depreciation in the RRP shall be decreased by \$5,719 to correct a mathematical error, which results in an increase in the rate base of \$5,719, causing a \$667.41 increase in the revenue requirement for the RRP.
- (4) For the 2009, 2010, and 2011 AMRP test years, the parties agree that Duke will provide a guaranteed minimum maintenance savings, using methodology provided in Jt. Ex. 1 at Ex. 2. This methodology will be reevaluated in 2012, or in the next case in which Duke seeks an increase in base rates. In the event that actual maintenance savings are greater than that achieved under the methodology reflected in Jt. Ex. 1 at Ex. 2, the customers shall receive the benefit of the higher, actual savings that year.
- (5) Duke shall eliminate the \$276,515 expense for the IMP from the base rates on Schedule 21 of the Rider AMRP filing.
- (6) Duke shall eliminate \$350,272.96 from the actual main maintenance expense for the 2009 program year related to its IMP.
- (7) For purposes of determining the AMRP annualized revenue requirement for the 2009 test year, the minimum main maintenance savings of \$328,230 from Jt. Ex. 1 at Ex. 2 was applied. No actual main maintenance savings exceeded the minimum during the 2009 test year.
- (8) In its next AMRP filing, Duke will demonstrate and document its efforts to determine whether the AMRP and RRP projects may qualify under the American Recovery and Reinvestment Act of 2009 and, thus, whether stimulus funding is available for those projects. Duke will include a record of such efforts in its next annual AMRP filing.

(Jt. Ex. 1 at 1-6, Ex. 3.)

CONCLUSION:

Rule 4901-1-30, O.A.C. authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented in the proceeding in which it is offered.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *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 559 (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 a just and reasonable resolution of the issues raised in these proceedings, violates no regulatory principle or precedent, and is the product of lengthy, serious bargaining among knowledgeable and capable parties, representing a wide range of interests, in a cooperative process. (Jt. Ex. 1 at 1). Duke witness Robert Parsons testified that the parties to these proceedings regularly participate in proceedings before the Commission, are knowledgeable in regulatory matters, and were represented by experienced, competent counsel who represented a

broad range of interests. Moreover, Mr. Parsons testified that all of the issues raised by the stipulating parties were addressed during negotiations and all parties had an opportunity to express their opinions. (Duke Ex. 4 at 6-7.) Therefore, upon review of the terms of the stipulation, we find that the first criterion, that the process involved serious bargaining by knowledgeable, capable parties, is met.

With regard to the second criterion, the signatory parties submit that, as a package, the stipulation benefits ratepayers and is in the public interest. The signatory parties offer that the stipulation provides a commitment by Duke to guarantee maintenance savings for its customers. Further, Duke eliminated IMP expenses from both the baseline and the test year expenses. These steps were taken to assure that customers experience actual savings every year. (Joint Ex. 1 at 3-4.) Mr. Parsons further testified that the stipulation resulted in a reduction of the Rider AMRP rates proposed in the application (Duke Ex. 4 at 9). Upon review of the stipulation, we find that, as a package, it satisfies the second criterion.

Finally, the signatory parties agree that the stipulation violates no regulatory principle or precedent (Joint Ex. 1 at ). Duke witness Parsons testified that, based on his examination, he concluded that the stipulation does not violate any regulatory principle and that the stipulation is fully supported by all of the evidence presented to the Commission and other Parties in this case (Duke Ex. 4 at 7-8). Accordingly, upon consideration, the Commission finds that there is no evidence that the stipulation violates any important regulatory principle or practice and, therefore, the stipulation meets the third criterion.

We find that the stipulation entered into by the parties is reasonable and should be adopted. Therefore, Duke should be authorized to implement the new rates for Rider AMRP in a manner consistent with the stipulation and this order and the proposed tariff page contained in Jt. Ex. 1 at Ex. 3 should be approved. The Commission finds that Duke should file, in final form, four, complete, printed copies of the final tariff page with the Commission's docketing division, as set forth in this order. The effective date of the new rates for Rider AMRP shall be a date not earlier than the date upon which the final tariff page is filed with the Commission or the first billing cycle of May, whichever is later.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) Duke is a natural gas company as defined in Section 4905.03(A)(6), Revised Code, and a public utility under Section 4905.02, Revised Code.

- (2) In accordance with the AMRP provisions in the *Duke Distribution Rate Case*, Duke filed its prefiling notice on November 27, 2009, in the instant cases.
- (3) On February 26, 2010, Duke filed its application in these cases.
- (4) By entry issued March 5, 2010, OCC was granted intervention.
- (5) Comments on the application in these cases were filed by OCC and Staff on April 2, 2010.
- (6) The hearing in these matters was held on April 19, 2010.
- (7) At the hearing, a stipulation was submitted, intending to resolve all issues in these cases. No one opposed the stipulation.
- (8) The stipulation meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted.
- (9) Duke should be authorized to implement the new rates for Rider AMRP consistent with the stipulation and this order.

**ORDER:**

It is, therefore,

ORDERED, That the stipulation of the parties be adopted and approved. It is, further,

ORDERED, That Duke take all necessary steps to carry out the terms of the stipulation and this order. It is, further,

ORDERED, That Duke be authorized to file in final form four complete copies of the tariff page consistent with this opinion and order and to cancel and withdraw its superseded tariff page. Duke shall file one copy in its TRF docket (or may make such filing electronically as directed in Case No. 06-900-AU-WVR) and one copy in this case docket. The remaining two copies shall be designated for distribution to the Rates and Tariffs, Energy and Water Division of the Commission's Utilities Department. It is, further,

ORDERED, The effective date of the new rates for Rider AMRP shall be a date not earlier than the date upon which four complete, printed copies of the final tariff page is filed with the Commission or the first billing cycle of May, whichever is later. It is, further,

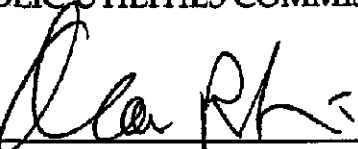


ORDERED, That the company shall notify its customers of the changes to the tariffs via bill message or bill insert within 30 days of the effective date of the revised tariffs. A copy of this customer notice shall be submitted to the Commission's Service Monitoring and Enforcement Department, Reliability, and Service Analysis Division at least 10 days prior to its distribution to customers. It is, further,

ORDERED, That nothing in this opinion and order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That a copy of this opinion and order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Alan R. Schriber, Chairman

  
Paul A. Centolella

  
Valerie A. Lemmie

  
Steven D. Lesser

  
Cheryl L. Roberto

KLS:dah

Entered in the Journal

APR 28 2010



Renee J. Jenkins  
Secretary