

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Recovery of Costs,)
Lost Margins, and Performance Incentives) Case No. 09-283-EL-RDR
Associated with the Implementation of)
Electric Residential and Nonresidential)
Demand-Side Management Programs.)

OPINION AND ORDER

The Commission, coming now to consider the evidence presented in this proceeding, and the stipulation and recommendation filed by the parties, hereby issues its opinion and order.

APPEARANCES:

Amy B. Spiller, Rocco O. D'Ascenzo, and Elizabeth H. Watts, Duke Energy Ohio, Inc., 2500 Atrium II, 139 East Fourth Street, Cincinnati Ohio 45201, on behalf of Duke Energy Ohio, Inc.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and Anne Hammerstein, 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 Larry S. Sauer and Ann M. Hotz, 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 and Colleen L. Mooney, 231 West Lima Street, Findlay, Ohio 45840, on behalf of Ohio Partners for Affordable Energy.

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

OPINION:

I. Background

On July 11, 2007, the Commission issued a finding and order that approved the implementation of Duke Energy Ohio, Inc.'s (Duke) proposed demand-side management (DSM) programs, including both residential and nonresidential programs, and also approved the establishment of DSM riders to recover the program costs, lost margins, and shared savings associated with those programs. See *In the Matter of the Application for Recovery of Costs, Lost Margin, and Performance Incentive Association with the Implementation of Electric Residential Demand Side Management Programs by The Cincinnati Gas & Electric Company*, Case No. 06-91-EL-UNC, et al. (06-91).¹ (App. at 3.)

In its December 17, 2008, opinion and order in *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, et al. (08-920), the Commission approved a stipulation under which Duke agreed to implement a new set of energy efficiency programs under its save-a-watt initiative (Rider DR-SAW) to begin January 1, 2009, as a replacement for the DSM rider. Those programs initiated under the save-a-watt initiative, and recovered through Rider DR-SAW, would replace those programs approved in 06-91, and recovered through the DSM rider. (App at 3.)

On March 31, 2009, Duke filed the current application. This application provides the reconciliation associated with the final operation of the current programs approved in 06-91 for the period July 1, 2008, through December 31, 2008, with any reconciliation amount included in an update of Rider DR-SAW. (App at 3-4.)

On December 22, 2009, the attorney examiner granted motions to intervene filed by the Ohio Consumers' Counsel (OCC), The Kroger Company (Kroger), and Ohio Partners for Affordable Energy (OPAE). Additionally, a motion to admit David C. Rinebolt to practice *pro hac vice* before the Commission in this proceeding was granted.

On February 25, 2010, a stipulation and recommendation (stipulation) signed by Duke, Staff, and OPAE was docketed. OCC filed correspondence on March 2, 2010, clarifying its position with respect to the stipulation, but stating that it did not oppose the stipulation. Kroger also filed correspondence on March 11, 2010, indicating that, although Kroger did not sign the stipulation, it would not oppose it. A hearing was held in this matter on March 5, 2010.

¹ Duke was, at that time, known as the Cincinnati Gas & Electric Company.

II. Summary of the Application

This application provides the reconciliation associated with the final operation of the DSM programs for the period July 1, 2008, through December 31, 2008, with any reconciliation amount included in an update of Rider DR-SAW. Additionally, the application provides a status report of the programs that were authorized in 06-91. Although Duke did not meet the goals set out for residential conservation programs, Duke's programs exceeded the planned goals for the nonresidential programs. The application explains that the residential programs reached an achievement level of 17 percent for residential conservation programs and a cumulative demand response achievement level of 123 percent for the demand response programs. For nonresidential conservation programs, the programs reached an achievement level of over 100 percent. The residential conservation programs, which only reached 17 percent of planned achievement, recognized no shared savings; however, the residential demand response program achieved 123 percent of the planned achievement, resulting in 10 percent shared savings. The nonresidential conservation plan achieved a 10 percent level of shared savings since it exceeded 100 percent of the planned achievement level. (App. at 3-10, 44.)

According to the application, Duke's DSM rider recovery, accomplished through an update of Rider DR-SAW, was proposed to become effective with the first billing cycle in January 2009. The proposed residential and nonresidential charges include save-a-watt revenue requirements and a true-up of any differences between actual and projected costs, lost revenues, and shared savings for the past programs for the period covered by the application. The proposed residential and nonresidential charges were calculated by dividing the reconciliation amount by the projected sales for the calendar year. The DSM cost recovery mechanism attributed the costs to be recovered to the respective class that benefits from the programs. The amounts associated with the reconciliation of Rider DSM are similarly allocated. The costs for the PowerManager program are fully allocated to the residential electric class, since this is the class directly benefiting from the implementation of the program. (App. at 44-46.)

III. Stipulation

As stated previously, on February 25, 2010, a stipulation signed by Duke, Staff, and OPAE was docketed. The signatory parties state that the stipulation is intended to resolve all of the outstanding issues in this proceeding. Under the stipulation, the parties agree that Duke's reconciliation and update provides sufficient data in order for the parties to adequately monitor progress of Duke's implementation of electric residential and nonresidential DSM programs. The parties also agree that the calculations attached to the stipulation as Exhibit 1 are accurate and correct and that Duke should adjust its Rider DSM, as applied in the Rider SAW tariff consistent with

the calculations contained in Exhibit 1 for the recovery of program costs, lost margins, and shared savings. (Jt. Ex. 1 at 5.) Specifically, the total DSM revenue requirement is a refund of \$3,392,633 (Jt. Ex. 1, App. C at 5).

IV. Consideration of the Stipulation

Rule 4901-1-30, Ohio Administrative Code, 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. See *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 125, citing *Akron v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 155.

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.* (April 14, 1994), Case No. 91-410-EL-AIR; *Western Reserve Telephone Co.* (March 30, 1994), Case No. 93-230-TP-ALT; *Ohio Edison Co.* (December 30, 1993), Case No. 91-698-EL-FOR, et al.; *Cleveland Electric Illum. Co.* (January 30, 1989), Case No. 88-170-EL-AIR; *Restatement of Accounts and Records (Zimmer Plant)* (November 26, 1985), Case No. 84-1187-EL-UNC. 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.* (1994), 68 Ohio St.3d 559, citing *Consumers' Counsel*, 64 Ohio St.3d 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 stipulation states that it is the product of discussions and compromises by the parties, and is, overall, a reasonable resolution of all of the issues in this case. In addition, Staff witness Greg Scheck testified that all of the parties to the stipulation had a material

interest in the programs that are the subject of the instant application. Moreover, Mr. Scheck testified that the stipulation benefits ratepayers because the programs pass cost savings onto consumers, and does not violate any important regulatory principles. (Tr. at 10-13; Jt. Ex. 1 at 4.)

Upon review of the record, the Commission finds that the stipulation entered into by the parties is reasonable and should be adopted in its entirety.

As a final matter, the Commission notes that this proceeding approves the DSM rider agreed to by the stipulating parties in this case, which includes recovery of generation costs incurred from July 1, 2008, through December 31, 2008. However, in accordance with Sections 4928.02 and 4928.66, Revised Code, our energy efficiency and demand reduction benchmark rules contained in Chapter 4901:1-39, O.A.C., became effective December 10, 2009. See *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928.66, Revised Code, as Amended by Amended Substitute Senate Bill No. 221*, Case No. 08-888-El-ORD, Entry on Rehearing (October 28, 2009) (08-888). Pursuant to Rules 4901:1-39-04(A), and 4901:1-39-07(A), O.A.C., an electric utility must file its first program portfolio plan prior to January 1, 2010, and, with the filing of its proposed plan, the electric utility may request recovery of appropriate lost distribution revenues through a rate adjustment mechanism that has been approved by the Commission; such recovery is subject to Commission review and reconciliation annually. In addition, in accordance with paragraph 32 of the stipulation approved in 08-920 on December 17, 2008, Duke agreed to conform to the Commission's rules established in Case Nos. 08-777-EL-ORD and 08-888. Notwithstanding the above, in accordance with paragraph 32, Duke has not completed the necessary filings to conform its ESP to the Commission's rules and orders and the requirements in Chapter 4901:1-39, O.A.C., including the modification of Rider DR-SAW to eliminate the recovery of lost generation revenues and the annual reconciliation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) Duke is a public utility as defined in Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission.
- (2) On March 31, 2009, Duke filed an application for recovery of costs, lost margins, and performance incentives associated with the implementation of electric residential and nonresidential DSM programs.
- (3) By entry issued December 22, 2009, OCC, Kroger, and OP&E were granted intervention.

- (4) On February 25, 2010, Duke, Staff, and OPAE filed a stipulation that purports to resolve all of the issues in this proceeding. OCC and Kroger did not sign the stipulation, but did not oppose the stipulation.
- (5) The evidentiary hearing was held on March 5, 2010.
- (6) The stipulation meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted.

ORDER:

It is, therefore,

ORDERED, That the stipulation filed in this proceeding be approved and adopted, as set forth herein. It is, further,

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


ORDERED, That nothing in this opinion and order shall be binding upon this 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 all parties 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/CMTP/dah

Entered in the Journal

JUN 09 2010



Renee J. Jenkins
Secretary