

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Report of Duke)
Energy Ohio, Inc. Concerning its Energy) Case No. 09-1999-EL-POR
Efficiency and Peak-Demand Reduction)
Programs and Portfolio Planning.)

ENTRY ON REHEARING

The Commission finds:

- (1) Duke Energy Ohio, Inc. (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 December 29, 2009, Duke filed an application for approval of its energy efficiency and peak demand reduction program portfolio pursuant to Rule 4901:1-39-04, Ohio Administrative Code (O.A.C.).
- (3) By opinion and order issued December 15, 2010, the Commission concluded that Duke's portfolio was reasonably calculated to achieve energy efficiency, consistent with the requirements articulated in Section 4928.66, Revised Code, and the state's policy set forth in Section 4928.66, Revised Code. The Commission approved Duke's application, subject to the modifications set forth in the order, including a requirement that Duke remove the recovery of lost generation revenues, collected as part of Duke's lost margin revenues, from Distribution Rider - Save-A-Watt (Rider DR-SAW), beginning December 10, 2009, the effective date of Chapter 4901:1-39, O.A.C.
- (4) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in the proceeding by filing an application within 30 days after the entry of the order upon the journal of the Commission.
- (5) On January 14, 2011, Duke filed an application for rehearing, setting forth five assignments of error. Specifically, Duke asserts the following assignments of error:

- (a) The Commission, without authority or jurisdiction, unreasonably ordered Duke to modify Rider DR-SAW to remove the recovery of lost generation margin revenues.
 - (b) The Commission, without authority, unreasonably ordered that the amendment of Rider DR-SAW to remove the recovery of lost generation revenues be effective more than a full year prior to the issuance of its Order.
 - (c) The Commission, in ordering Duke to amend Rider DR-SAW to remove the recovery of lost generation revenues as of the effective date of Rule 4901:1-39-07, O.A.C., failed to abide by the process set forth in and required by the same rule.
 - (d) The Commission's modifications of the recovery mechanism in this proceeding is barred by the doctrines of *res judicata* and collateral estoppel, and the order inappropriately failed to consider those doctrines.
 - (e) The order failed to account for the fact that the stipulation approved 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., Opinion and Order (December 17, 2008) (*Duke ESP Case*), was a package of many agreements on many issues and that Rider DR-SAW included other terms.
- (6) On January 24, 2011, the Ohio Consumers' Counsel (OCC) filed a memorandum contra Duke's application for rehearing.
- (7) For ease of discussion we will address Duke's first two assignments of error together, wherein Duke argues that the Commission erred in ordering Duke to modify its Rider DR-SAW without authority, and, in doing so, acted retroactively. According to Duke, the Commission should never have reached the issue of the cost recovery mechanism for the costs associated with the programs contained in Duke's portfolio plan because Duke believes it already had an approved cost recovery mechanism, Rider DR-SAW, approved by the Commission in the *Duke ESP Case*. Duke argues

that, because Rider DR-SAW was approved in the *Duke ESP Case* for a period of three years, terminating at the end of calendar year 2011, Duke did not need to request cost recovery for any of the programs contained in its portfolio plan in its application. Moreover, Duke asserts that the Commission misplaced its reliance, in concluding that Duke did need to request cost recovery, on a minor provision contained in the stipulation reached in the *Duke ESP Case*, which provided that Duke "shall conform to the Commission's ESP rules as set forth in Case Nos. 08-777-EL-ORD (08-777) and 08-888-EL-ORD (08-888)." Specifically, Duke argues that the Commission erred in reading this provision to indicate that Duke intended to comply with the rules considered in Case Nos. 08-777 and 08-888. Instead, Duke argues that it only intended to comply with the electric security plan (ESP) rules that pertain to the filing of an ESP, contemplated in Case No. 08-888. Therefore, Duke concludes that the Commission's order that Duke modify Rider DR-SAW to only include recovery of costs contemplated in Rule 4901:1-39-07, O.A.C., was beyond what Duke intended when it entered into the stipulation in the *Duke ESP Case*. Finally, Duke contends that the Commission was without authority to order amendment of Rider DR-SAW to remove the recovery of lost generation revenues, effective approximately a full year prior to the issuance of the opinion and order in the present case, because such an order constitutes retroactive ratemaking.

- (8) In response to Duke's first two assignment of error, OCC points out that Duke placed Rider DR-SAW at issue in this case by proposing a portfolio of programs, as required, and expecting to recover the costs of those programs through Rider DR-SAW. Moreover, OCC argues that Duke misrepresents the stipulation approved in the *Duke ESP Case*. Instead, OCC asserts that the provision in question was placed in the stipulation to assure the legality of the stipulation and that it violate no regulatory principle or precedent. In support of its position, OCC notes that, at the time the stipulation in the *Duke ESP Case* was signed, the parties to the stipulation knew the general substance of the rules being considered in both 08-777 and 08-888. Finally, OCC argues that Duke's contention that it would not have contemplated such a modification to the stipulation when it signed the stipulation is flawed. Specifically, OCC asserts that Duke was aware that lost generation revenues were not being considered for recovery in Rule 4901:1-39-07, O.A.C., at the time the stipulation was signed.

- (9) In considering the arguments presented regarding Duke's first and second assignments of error, the Commission notes that our interpretation of the stipulation approved in the *Duke ESP Case* was discussed at length in our opinion and order in the present case. Once again, the Commission believes Duke has disregarded its agreement in the *Duke ESP Case* to comply with the rules in Chapter 4901:1-39, O.A.C., which includes the requirement that, if the electric utility wishes to recover costs due to electric utility peak-demand reduction, demand response, energy efficiency program costs, appropriate lost distribution revenues, and shared savings through an approved rate adjustment mechanism, it must submit such request for recovery in conjunction with its proposed portfolio plan. Moreover, we find it is disingenuous that Duke asserts that it fully intended to comply with any procedural requirements established in 08-777 and 08-888 but that it did not intend to comply with any substantive requirements of the rules. Finally, our order that Duke comply with its own stipulation, as well as Rule 4901:1-39-07(A), O.A.C., and remove the recovery of lost generation revenues, collected as part of Duke's lost margin revenues, from its Rider DR-SAW beginning on December 10, 2009, does not constitute retroactive ratemaking. Instead, the Commission directed Duke to do something that it should have done, with the effective date of Chapter 4901:1-39, O.A.C.: comply with the stipulation in the *Duke ESP Case* and Rule 4901:1-39-07, O.A.C. Therefore, we find that Duke's first and second assignments of error should be denied.
- (10) In its third assignment of error, Duke argues that the Commission erred in ordering Duke to amend Rider DR-SAW to remove the recovery of lost generation revenues as of the effective date of Rule 4901:1-39-07, O.A.C., without abiding by the process set forth in the rule. Specifically, Duke argues that the Commission did not follow the procedure articulated in Rule 4901:1-39-07, O.A.C., wherein an electric utility may submit a request for recovery of an approved rate adjustment mechanism, commencing after the approval of the utility's portfolio plan, for the recovery of various specified costs. The rule also provides for the filing of objections within thirty days of the filing of an electric utility's application for recovery and opportunity for a hearing, if the application appears unjust or unreasonable. According to Duke, no period for the filing of objections was observed, no consideration was given to whether

the recovery was unjust or unreasonable, and no hearing was ever held.

- (11) In reply to Duke's third assignment of error, OCC asserts that an opportunity for objections was had, as the attorney examiner set the deadline for the filing of objections to Duke's application as March 1, 2010. More importantly, OCC offers that, when objections to Duke's application were filed, it included an objection to the inclusion of lost generation revenues for collection in Rider DR-SAW. At the hearing in this case, despite the objections of Duke, the topic of the removal of lost generation revenues from Rider DR-SAW was discussed by OCC witness Gonzalez, and Duke had the opportunity to cross-examine Mr. Gonzalez. OCC points out that Duke also had the opportunity to present rebuttal testimony, but declined to do so. The issue of the removal of lost generation revenues from Rider DR-SAW was also discussed on brief.
- (12) In considering Duke's arguments regarding its third assignment of error, the Commission fails to understand how Duke can argue that the process set forth in Rule 4901:1-39-07, O.A.C., was not followed by the Commission in this case. If anything, Duke is the entity that has neglected to follow the proper process established in the rules, by not complying with Rule 4901:1-39-07(A), O.A.C., and requesting that it be permitted to recover its costs for its portfolio plan through its approved rate adjustment mechanism, Rider DR-SAW. Irrespective of this failure, the Commission established the procedural schedule in this case, which included a technical conference, deadlines for the filing of objections and testimony, and the scheduling of a hearing. As pointed out by OCC, it specifically addressed what costs should be recoverable through Rider DR-SAW in its objections. In addition, Duke had the opportunity to provide testimony and question witnesses at the hearing regarding the inclusion of lost generation revenues in Rider DR-SAW; however, Duke chose not to do so, despite the fact that its objection to this line of questioning was overruled and the topic of cost recovery was deemed relevant to the proceeding. Therefore, the Commission finds that, contrary to Duke's assertions, the process provided for in Rule 4901:1-39-07, O.A.C., was followed and Duke was afforded the necessary due process for consideration of this issue. Accordingly, Duke's third assignment of error should be denied.

- (13) In its fourth assignment of error, Duke argues that the Commission's modification of Rider DR-SAW in this proceeding is barred by the doctrines of *res judicata* and collateral estoppel, and the Commission failed to adequately consider these doctrines. Specifically, Duke argues that the Commission's order failed to address whether the doctrines of *res judicata* and collateral estoppel applied to our consideration and subsequent modification of Rider DR-SAW. Moreover, Duke argues that the relitigation of Rider DR-SAW was barred because the Commission actually and necessarily litigated and determined the substance and terms of Rider DR-SAW in the *Duke ESP Case*.
- (14) In contrast, OCC asserts that, in this case, the stipulation entered in the *Duke ESP Case* was not relitigated. Instead, in the present case, the stipulation was enforced, and the portfolio plan and recovery mechanism were reviewed pursuant to Chapter 4901:1-39, O.A.C.
- (15) In considering Duke's argument supporting its fourth assignment of error, the Commission finds that the doctrines of collateral estoppel and *res judicata* are not applicable because the issue of cost recovery for Duke's portfolio of programs was not previously addressed. Instead, we believe that, as provided for in Chapter 4901:1-39, O.A.C., Duke was required to file an application for approval of its portfolio plan by January 1, 2010, and Rule 4901:1-39-04, O.A.C., provides that such plan could include previously approved programs or entirely new programs. The filing of the application in the present case triggered our consideration of Duke's portfolio plan, and the programs contained therein, anew. While we acknowledge that Duke did not specifically request recovery of costs in this case, without our consideration of Duke's recovery under Rider DR-SAW, Duke would not have approval to recover any costs through its rider mechanism. Accordingly, since actual cost recovery was a required issue in this case, in the event Duke wanted to utilize its Rider DR-SAW as the mechanism to recover the costs associated with this case, and because we find value in the save-a-watt programs, we determined in this case that Duke should be permitted to continue the recovery mechanism for these programs. Accordingly, we find that Duke's fourth assignment of error should be denied.
- (16) In its fifth assignment of error, Duke argues that the Commission failed to account for the fact that the stipulation in the *Duke ESP Case* was a package of many agreements on many issues and that

Rider DR-SAW included other terms. According to Duke, by requiring it to modify Rider DR-SAW, the Commission is upsetting the balance of the stipulation. Moreover, Duke appears to assert that, by allowing recovery through the terms of the stipulation only after the benchmarks have been met, Duke does not receive what it believes are the benefits of Rule 4901:1-39-07, O.A.C., but instead is bound by the constraints of the rule.

- (17) In response, OCC points out that one of the agreements contained in the stipulation approved in the *Duke ESP Case* was that Duke would conform to the rules adopted in 08-888 and 08-777. Therefore, OCC asserts that, by enforcing that provision of the stipulation, the Commission has maintained the balance of fairness in the ESP stipulation.
- (18) In considering Duke's argument pertaining to its fifth assignment of error, the Commission concludes that it did not modify the stipulation approved in the *Duke ESP Case* by directing Duke to conform its recovery under Rider DR-SAW with Rule 4901:1-39-07, O.A.C. Instead, the Commission believes that it only ordered Duke to comply with the stipulation it signed, thus requiring Duke to conform to the rules promulgated in 08-888. Accordingly, the Commission finds that Duke's fifth assignment of error should be denied.
- (19) Pursuant to our December 15, 2010, order, Duke was to file revised tariffs with the Commission for review and approval within seven days of the issuance of the order. On December 22, 2010, Duke filed a motion for an extension of time requesting that it be permitted to file revised tariffs seven days after the Commission issued its order on rehearing. The Commission finds that Duke's motion for an extension is reasonable and should be granted. Accordingly, Duke should now file revised tariffs with the Commission for review and approval within seven days of the date of this entry on rehearing.

ORDERED, That Duke's application for rehearing be denied. It is, further.

ORDERED, That, in accordance with finding (19), Duke's motion for an extension of time to file its tariffs be granted and that Duke file, in this case, proposed revised tariffs within seven days of the issuance this entry on rehearing. It is, further,

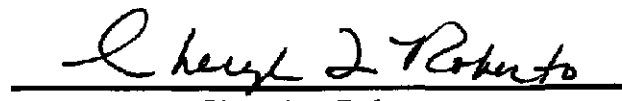
ORDERED, That a copy of this entry on rehearing be served upon all interested parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Steven D. Lesser, Chairman


Paul A. Centolella


Valerie A. Lemmie


Cheryl L. Roberto

KLS/CMTP/dah

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Renee J. Jenkins
Secretary