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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Associate Tariff Approval.	)	Case No. 11-2641-EL-RDR
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Associate Tariff Approval.	)	Case No. 11-2642-EL-RDR

DUKE ENERGY OHIO'S MEMORANDUM CONTRA APPLICATION FOR REHEARING

I. Introduction

On May 25, 2011, the Public Utilities Commission of Ohio (Commission) issued an Opinion and Order approving an application filed by Duke Energy Ohio, Inc. (Duke Energy Ohio or Company). That application requested approval for Duke Energy Ohio to establish Riders BTR and RTO, both of which relate to transmission services. On June 21, 2011, Ohio Partners for Affordable Energy (OPAE) filed an application for rehearing of that Commission order. For the reasons explained below, Duke Energy Ohio submits that the Commission should deny the application for rehearing filed by OPAE.

II. Argument

OPAE raises two general issues in its application for rehearing. First, OPAE claims that the Commission erred by not striking the entire Stipulation and Recommendation (Stipulation) from the record of the case. Second, OPAE asserts that the Stipulation should not have been approved, as it fails all three parts of the Commission's three-part test.

OPAE is wrong on all counts.

A. The Commission was Correct in not Striking the Stipulation.

In OPAE's first ground for rehearing, it asserts that the Commission erred in denying OPAE's motion to strike the Stipulation. As it argued in its briefs, OPAE believes that the signature on that Stipulation of certain entities who were not yet, on the filing date, parties in the proceeding causes the entire document to be invalid. What OPAE fails to mention – and what was correctly relied upon by the Commission in its Opinion and Order – is that two signatory entities were "parties" at the time the Stipulation was filed. Two signatory parties are all that is required under O.A.C. 4901-1-30. "Any two or more parties may enter into a written or oral stipulation... ."[1] The Company was a party, as it had then filed its application.[2] Staff of the Commission was a party, under the provisions of the Commission's administrative rules.[3] Two "parties" signatures on a stipulation results in a valid stipulation. It should not have been stricken.

OPAE makes the bold assertion that no settlement discussions should ever be commenced until after an application is filed and parties have had an opportunity to intervene. However, its argument is a chimera. OPAE itself has participated in settlement discussions prior to the filing of an application and has even signed a stipulation that was filed with the application, just as was done in the present proceeding.[4] Apparently, OPAE's execution and filing of that stipulation on the day the case's application was filed – and before *it* was officially a party in that proceeding – was legal and appropriate. The Commission often looks to the substance of a filing and determines an equitable and reasonable outcome. This, like the

[1] O.A.C. 4901-1-30(A).

[2] O.A.C. 4901-1-10(A)(1).

[3] O.A.C. 4901-1-10(C).

[4] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service offer Pursuant to R.C. §4928.143 in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Stipulation and Recommendation (March 23, 2010).

FirstEnergy proceeding in which OPAE's signature on a stipulation was filed with the application, is one of those situations. The Commission, in its Opinion and Order, wisely looked to the essence of the situation and allowed the stipulation to stand, as filed.

OPAE's first ground for rehearing should be denied.

B. The Commission Properly Concluded that the Stipulation should be Approved.

As the Commission explained in its Opinion and Order, it considers three questions in determining whether or not to approve stipulations. The Commission determined, rightly, that the Stipulation submitted in this proceeding meets all three requirements.

1. The Settlement is the Product of Serious Bargaining among Capable, Knowledgeable Parties.

OPAE argues that, because "certain customer groups, including OPAE," were not included in the negotiations, the resultant stipulation is not the product of serious bargaining among capable, knowledgeable parties. In this regard, OPAE relies upon a footnote penned by the Ohio Supreme Court's opinion in a 1996 opinion. It is important, in analyzing the import of that footnote, to recall the *entirety* of the Court's statement.

> Given our finding that the commission lacked jurisdiction to use R.C. 4927.04(A) when setting Ameritech's rates below, we need not specifically address the remaining propositions of law raised by the appellants. However, in the interest of judicial economy and given the extensive briefing and arguments of the parties, we feel compelled to note our grave concern regarding the partial stipulation adopted in the case at bar. The partial stipulation arose from settlement talks from which **an entire customer class was intentionally excluded**. This was contrary to the commission's negotiations standard in *In re Application of Ohio Edison to Change Filed Schedules for Electric Service,* case No. 87-689-EL-AIR (Jan. 26, 1988) at 7, and the partial settlement standard endorsed in *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St. 3d 123, 125-126, 592 N.E.2d 1370, 1373. The benefits of alternative rate treatment and deregulation for the local exchange company under R.C. 4927.03 and 4927.04 are to be balanced by an equal offset of increased competition, infrastructure commitments, and other benefits to the ratepayers. R.C. 4927.02. This balancing did not occur. Ameritech managed to either settle its competitive issues or defer them until a later date, all without having its competitors at the settlement table. Under these circumstances, we

> question whether the stipulation, even assuming the commission's authority to approve it, promotes competition in the telephone industry as intended by the General Assembly. **We would not create a requirement that all parties participate in all settlement meetings.** However, given the facts in this case, we have grave concerns regarding the commission's adoption of a partial stipulation which arose from the exclusionary settlement meetings.[5]

Under the Court's standard, it is unambiguous that there is *no* requirement that *all* parties be included in settlement discussions – or, in the present situation, all potential parties. However, the Court was gravely concerned – in its words – about the exclusion of "an entire customer class." OPAE, in contrast, asks the Commission to mandate that "**all** intervening parties should be aware that settlement negotiations are taking place, even if each and every party does not attend each and every settlement meeting."[6] The Court said nothing about requiring all parties to be invited – only customer *classes*.

OPAE asserts that the customers it represents should be deemed a customer class, entirely unto themselves. It points out that it "is not a 'residential group' identical to OCC."[7] Again, looking at the Supreme Court's language, there is no reference to defining "customer classes" as identical. That term, undefined in the footnote, must refer to the ordinary meaning of the term in the industry; therefore referencing the different classes of customers under utility tariffs. OPAE's constituents are primarily residential customers, just as are the constituents of OCC. Its constituents need not be identical to OCC's in order to demand representation in negotiations under the Supreme Court's approach.

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[5] *Time Warner AxS v. Public Util. Comm.* (1996), 75 Ohio St.3d 229, 233, 661 N.E.2d 1097 (footnote 2) (emphasis added).

[6] OPAE Application for Rehearing, at page 9-10 (emphasis added).

[7] *Id.* at 10.

OPAE also asserts that its constituents (non-profit organizations and community action agencies) were unrepresented at the negotiating table.[8] In this regard, OPAE confuses both the Court's intent and its own purpose for existence. OPAE has never indicated that its constituents are the agencies; the agencies and organizations are simply "members" of OPAE. It is the residential customers who are themselves assisted by those agencies and organizations that are OPAE's interest. Indeed, in its motion to intervene, OPAE noted that the members include non-profit organizations and community action agencies, but it argued for intervention on the ground that it advocates "for low and moderate income Ohioans." These are residential customers. It has never moved to intervene on the ground that it advocates for the agencies that are its members. Indeed, it is unclear under what legal theory it could do so. Certainly, OPAE itself indicated that it wished to intervene on behalf of low and moderate income Ohioans, not its members.[9] Under the *Time Warner* approach, OPAE's constituents are included within the residential customer class, also represented by OCC in the negotiations that led to the Stipulation.

OPAE, additionally, suggests that the City of Cincinnati (City) was excluded from settlement discussions. Duke Energy Ohio would note that the City is situated in a similar manner as OPAE in that it intervened, among other things, on behalf of residential customers. However, the City's post-hearing brief reflects no concern about this issue. A fair interpretation of that fact is that the City agreed that the residential customer class was adequately represented.

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[8] *Id.* at 10.

[9] OPAE Memorandum in Support of Motion to Intervene, at pages 1-3 (May 2, 2011); OPAE Application for Rehearing, at page 10 (June 21, 2011).

OPAE asserts that a wide array of interests was *not* represented in the negotiations that led to this Stipulation.[10] The discussions included representatives of the residential customers, commercial customers, and industrial customers, as well as Staff of the Commission. This is, indisputably, a wide array of interests. OPAE is wrong.

Further, OPAE argues that the Commission has no knowledge of whether all issues raised by stipulating parties were thoroughly addressed in negotiations.[11] Contrary to OPAE's statement, Duke Energy Ohio witness William Don Wathen Jr. provided testimony on this precise point.[12] There is nothing in the record to dispute this fact. OPAE did not elect, on cross-examination, to question Mr. Wathen regarding whether all issues raised by stipulating parties were thoroughly addressed in negotiations and what issues may have been mysteriously ignored. Evidently, the Commission found Mr. Wathen's testimony to be convincing and believable.

The stipulation is the product of serious bargaining among capable, knowledgeable parties.

2. The Settlement, as a Package, Benefits Ratepayers and the Public Interest.

The testimony of Duke Energy Ohio witness Wathen details numerous benefits to ratepayers and the public interest, resulting from the Stipulation in this proceeding. OPAE contests several of these substantial benefits.

First, OPAE argues that there is no benefit resulting from Duke Energy Ohio's agreement not to seek recovery form retail customers of its Midwest Independent System Operator (Midwest ISO) exit fees, its PJM Interconnection L.L.C. (PJM) integration fees, and its internal costs related to that realignment. OPAE bases its assertion on the fact that these costs are, at this

[10] OPAE Application for Rehearing, at page 12-13 (June 21, 2011).

[11] OPAE Application for Rehearing, at page 11 (June 21, 2011).

[12] Direct Testimony of William Don Wathen Jr., at page 6 (April 26, 2011).

time, estimated.[13] Does OPAE believe that these costs will be nonexistent or negligible? Certainly, the fact that a precise dollar figure cannot now be assigned to these categories of costs does not mean that there is no benefit conferred on ratepayers or the general public as a result of the Company's agreement not to seek recovery of the ultimate amounts.

OPAE next asserts that the Company's promise to appeal an anticipated decision of the Federal Energy Regulatory Commission (FERC) is "hardly a concession." While Duke Energy Ohio's agreement to pursue such an appeal absolutely qualifies as a concession, in OPAE's terms, OPAE fails to understand that elements of a stipulation can be beneficial to ratepayers and the public interest without also being a "concession." OPAE raises this argument under the umbrella of the second prong of the stipulation test: Does the settlement, as a package, benefit ratepayers and the public interest? With regard to this issue, the Company's agreement to vigorously pursue the appeal will, if the effort is successful, result in a substantial benefit to customers. Further, OPAE ties to this promise the agreed-upon recoverability of certain multi-value project (MVP) obligations.[1] However, nothing in the record suggests, as OPAE implies, that the recoverability of the MVP costs was agreed upon solely as a result of the Company's agreement with regard to the FERC decision. The Stipulation is to be considered as a package – not one provision at a time. The FERC appeal is simply one of the promises of Duke Energy Ohio, just as the payment of the MVP obligations is one of the promises of ratepayers.

Finally, OPAE again debates the benefit on the basis that the costs of PJM's regional transmission expansion planning (RTEP) are not now known.[14] The Company has agreed, in essence, to absorb the first $121 million in such costs. That $121 million in clear financial

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[13] OPAE Application for Rehearing, at page 13 (June 21, 2011).

[1] *Id.*, at 14.

[14] *Id.*, at 14-15.

benefit to customers is not any less beneficial just because the amount *not* absorbed is not now known. OPAE wants a "quantification of the value to ratepayers of the stipulation."[15] However, there has never been, under the law, any requirement for the Commission to quantify a stipulation's value; nor has it done so. Indeed, sometimes the unmeasurable benefits are the most vital.

The Stipulation undeniably provides material benefits to ratepayers and the general public.

3. The Settlement Package does not Violate any Important Regulatory Principle or Practice.

OPAE provides a lengthy argument based on the Commission's order in the Company's previous standard service offer proceeding (MRO case).[16] OPAE complains that the Commission's decision in these proceedings is "directly opposite" from its decision in the MRO case.[17] OPAE goes on to dispute the Commission's own statement that the language in the MRO order was "guidance," quoting only the portion of that order dealing with transmission costs.[18] It failed to indicate the Commission's clear language in that order to the contrary:

> Even though we are unable to reach the merits of Duke's application, due to the deficiencies of the application, in order to provide useful guidance for any future application filed by Duke, we have gone to great lengths in this order to provide guidance on some of the issues raised by various parties."[19]

Of similar import, in the Entry on Rehearing in the MRO case, the Commission stated:

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[15] *Id.*, at 15.

[16] *In the Matter of the Application of Duke Energy Ohio for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO.

[17] OPAE Application for Rehearing, at pages 16-18 (June 21, 2011).

[18] *Id.*, at 18-19.

[19] *In the Matter of the Application of Duke Energy Ohio for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Opinion and Order, at page 27 (February 23, 2011).

However, the Commission chose to fully discuss the remainder of Duke's application as guidance for any future filings."[20]

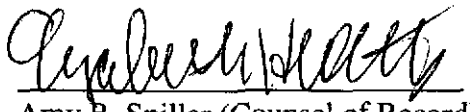
The Commission's prior statement concerning transmission rider applications and approvals was, indeed, guidance. The procedural issue that OPAE calls a violation of important regulatory principles or practices is a red herring. OPAE uses this issue merely to rehash its previously refuted arguments. No violation of important regulatory principles or practices can be found in this situation.

OPAE's second ground for rehearing should be denied in its entirety.

III. Conclusion

In summary, OPAE has not raised any argument that would require the Commission to arrive at a different conclusion than that set forth in the Opinion and Order. For the reasons discussed herein, the Commission's Opinion and Order is reasonable and lawful. Therefore, the application for rehearing filed by OPAE should be denied.

Respectfully submitted,
Duke Energy Ohio, Inc.



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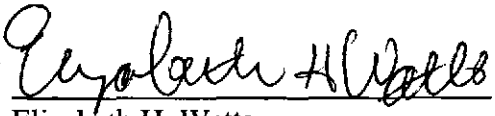
[20] *In the Matter of the Application of Duke Energy Ohio for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Entry on Rehearing, at finding (7) (May 4, 2011).

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by ordinary mail (postage prepaid), personal delivery, or electronic service, on all the parties of record this 29th day of June, 2011.



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