

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Administration of)
the Significantly Excessive Earnings Test) Case No. 11-2954-EL-UNC
Under Section 4928.143(F), Revised Code,)
and Rule 4901:1-35-10, Ohio)
Administrative Code.)

OPINION AND ORDER

The Commission, having considered the record in this matter 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 and Elizabeth H. Watts, 2500 Atrium II, 139 East Forth Street, Cincinnati, Ohio 45201, on behalf of Duke Energy Ohio, Inc.

Mike DeWine, Ohio Attorney General, Thomas W. McNamee and Devin D. Parram, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of Staff of the Commission.

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

Colleen L. Mooney, 231 West Lima Street, Findlay, Ohio 45839, on behalf of Ohio Partners for Affordable Energy.

McNees, Wallace & Nurick, LLC, by Samuel C. Randazzo, Frank P. Darr, and Joseph E. Olikier, 21 East State Street, 17th Floor, Columbus, Ohio 43215, on behalf of Industrial Energy Users-Ohio.

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

OPINION:

I. Background

Pursuant to the language of Section 4928.14, Revised Code, electric utilities are required to provide consumers with a standard service offer (SSO), consisting of either a market-rate offer or an electric security plan (ESP). Pursuant to the directives of Section 4928.143(F), Revised Code, the Commission is required to evaluate the earnings of each electric utility's approved ESP to determine whether the plan produces significantly excessive earnings for the electric utility. On June 30, 2010, the Commission issued a finding and order in *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC (09-786), which established policy and significantly excessive earnings test (SEET) filing directives for the electric utilities.

On May 16, 2011, Duke filed an application for the administration of the SEET for 2010, as required by Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code (O.A.C.) (Duke Ex. 1). Duke also filed the supporting testimony of Peggy Laub (Duke Ex. 2).

By entry issued May 26, 2011, the attorney examiner, *inter alia*, scheduled the hearing in this matter for August 2, 2011. On July 19, 2011, a stipulation and recommendation (Stipulation) entered into by Duke, Staff, Ohio Energy Group (OEG), Ohio Partners for Affordable Energy (OPAE), and The Kroger Company (Kroger) was filed in this proceeding (Joint Ex. 1).

At the August 2, 2011, hearing, the Stipulation was introduced. Motions to intervene filed by OEG, Kroger, OPAE, and Industrial Energy Users-Ohio (IEU) were granted at the hearing. At the hearing, Duke submitted the supplemental testimony of Ms. Laub (Duke Ex. 3). IEU did not sign the stipulation or appear at the hearing.

II. Application and Comments

In its application, Duke explains that, in *In the Matter of the Application of Duke Energy Ohio, Inc. for an Electric Security Plan*, Case No. 08-920-EL-SSO, et al. (08-920), the Commission approved a stipulation (ESP stipulation) which provides a mechanism for how the Commission will administer the SEET with regard to Duke. Specifically, Duke asserts that the approved ESP stipulation provides that, should Duke's actual annual return on ending common equity for each review year, as adjusted, not exceed 15 percent, Duke's return on common equity will be deemed to not be significantly in excess of the return on common equity that was earned during the same period by

publicly traded companies facing comparable business and financial risks. (Duke Ex. 1 at 1-5.)

Duke submitted testimony along with its application, indicating that Duke's return earned on average electric common equity for the year ended December 31, 2010, is 7.14 percent based on a calculated average electric common equity of \$3,441,047,304 and an adjusted electric net income of \$245,669,957 (Duke Ex. 2 at Att. PAL-1).

Duke further states that, pursuant to the Commission's June 30, 2010, finding and order issued in 09-786, it included proceeds from off-system sales in the calculation contained in its application of its return on common equity for the 2010 review year. Moreover, Duke represents that Duke's earnings are not excessive, regardless of the inclusion or exclusion of ESP-related deferrals. Duke states that, without the exclusion of ESP-related deferrals, its return earned on average electric common equity is 7.14 percent and, with the exclusion of ESP-related deferrals, its return is 7.47 percent. (Duke Ex. 1 at 2-5; Duke Ex. 2 at 13-15, Att. 1 at PAL-1.)

III. Stipulation

A Stipulation signed by Duke, Staff, OP&A, Kroger, and OEG was submitted, on the record, at the hearing held on August 2, 2011 (Jt. Ex. 1). The Stipulation was intended by the signatory parties to resolve all outstanding issues in this proceeding. The Stipulation provides that Duke calculated its earned return on average electric common equity for the year ended December 31, 2010, to be 7.14 percent, including deferred expenses authorized as part of the Duke's ESP. Excluding the deferrals, the earned return is 7.47 percent. The parties agree that, consistent with the stipulation approved in 08-920, because this return does not exceed 15 percent, Duke's return on common equity is not significantly in excess of the return on common equity earned during 2010 by publicly traded companies facing comparable business and financial risk. (Jt. Ex. 1 at 2.)

IV. Consideration of the Stipulation

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. 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.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1004); *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.* (1994), 68 Ohio St.3d 559 (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.*)

Duke witness Laub testified that the Stipulation is a product of serious bargaining among capable, knowledgeable parties, represented by experienced counsel who regularly participate in regulatory proceedings before the Commission. Ms. Laub further states that all parties participated in negotiations and had the opportunity to express their opinions during negotiations. (Duke Ex. 3 at 3-4.) Therefore, upon review of the terms of the Stipulation, based on our three-prong standard of review, we find that the first criterion, that the process involved serious bargaining by knowledgeable, capable parties, is met.

With regard to the second criterion, Ms. Laub asserts that the Stipulation was reached by stakeholders with many different interests and the public interest is served when parties intervene and represent diverse interests in examining the record and ensuring that it meets regulatory requirements. Moreover, Ms. Laub explains that the stipulation represents an efficient and timely resolution of the issues raised in this proceeding (Duke Ex. 3 at 4-5). Upon review of the Stipulation, we find that, as a package, it satisfies the second criterion as it benefits ratepayers by avoiding the cost of litigation.

Duke witness Laub also testified that the Stipulation does not violate any important regulatory principle or practice (Duke Ex. 3 at 4). 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.

Accordingly, we find that the Stipulation entered into by the parties is reasonable and should be adopted.

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 May 16, 2010, Duke filed an application for the administration of the SEET, as required by Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, O.A.C.
- (3) OPAE, OEG, Kroger, and IEU were granted intervention in this proceeding.
- (4) On July 19, 2011, Duke, Staff, OPAE, Kroger, and OEG filed a Stipulation that purports to resolve all of the issues in this proceeding.
- (5) The evidentiary hearing was held on August 2, 2011.
- (6) At the hearing, the Stipulation was submitted, intending to resolve all issues in this case. No one opposed the Stipulation. IEU did not sign the stipulation or appear at the hearing.
- (7) 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. It is, further,

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

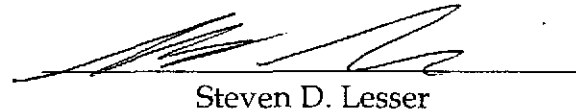
ORDERED, That nothing in this opinion and order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

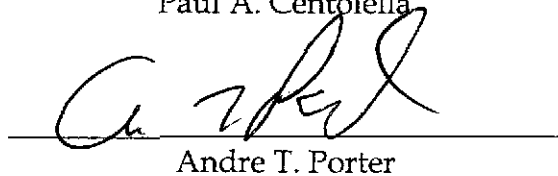
ORDERED, That a copy of this opinion and order be served upon all parties of record.


THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Paul A. Centolella


Steven D. Lesser

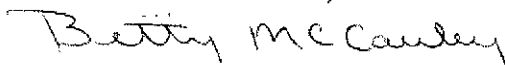

Andre T. Porter


Cheryl L. Roberto

KLS/CMTP/dah

Entered in the Journal

OCT 12 2011


Betty McCauley
Secretary