

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval of its 2009)
Advanced and Renewable Energy Baseline) Case No. 10-511-EL-ACP
and Benchmarks Pursuant to Section)
4928.64(B) of the Ohio Revised 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 G. Lindgren, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of Staff of the Commission.

Bruce J. Weston, Interim Ohio Consumers' Counsel, by Terry L. Etter, Assistant Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215, on behalf of the residential utility consumers of Duke Energy Ohio, Inc.

Trent A. Dougherty, Nolan Moser, and Cathryn N. Loucas, 1207 Grandview Avenue, Suite 201, Columbus, Ohio 43212, on behalf of Ohio Environmental Council.

Robert Kelter, 35 East Wacker Drive, Suite 1600, Chicago, Illinois 60601, on behalf of the Environmental Law and Policy Center.

OPINION:

I. Background

Section 4928.64(B), Revised Code, establishes benchmarks for electric utilities to acquire a portion of the electric utility's standard service offer (SSO) from renewable energy resources. Specifically, the statute provides that, for 2009, a portion of the electric utility's electricity supply for its SSO offer must come from alternative energy sources, including 0.004 percent from solar energy resources (SER); this requirement increases to 0.010 percent for 2010.

On April 15, 2010, Duke filed its alternative energy portfolio status report for 2009 (Duke Ex. 2). Along with its report, Duke requested, *inter alia*, that the Commission: grant Duke a one-time waiver of Rule 4901:1-40-04(D)(1), Ohio Administrative Code (O.A.C.); and allow Duke to substitute 80 Pennsylvania solar renewable energy credits (SRECs) from Ohio-certified facilities in place of the 80 in-state SRECs that have proven to be unavailable or, in the alternative, make a force majeure determination regarding its 2009 SER benchmark and reduce the aggregate SER benchmark to the level of SRECs actually obtained by Duke. By entry issued, February 9, 2011, the Commission granted Duke's request for waiver of Rule 4901:1-40-04(D)(1), O.A.C., and granted its request for a force majeure determination.

By entry issued February 9, 2011, motions to intervene filed by the Ohio Environmental Council (OEC), the Environmental Law and Policy Center (ELPC), and the Ohio Consumers' Counsel (OCC) were granted and a motion for admission to practice *pro hac vice* by Robert Kelter was granted.

On May 17, 2010, OEC, ELPC, and OCC filed joint comments in opposition to Duke's April 15, 2010, filing (OCC/ELPC/OCC Ex. 1). On August 31, 2011, Staff filed its findings and recommendations on Duke's 2009 alternative energy status report (Staff Ex. 1).

By entry issued September 30, 2011, the attorney examiner, *inter alia*, scheduled the hearing in this matter to commence on December 6, 2011. The hearing was subsequently continued to January 17, 2012. On January 13, 2012, a stipulation and recommendation (Stipulation) entered into by Duke, Staff, OEC, ELPC, and OCC was filed in this proceeding (Joint Ex. 1).

At the January 17, 2012, hearing, the Stipulation was introduced and Duke submitted the testimony of Andrew S. Ritch (Duke Ex. 1).

II. Application and Comments

In its report, Duke calculated its unadjusted baseline of 20,713,297 megawatt hours (MWhs) by averaging its annual sales for 2006, 2007, and 2008. However, in its report, Duke proposed adjusting its baseline calculation to reflect increased levels of customer shopping in its service territory. Duke argued that adjusting its baseline is permitted under Section 4928.64(B), Revised Code, and Rule 4901:1-39-05(B), O.A.C. In accordance with its adjusted baseline of 17,187,784 MWh, Duke adjusted its 2009 compliance benchmarks. Based on its adjusted 2009 compliance benchmarks, Duke asserted that it satisfied its 2009 compliance requirements, except its Ohio solar requirement for which it sought a force majeure determination, which was granted, with Duke being directed to add any shortfall in its 2009 requirements to its 2010 requirements.

On May 17, 2010, OEC, ELPC, and OCC (commenters) filed joint comments on Duke's report. The commenters opposed Duke's proposed adjustment to its baseline and argued that 2009 sales are not relevant for determining compliance with Duke's 2009 benchmarks. In its September 30, 2011, recommendation, Staff asserted that it does not believe that Duke's adjusted baseline based upon customer shopping is consistent with Section 4928.64(B), Revised Code. Therefore, Staff opined that, although Duke asserted that it satisfied its compliance obligations, that assertion was based on Duke's adjusted baseline and reduced compliance obligations. Accordingly, Staff concluded that Duke was short of achieving its compliance obligations by the following amounts:

Ohio Solar	- 86 MWhs
Overall Solar	- 70 MWhs
Ohio Renewables	- 4,337 MWhs
Overall Renewables	- 4,377 MWhs

Staff therefore recommended that a compliance payment of \$421,830 may be warranted.

III. Stipulation

As previously stated, a Stipulation signed by all the parties in this case was filed on January 13, 2012. The Stipulation was intended by the signatory parties to resolve all outstanding issues in this proceeding. The following is a summary of the provisions agreed to by the stipulating parties and is not intended to replace or supersede the Stipulation:

- (1) The baseline for purposes of calculating Duke's annual compliance obligation regarding alternative energy sources for 2009 under Ohio law will be computed based upon Duke's unadjusted baseline of 20,713,297 MWhs, as set forth in its initial filing.
- (2) Duke's 2009 compliance obligations, using the statutory benchmarks and Duke's unadjusted baseline are as follows:

Ohio Solar	- 415 MWhs
Overall Solar	- 414 MWhs
Ohio Renewables	- 25,478 MWhs
Overall Renewables	- 25,477 MWhs

- (3) Duke shall transfer the following quantities of renewable energy certificates (RECs) to its Generation Attributes Tracking System (GATS) reserve subaccount for 2009 Ohio compliance purposes:

Ohio Solar	- 323 RECs
Overall Solar	- 414 RECs
Ohio Renewables	- 25,478 RECs
Overall Renewables	- 25,477 RECs

Such transfer shall occur within 45 days of the issuance of this order. Duke shall provide sufficient information to permit Staff to review the details of the transfer for confirmation and to ensure consistency with the data previously provided to Staff.

- (4) After Duke retires the RECs set forth above, Duke will have a shortfall of 92 RECs in the Ohio solar category. This shortfall in REC compliance for 2009 shall be rolled forward into 2010 and added to Duke's 2010 compliance obligations.
- (5) Duke shall not be assessed a compliance penalty for the shortfall set forth above related to 2009 compliance only.
- (6) Duke shall be permitted to transfer 70 of the additional 80 Ohio-certified Pennsylvania solar RECs to its 2009 Ohio GATS reserved subaccount in order to cover its non-Ohio solar shortfall as shown on Exhibit 1 of Duke's application in this proceeding. These 70 RECs are included in the total of 414 non-Ohio solar RECs addressed above.

(Jt. Ex. 1 at 4-5.)

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 Ritch 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. Mr. Ritch further opined that the stipulating parties represent a broad range of interests, that all parties who participated in negotiations had the opportunity to express their opinions during negotiations and all issues raised were addressed. (Duke Ex. 1 at 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, Mr. Ritch asserted that the Stipulation demonstrates that stakeholders representing different interests in the Duke service territory have examined information relevant to Duke's renewable compliance and determined that Duke is in compliance. Mr. Ritch further opined that the public interest is served when parties intervene and represent diverse interests in examining the record and ensuring that it meets regulatory requirements. (Duke Ex. 1 at 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 and is in the public interest.

Duke witness Ritch also testified that the Stipulation does not violate any important regulatory principle or practice (Duke Ex. 1 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 April 15, 2010, Duke filed its 2009 alternative energy portfolio status report.
- (3) OEC, ELPC, and OCC were granted intervention in this proceeding on February 9, 2011.
- (4) OEC, ELPC, and OCC filed joint comments in this case on May 17, 2010.
- (5) Staff's report was filed on August 31, 2011.
- (6) On January 13, 2012, Duke, Staff, OEC, ELPC, and OCC filed a Stipulation that purports to resolve all of the issues in this proceeding.
- (7) The evidentiary hearing was held on January 17, 2012.
- (8) At the hearing, the Stipulation was submitted, intending to resolve all issues in this case. No one opposed the Stipulation.
- (9) 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.

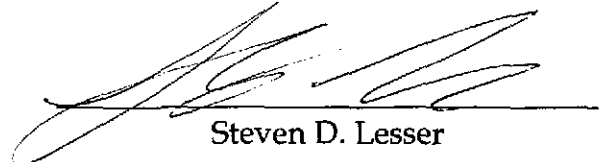
THE PUBLIC UTILITIES COMMISSION OF OHIO



Todd A. Snitchler, Chairman



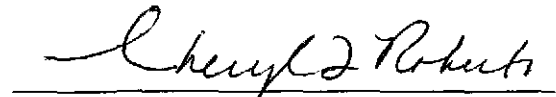
Paul A. Centolella



Steven D. Lesser



Andre T. Porter

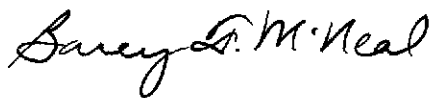


Cheryl L. Roberto

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Secretary