THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC. FOR RECOVERY OF PROGRAM COSTS, LOST DISTRIBUTION REVENUE, AND PERFORMANCE INCENTIVES RELATED TO ITS ENERGY EFFICIENCY AND DEMAND RESPONSE PROGRAMS.

CASE NO. 14-457-EL-RDR

# FOURTH ENTRY ON REHEARING

Entered in the Journal on April 10, 2019

## I. SUMMARY

{¶ 1} In this Fourth Entry on Rehearing, the Commission denies the applications for rehearing filed by Ohio Manufacturers' Association and the Ohio Consumers' Counsel.

## II. PROCEDURAL BACKGROUND

{¶ 2} Duke Energy Ohio, Inc. (Duke or the Company) is an electric distribution utility (EDU) as defined in R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an EDU shall provide customers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO must be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} Pursuant to R.C. 4928.66, EDUs are required to implement energy efficiency and peak demand response (EE/PDR) programs. Through these programs, the EDUs are mandated to achieve a specific amount of energy savings every year.

{¶ 5} By Opinion and Order issued August 15, 2012, the Commission approved a stipulation entered into between Duke and some of the parties. *In re Duke Energy Ohio, Inc.*, Case No. 11-4393-EL-RDR (*Rider Case*). Specifically, among other things, the

Commission approved the recovery of program costs, lost distribution revenue, and performance incentives related to Duke's EE/PDR programs.

{¶ 6} On March 28, 2014, as revised on April 17, 2014, Duke filed an application for recovery of program costs, lost distribution revenue, and performance incentives related to its energy efficiency and demand response programs for 2013. *In re Duke Energy Ohio, Inc.*, Case No. 14-457-EL-RDR (*2013 Recovery Case*). On March 30, 2015, Duke filed a similar application for recovery for 2014. *In re Duke Energy Ohio, Inc.*, Case No. 15-534-EL-RDR (*2014 Recovery Case*).

{¶ 7} Motions to intervene were granted to the Ohio Manufacturers' Association (OMA), the Ohio Consumers' Counsel (OCC), and Ohio Partners for Affordable Energy (OPAE). OMA, OCC, and OPAE all filed comments regarding the application on June 17, 2014. Reply comments were filed by OMA, OCC, OPAE, and Duke.

{¶ 8} On May 20, 2015, the Commission issued its Finding and Order in the *2013 Recovery Case*, approving Duke's application with certain modifications. In its modifications, the Commission ruled that the Company cannot use banked savings toward achieving the performance incentive. The Commission also noted that Staff was currently auditing the costs included in the rider rate and that the Commission's approval is subject to its consideration of that audit.

{¶ 9} On June 19, 2015, applications for rehearing of the May 20, 2015 Finding and Order were filed by Duke and OPAE. By Entry on Rehearing dated July 8, 2015, the Commission granted rehearing for further consideration of the matters specified in the applications.

{¶ 10} On January 6, 2016, Duke and Staff filed a joint stipulation and recommendation (Stipulation) regarding the *2013 Recovery Case* and the *2014 Recovery Case* for the Commission's consideration. As part of the Stipulation, Duke would receive $19.75 million in shared savings. Further, Duke agreed to retire 150,000 hours of banked savings

and agreed not to pursue shared savings in future cases. Duke and Staff filed testimony in support of the Stipulation on February 19, 2016. On March 4, 2016, OPAE, OCC, and OMA filed testimony in opposition to the Stipulation. A hearing on the Stipulation was held on March 10, 2016. Thereafter, on April 28, 2016, Duke, Staff, OPAE, OCC, and OMA filed initial briefs. Reply briefs were filed by Duke, Staff, OPAE, OCC, and OMA on May 13, 2016.

**{¶ 11}** In a Second Entry on Rehearing (*EOR*) regarding the *2013 Recovery Case*, as well as a companion Opinion and Order in the *2014 Recovery Case*, on October 26, 2016, the Commission approved the Stipulation. The Commission found that the Stipulation is reasonable, meets the criteria used by the Commission to evaluate stipulations, and should be adopted. In approving the Stipulation, the application for rehearing filed by Duke was granted, pursuant to the terms of the Stipulation, and OPAE's application was denied.

**{¶ 12}** R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

**{¶ 13}** On November 23, 2016, and November 25, 2016, OMA and OCC, respectively, filed applications for rehearing. Duke filed a memorandum contra the applications for rehearing on December 5, 2016. On December 14, 2016, the Commission granted the applications for rehearing for the limited purpose of further consideration of the matters specified in the applications for rehearing.

## III. APPLICATIONS FOR REHEARING

**{¶ 14}** In reviewing the Stipulation between Duke and Staff, the Commission found that the Stipulation was reasonable and should be adopted. The Commission's standard of review for considering the reasonableness of a stipulation has been discussed in prior Commission proceedings. *See, e.g., In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR,

Order on Remand (Apr. 14,1994); *In re Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT, Opinion and Order (Mar. 30, 1994); *In re Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al. Opinion and Order (Dec. 30, 1993); *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Jan. 31, 1989); *In re Restatement of Accounts and Records*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 26, 1985). The ultimate issue was whether the agreement was reasonable and should be adopted. In considering the reasonableness of the stipulation, the Commission 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? This analysis has been previously endorsed by the Ohio Supreme Court. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 629 N.E.2d 423 (1994), *citing Consumers' Counsel* at 126. In approving the Stipulation, we found that the agreement satisfied the three-part standard of review and should be approved. *EOR* at 8-15.

**{¶ 15}** In the applications for rehearing, OMA initially asserts that the Commission wrongly permitted Duke to recover shared savings incentives in both 2013 and 2014. Elaborating further, both OMA and OCC maintain that the Commission improperly found that the Stipulation was reasonable. The parties affirm that a stipulation is not binding on the Commission and is merely a recommendation. The Stipulation approved by the Commission, according to the parties, was unreasonable as it goes against past Commission precedent, defeats the purpose of the shared savings, and improperly gives Duke $19.75 million. OCC and OMA maintain that the Stipulation failed each part of the three-part test and the Commission should not have approved it.

### *A. Is the settlement a product of serious bargaining among capable, knowledgeable parties?*

**{¶ 16}** OCC submits multiple points of error regarding the Commission's finding that the Stipulation met the first part of the three-part test. On similar grounds, OMA also maintains that the Commission erroneously found the Stipulation complied with the first

part of the test. OCC contends that serious bargaining did not occur as whole customer classes were excluded from negotiations. According to OCC and OMA, Duke and Staff engaged in exclusive discussions, without the knowledge of the intervening parties, which eventually resulted in the Stipulation. OCC states that other parties were not involved until after the Stipulation was completed. Further, according to OCC, Duke and Staff's communication to the intervening parties was only a request to sign the Stipulation – not an invitation to negotiate. OCC and OMA both assert that the main component of the Stipulation, Duke's $19.75 million recovery, was a non-negotiable point. Thus, OCC and OMA argue the intervening parties were purposely excluded from negotiations, in violation of the Ohio Supreme Court's directives in *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229. Both OCC and OMA also contend that the Stipulation signatories do not represent a diversity of interests, and therefore the settlement does not represent a product of serious bargaining. OCC notes no intervenors, which include residential consumers and manufacturing groups, signed the Stipulation. OMA also maintains that the Commission failed to explain how Duke and Staff represent diverse interests.

**{¶ 17}** Duke responds that the Commission properly found that serious bargaining did occur and that the applications for rehearing on this issue should be dismissed. Duke states that the Commission correctly found that parties were provided an opportunity to respond to the proposed Stipulation. Further, after the Stipulation was filed, Duke points out that proceedings were continued multiple times to allow parties to negotiate. The Company also explains that Staff has an interest in balancing the concerns of all ratepayers, as well as ensuring fair rates and reliable service, and, thus, Staff's involvement is particularly noteworthy and representative of a variety of interests. According to Duke, all parties do not need to agree to a stipulation; rather, parties just need to be provided an opportunity to participate in discussions.

*B. Does the settlement benefit ratepayers and the public interest?*

{¶ 18} OCC and OMA argue that that the Commission erroneously determined that the Stipulation will benefit ratepayers and the public interest. Both OCC and OMA affirm the $19.75 million recovery for Duke is improper and not beneficial to ratepayers. The parties state that Duke should not be entitled to any recovery, as the Company did not meet the requirements to earn shared savings. According to OCC and OMA, the Commission already found that Duke was not authorized to recover shared savings, so it is improper to consider the $19.75 million a compromise of the potential $55 million that Duke contends it is entitled to. Instead, OCC and OMA maintain the $19.75 million will be an additional cost to customers that they otherwise should not have to pay. OMA additionally argues that customers do not get the benefit of the shared savings incentive. According to OMA, the purpose of the shared savings incentive is to motivate the Company to implement effective energy efficiency programs. If Duke is permitted to recover shared savings incentive money without meeting the required standards, OMA submits that customers will end up paying for benefits they did not receive. OCC and OMA also aver that the Commission wrongly found that litigation costs would be avoided through a stipulation. They submit that the Stipulation still resulted in a contested hearing and there is always a risk of additional litigation. Finally, OMA additionally asserts that the Stipulation has an opt-out provision that allows the Company to void the Stipulation if the Stipulation is affected by future statutes or Commission decisions. OMA contends Duke could loosely apply this provision and negate any potential customer benefits associated with the Stipulation.

{¶ 19} In its memorandum contra, Duke avers that the Stipulation is a considerable compromise that benefits its customers. Duke notes that the Stipulation requires Duke to retire a significant amount of its banked savings such that the Company will no longer be able to rely on banked savings going forward. Thus, Duke states that customers will benefit as Duke offers more energy efficiency programs in order to meet the baseline standards. Duke additionally states it was established that the Company may have been

entitled to up to $55 million and the stipulated $19.5 million represents a significant compromise. Duke also points out that the Stipulation prevented excessive litigation and provides customers and ratepayers with certainty going forward.

*C. Does the settlement violate any important principles or practices?*

**{¶ 20}** OCC and OMA also maintain that the Commission erred in finding that the Stipulation did not violate any regulatory principles or practices. OCC and OMA reiterate their argument that intervening parties were intentionally excluded from negotiations. OCC and OMA assert this goes directly against principles established by the Ohio Supreme Court. OMA also contends that the Commission's finding goes against other Commission orders. First, OMA states the Commission's Entry violates the initial Opinion and Order in the *2013 Recovery Case*, which found Duke could not use banked savings to obtain the incentive. Further, OMA avers that the Stipulation prevents Duke from seeking further cost recovery, but because Duke currently has a pending application to continue cost recovery, this Stipulation contradicts that application. Finally, OMA submits that the Stipulation accepts Duke's application in the *2013 Recovery Case* as filed and is not subject to audit from Staff. According to OMA, this avoids important consumer protections and goes against basic Commission principles.

**{¶ 21}** In reply, Duke argues the Commission has already addressed these issues and that the parties are not offering new arguments. Duke again notes that it is not a requirement that all parties agree to a stipulation; rather, all parties must have an opportunity to participate in the discussions. Duke submits that all parties were provided such an opportunity in these proceedings. Duke further asserts that the purpose of rehearing is for the Commission to reconsider its findings. Therefore, Duke avers it is proper and not unexpected that the Commission findings might differ from its previous rulings in those proceedings.

*D. Commission Conclusion*

**{¶ 22}** The Commission finds that the applications for rehearing filed by OCC and OMA should be denied. Initially, we find no error in our conclusion that the Stipulation meets the first part of the three-part test. The applications for rehearing reargue the same issues litigated in the hearing. In our order, we found no parties were specifically excluded from negotiations. *EOR* at ¶ 32. In making our decision, we noted the proposed settlement was distributed to all intervening parties prior to filing, and parties were provided an opportunity to respond (OMA Ex. 21). Further, after the Stipulation was filed it was demonstrated that discussions continued, as all of the parties filed a joint request to continue the procedural schedule in order to provide more time for negotiations (Jan. 29, 2017 Jt. Motion for Extension of Time). Accordingly, we affirm that no parties were excluded from negotiations. We additionally reaffirm that the choice of any one party to not sign a stipulation cannot invalidate a settlement. *EOR* at ¶ 32, citing *Dominion Retail v. Dayton Power & Light Co.*, Case No. 03-2405-EL-CSS, Opinion and Order (Feb. 2, 2005) at 18; Entry on Rehearing (Mar. 23, 2005) at 7; *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., The Toledo Edison Co.*, Case No. 14-1297-EL-SSO), Opinion and Order (March 31, 2016) at 43. As we discussed, Staff's role is to consider the concerns of all parties and a diversity of interests (Tr. Vol. 1 at 246; Staff Br. at 8). In sum, we find the applications for rehearing regarding the first prong of the test present issues that were already considered and addressed by the Commission. Thus, the applications for rehearing on this issue are denied, and we affirm that the Stipulation was a product of serious bargaining.

**{¶ 23}** The Commission additionally upholds its finding that the Stipulation benefits ratepayers and the public interest. The resolution of both the *2013 Recovery Case* and the *2014 Recovery Case* provides additional certainty going forward as to issues regarding shared savings, as it provides guidance not just for those two cases but also several related filings. *EOR* at ¶ 36. Specifically, through the Stipulation, Duke agrees to no longer pursue shared savings in other proceedings (Duke Ex. 1 at 4-5). This prevents protracted litigation and benefits ratepayers. The argument that the stipulated $19.75

million recovery should not be considered a compromise is unpersuasive. As discussed, Duke believed it was entitled to up to $55 million of recovery through multiple cases that were not on final order and still pending before the Commission (Tr. Vol. 1 at 329). This settlement resolves that issue at a much lower amount, to the benefit of Duke's customers. We further noted that Duke's retirement of 150,000 MWh of banked savings significantly benefits ratepayers. *EOR* at ¶ 36, citing Duke Ex. 1 at 4-5. This ensures the Company will continue to offer efficiency programs in order to meet the minimum benchmarks, which is the purpose of the program. *EOR* at ¶ 37, citing Staff Ex. 1. Accordingly, we again find that the Stipulation will provide benefits to ratepayers and deny the applications for rehearing on this issue.

**{¶ 24}** Finally, the Commission reiterates that the Stipulation does not violate any important regulatory principles. As we previously stated, the argument from OCC and OMA that the approved Stipulation violates previous Commission orders is without merit. *EOR* at ¶ 41. All the proceedings and Commission rulings cited in the applications for rehearing were still pending before the Commission, and thus subject to review. We additionally reaffirm that no parties were intentionally excluded from settlement discussions, as discussed above as well as in the *EOR* at ¶ 42. The Commission is also unpersuaded by the argument from OMA requiring an audit. We note this was a negotiated term of the Stipulation and does not violate any specific rule or principle.

**{¶ 25}** Accordingly, the applications for rehearing should be denied. Most of the issues brought up on rehearing concern issues already litigated at hearing, addressed by the Commission in the *EOR* and confirmed by the evidence. After review of the record, we further affirm our conclusion that the Stipulation meets the three-part test used by the Commission to validate stipulations.

## IV. ORDER

**{¶ 26}** It is, therefore,

{¶ 27} ORDERED, That the applications for rehearing filed by OMA and OCC be denied. It is, further

{¶ 28} ORDERED, That a copy of this Fourth Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

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