

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of :
Duke Energy Ohio, Inc. for Approval : Case No. 19-791-GA-ALT
Of an Alternative Form of Regulation to :
Establish a Capital Expenditure Program :
Rider Mechanism. :

**INITIAL POST-HEARING BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF THE
PUBLIC UTILITIES COMMISSION OF OHIO**

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INTRODUCTION

The Stipulation and Recommendation (Stipulation) submitted in this case requests that the application filed by Duke Energy Ohio, Inc. (Duke or Company) on May 3, 2019 be approved as filed, subject to the findings and recommendations contained in the Staff Report and certain other modifications. The Office of the Ohio Consumers' Counsel (OCC) asks the Public Utilities Commission of Ohio (Commission) to deny the application. Moreover, OCC asks this Commission to modify its previous authorizations to redefine the appropriate pre-tax rate of return of calculating the Rider CEP revenue requirement. The Staff of the Public Utilities Commission of Ohio (Staff) believes that the Stipulation is adequately supported by the evidence of record and satisfies the time-honored three-part test for reasonableness. The Commission should approve the Stipulation without modification.

DISCUSSION

Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into stipulations. Although not binding upon the Commission, the terms of such agreements are to be accorded substantial weight.¹ The ultimate issue for the Commission's consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. The standard of review for considering the reasonableness of a stipulation has been discussed

¹ *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St, 3d 123, at 125, citing *Akron v. Pub. Util. Comm.* (1978), 55 Ohio St, 2d 155.

in a number of prior Commission proceedings.² 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 cases.³ When the Commission reviews a contested stipulation, as is the case here, the Court has also been clear that the requirement of evidentiary support remains operative. While the Commission "may place substantial weight on the terms of a stipulation," it "must determine, from the evidence, what is just and reasonable."⁴ The agreement of some parties is no substitute for the procedural protections reinforced by the evidentiary support requirement.⁵

² See, e.g., *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Ohio Edison Co.*, Case No. 92-1463-GA-AIR, et al. (August 26, 1993); *Ohio Edison Co.*, Case No. 89-1001-EL-AIR (August 19, 1993); *The Cleveland Electric Illumination Co.*, Case No. 88-170-EL-AIR (January 31, 1989); and *Restatement of Accounts and Records* (Zimmer Plant); Case No. 84-1187-EL-UNC (November 26, 1985).

³ *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St. 3d 559, citing, *Consumers' Counsel*, supra, at 126.

⁴ *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 126, 592 N.E.2d 1370.

⁵ *In re Application of Columbus S. Power Co.* (2011), 129 Ohio St.3d 46.

Staff respectfully submits that the Stipulation satisfies all three prongs of this test, and that the evidence of record supports and justifies a finding that its terms are just and reasonable. Staff, therefore, requests that the Stipulation be approved as filed.

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

The first part of the Commission's three-part test has been met. In considering whether there was serious bargaining among capable and knowledgeable parties, the Commission evaluates the level of negotiations that appear to have occurred and takes notice of the experience and sophistication of the negotiating parties. The fact that OCC elected not to sign the Stipulation does not indicate a lack of serious bargaining.

The bargaining among the Signatory Parties was serious in both process and result. The capability and knowledge of the Signatory Parties and their counsel is readily apparent.⁶ The Signatory Parties include the Company and Staff of the Commission.⁷ These parties regularly participate in rate proceedings before the Commission, are very knowledgeable in regulatory matters, and were represented by experienced, competent counsel.⁸ All of the issues raised by the Signatory Parties, and even those raised by the non-signatory parties in these proceedings were thoroughly reviewed, discussed, and, to the extent agreement could be reached, were resolved during negotiations.⁹ Despite the

⁶ *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Form of Regulation*, Case No. 19-0791-GA-ALT, Duke E. 7 (Brown Supplemental) at 9.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 9-10.

divergent interests among them, all parties had an opportunity to express their opinions in the negotiating process.¹⁰ Moreover, all parties had the opportunity to conduct significant discovery and have had ample time, more than a year, to review the Company's application.¹¹ The Company's application was subject to an independent audit and review that resulted in a report filed publicly in the docket on May 11, 2020 and Staff filed its own recommendations in this proceeding several months ago as well.¹²

This Stipulation as a package, represents a comprehensive and reasonable balance of issues raised in those reports and recommendations and the Company's application.¹³ The parties held numerous virtual settlement conversations using video conference technology during the months of August, September, and October 2020.¹⁴ All parties were invited and participated in these settlement conferences and parties were given the opportunity to raise issues and did in fact discuss positions and make recommendations for resolving the case.¹⁵ In addition, in those discussions, parties and Staff had the benefit of able counsel as well as their own subject matter experts.¹⁶ The settlement discussions resulted in a series of compromises confirming that serious bargaining most certainly occurred.¹⁷

¹⁰ *Id.* at 10.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

The diversity of the parties, while important, does not determine whether this criterion is satisfied. Nor does OCC's opposition to the Stipulation indicate that diverse interests were not represented. Further, as the Commission has previously noted, the three-part test does not include a mandatory diversity of interest component.¹⁸ The Commission has also found that there is no requirement that any particular party must join a stipulation in order for the first part of the test to be met.¹⁹ Since Staff is a party to the Stipulation, it is disingenuous for OCC to claim that no party mindful of customer interests elected to join the Stipulation.

The record demonstrates that serious bargaining did occur between capable and knowledgeable parties. The first prong of the Commission's test for approval of stipulations is clearly satisfied.

2. The settlement, as a package, benefits ratepayers and the public interest.

The Stipulation benefits ratepayers and is in the public interest. The Stipulation includes a number of ways in which the public interest will be benefitted. The Stipulation affords the Company the opportunity to recover prudently incurred costs for natural gas capital investments and mitigate rate impacts for residential customers.²⁰ The Signatory Parties agree that the Company's Application to establish its Rider CEP and the proposed

¹⁸ *In re Ohio Power Co.*, Case No. 14-1158-EL-ATA, Second Entry on Rehearing (Feb. 1, 2017) at ¶ 14; *In re Ohio Power Co.*, Case No. 14-1693-EL-RDR, *et al.*, Opinion and Order (Mar. 31, 2016) at 52.

¹⁹ *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 04-571-GA-AIR, *et al.*, Opinion and Order (Apr. 13, 2005) at 9.

²⁰ Duke Ex. 7 (Brown Supplemental) at 11-12.

rate for the recovery of natural gas investments, including the plant-in service and the deferred post-in-service carrying costs (PISCC), property taxes, and depreciation through December 31, 2018 be approved.²¹ The only major modification to the Staff Report recommendations is that the Stipulating Parties agree that incentive pay will continue to be capitalized in accordance with the Company's existing accounting policies and procedures that follow generally accepted accounting principles (GAAP) and will be recoverable through Rider CEP.²² The Company is agreeing to the disallowance related to its fitness room.²³

The Staff, or its designee, will perform an audit of the Company's annual application to review the lawfulness, used and usefulness, prudence, and reasonableness of the CEP assets placed in service, as well as the related calculation of the regulatory asset to be included in the updated Rider CEP revenue requirement.²⁴

A key component of the Stipulation, and the most significant issue during the negotiations, is the Company's agreement to establish caps on the incremental revenue requirement increase and the deferral balances going forward for residential customers.²⁵ For investments that have already been made (i.e. calendar years 2019 and 2020) the Signatory Parties have agreed to a cap on residential customer rates of no more than \$9.31, or an increase of \$5.62 (\$2.92 related to 2019 investments and \$2.70 related to

²¹ *Id.* at 4.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 5-6.

²⁵ *Id.* at 12.

2020 investments), from the previous year's residential Rider CEP rate of \$3.69.²⁶ For Rider CEP update filings made by the Company to recover the revenue requirement associated with investments and associated CEP regulatory assets beginning January 1, 2021 and forward, the monthly residential Rider CEP rate will be allowed to increase no more than \$1.00 over the prior year's residential Rider CEP rate.²⁷ The agreed-upon Rider CEP residential rate cap will cap Duke Energy Ohio's CEP deferral authority, meaning that the deferral of post-in-service carrying costs, property tax and depreciation into a regulatory asset will cease for CEP assets excluded from the annual Rider CEP revenue requirement due to the application of the residential rate caps.²⁸ Any assets excluded from recovery through the Rider CEP due to the residential rate cap will be deemed base rate assets and will be included in base rate recovery in the Company's next natural gas base rate case.²⁹ The agreed-upon residential rate cap for Rider CEP will continue until the effective date of the Company's next natural gas base rate case.³⁰

Customers will benefit from the adoption of rate caps and depreciation offset that mitigate increases to a customer's bill during the term of Rider CEP.³¹ While the Company will continue to invest in infrastructure that benefits customers, and will be subject to an annual audit to determine the lawfulness, used and usefulness, prudence and reasonableness of the CEP assets placed in service, the depreciation, property taxes and

²⁶ *Id.* at 6.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 7.

³¹ *Id.* at 8

PISCC related to those assets will no longer be deferred into a regulatory asset related to those net additions above the stipulated cap.³² Therefore, the amount paid by customers will be lower than if the rate cap established in the stipulation had not been agreed to.³³

The Company is also agreeing to file an application for a natural gas base rate case by June 30, 2022, providing its Central Corridor Pipeline goes into service by March 31, 2022.³⁴ If, by some reason, the Central Corridor Pipeline does not go into service by that date, the Company is agreeing to file a natural gas base rate case within six months of the Central Corridor Pipeline's in-service date.³⁵ The Company agrees that notwithstanding the in-service date of the Central Corridor Pipeline, it will file a rate case no-later than June 30, 2023.³⁶ The Company further agrees that the date certain for that rate case will be no later than the date the case is filed, which was an important concession the Company made at the request of Staff, to not use a forecasted date certain its next natural gas base rate case.³⁷ In addition, the Signatory Parties agree that the revenue requirement associated with all CEP investment and CEP regulatory assets as of the date certain in that case will be rolled into base rates and that Rider CEP will then be reset to zero.³⁸

Although the Commission's test does not require the Stipulation package's benefits to be "substantial," many of these enumerated benefits may prove to be quite

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 7.

³⁸ *Id.*

substantial, to the economy, the environment, the energy market, and to individual ratepayers. Staff respectfully submits that the record adequately demonstrates that the Stipulation, taken as a package, benefits customers and is in the public interest

3. The settlement does not violate any important regulatory principle of practice.

The Stipulation does not violate any important regulatory principle or practice. As Duke witness Brown testified, the Stipulation complies with all relevant and important principles and practices.³⁹ In fact, the Stipulation actually furthers important regulatory principles, insofar as it mitigates rate shock by the Company agreeing to rate caps for its residential customers for Rider CEP going forward.⁴⁰ The Company agreed to caps for recovery of costs already spent, that balanced the interests of recovering prudently incurred costs spent to date, and mitigating rate shock for customers, including significantly reduced residential rate caps for Rider CEP beginning with investments placed in-service in 2021 and going forward.⁴¹ The Company is also committing to file a natural gas base rate case, where the Commission will have the opportunity to examine all of the Company's natural gas customer rates.⁴² These commitments, in turn, result in additional benefits to customers. Finally, the Commission has approved three similar alternative rate plan applications for CEP deferrals and riders in Case Nos. 19-468-GA-ALT, 17-2202-GA-ALT and 18-49- 17 GA-ALT and if the Stipulation is approved,

³⁹ *Id.* at 11.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

without major modification, it would provide fair and equitable regulatory treatment among the natural gas utilities.⁴³

The Stipulation adheres to long-standing Commission practice, and should be approved.

CONCLUSION

Based upon the foregoing, the Staff respectfully requests that the Commission adopt the Joint Stipulation and Recommendation.

Respectfully submitted,

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Id.

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Initial Post-Hearing Brief**, submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served by electronic mail, upon the following parties of record, this 24th day of February, 2021.

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