BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker Market Price.	)))	Case No. 05-724-EL-UNC
In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer.	))))	Case No. 05-725-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc., to Modify its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer.	))))	Case No. 06-1068-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its System Reliability Tracker.	)))	Case No. 06-1069-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set the Annually Adjusted Component of its Market-Based Standard Service Offer.	))))	Case No. 06-1085-EL-UNC

ENTRY ON REHEARING

The Commission finds:

(1) On November 20, 2007, the Commission issued an opinion and order in the above-captioned cases, approving a stipulation and recommendation (stipulation) signed by Duke Energy Ohio, Inc. (Duke); the staff of the Commission; Ohio Energy Group (OEG); Ohio Hospital Association (OHA); the city of Cincinnati (city); and People Working Cooperatively (PWC). These cases involved, in part, the setting of rates for riders for the recovery of certain of expenses associated with Duke's rate stabilization plan (RSP), first approved by the Commission in *In the Matter of the Application of the Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period,*

Case No. 03-93-EL-ATA, et al. (RSP Case). The Office of the Ohio Consumers' Counsel (OCC) and Ohio Partners for Affordable Energy (OPAE) opposed the stipulation. The riders involved in the above-captioned cases include: (1) the fuel and purchased power (FPP) rider, which is intended to allow Duke to recover the costs associated with its purchase of fuel for its generating stations, emission allowances, and economy purchased power to meet its load; (2) the system reliability tracker (SRT) rider, which is intended to allow Duke to recover the costs it incurs in maintaining a reserve margin for switched and non-switched load; and (3) the annually adjustable component (AAC),which is intended to allow Duke to recover its incremental costs associated with homeland security, taxes, and environmental compliance.

(2) Section 4903.10, Revised Code, indicates that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by filing an application within 30 days after the entry of the order upon the journal of the Commission.

(3) On December 21, 2007, OCC and OPAE filed applications for rehearing. Duke filed a memorandum contra both applications for rehearing, on December 31, 2007.

(4) In its application for rehearing, OPAE raises four assignments of error. OPAE's first assignment of error suggests that the Commission acted unreasonably and unlawfully when it found that the stipulation was the product of serious bargaining among the parties. OPAE argues that, contrary to the Commission's finding, serious bargaining did not take place at the settlement negotiations for the stipulation. OPAE contends that the Supreme Court has already confirmed that attendance and discussion at settlement negotiations does not satisfy the criterion the serious bargaining take place. OPAE claims that the Commission ignored the Supreme Court's determination that the Commission must look beyond the stipulation to determine if serious bargaining has taken place. OPAE argues that the question is whether there are side agreements undermining the settlement process. OPAE reasons that the evidence on remand in the RSP case, demonstrating that the side agreements affected the signatory parties to the stipulation, was ignored by the Commission on remand. OPAE claims that the stipulation is simply the furtherance of the side agreements that benefit a

handful of customers at the expense of whole classes of customers. OPAE points out that the stipulation was submitted by Duke and five other parties, all of whom supported the stipulation filed in the RSP case. OPAE argues that the city of Cincinnati is acting as a customer of Duke and not as a representative of the residential class and, in addition, suggests that its support can be seen as a product of its separate side agreement with Duke. OPAE also contends that PWC represents the interest of consumers only to the extent that those interests coincide with the funding PWC receives from Duke for is projects. OPAE argues that OEG and OHA, which support the stipulation, also had side agreements with Duke that could have influenced their support for the stipulation. Further, OPAE argues that this is also true of IEU, although it did not sign the stipulation. According to OPAE, it and OCC, both of whom oppose the stipulation, are the two parties representing the vast majority of Duke's customers. (OPAE application for rehearing at 7-14.)

(5) Duke, in its memorandum contra, disagrees with OPAE's contention that the existence of side agreements in the RSP case makes certain signatory parties' support suspect. Duke argues that there is no requirement that each party come to the negotiating table with the same interests. After detailing the positions and backgrounds of various parties, Duke asserts that each party, whether a signatory or not, fully participated in negotiation of the stipulation. Duke also points out that parties to side agreements in the RSP case are not exempted from paying increases in the FPP, SRT, or AAC riders and that those side agreements make no mention of the above-captioned cases. (Duke memorandum contra at 17-21.)

(6) We find no merit to OPAE's first assignment of error. Many of these arguments were raised by OPAE and discussed by the Commission in its opinion and order. We found that the stipulation was the product of serious bargaining by knowledgeable parties. We noted that all parties were invited to all negotiations. There was no evidence provided by OPAE to the contrary. We also found that the stipulation was either supported or not opposed by representatives of each stakeholder group. Residential consumers were represented by PWC and the city, OEG represented manufacturing consumers, and OHA represented commercial interests. OMG and Dominion did not oppose the stipulation and were involved in negotiations. As we

noted, the lack of agreement to the stipulation by two parties in this case should not cause the entire stipulation to be rejected as if serious bargaining had not occurred. We also found that, while the stipulation in the RSP case was impacted by the side agreements, there were no such connections between any side agreements and the stipulation in these cases. As to OPAE's contention that the city's support for the stipulation "can be seen as a product of its separate side agreement with Duke" or that OEG and OHA, both of which supported the stipulation, also had side agreements with Duke that could have influenced their support for the stipulation, we find no evidence for either claim. We also note that, contrary to OPAE's assertion that the existence of side agreements in a separate proceeding might inappropriately "affect" the parties to the stipulation in these cases, the Supreme Court of Ohio, on which OPAE was relying, was, on appeal of the RSP case, considering the impact of undisclosed side agreements on the fairness of the bargaining process. In the present circumstance, those same side agreements were fully known to all parties. As to OPAE's claim that PWC represents the interests of consumers only to the extent that those interests coincide with the funding PWC receives from Duke for its projects, we find no proof and no merit. OPAE's first assignment of error will be denied.

(7) OPAE's second assignment of error provides that, given the stipulation's treatment of returns on construction work in progress (CWIP), the Commission acted unreasonably and unlawfully when it found that the stipulation benefits ratepayers, serves the public interest, and does not violate any important regulatory principle or practice. OPAE argues that the stipulation fails to benefit ratepayers and the public interest and violates important regulatory practice and principles by allowing for the recovery of a return on CWIP through Duke's AAC. OPAE asserts that this approach is contrary to the findings of the auditor and results in unreasonable AAC charges. According to OPAE, a return on CWIP would not be allowed in ratemaking proceedings because such proceedings require that any CWIP be at least 75 percent complete before the Commission would consider allowing a return, a fact not demonstrated by Duke. OPAE also argues that the current regulatory paradigm does not provide any assurance of lower capital costs for customers at a future date, noting that, under a traditional regulatory paradigm, after construction is complete, the customers have a claim that the return on CWIP will provide lower capital costs at a future

date when the plant is in service. OPAE contends that the AAC has no place in the market environment and that traditional regulatory practices can and should be used to ensure reasonable standard service offer rates. OPAE argues that there is no market for retail electric generation to serve Ohio's residential and small commercial customers and, therefore, no reason why standards for CWIP should not apply. (OPAE application for rehearing at 14-17.)

(8) Duke asserts that the limitation on earning a return on CWIP does not apply to competitive retail electric service. (Duke memorandum contra at 23.)

(9) We find no merit to this assignment of error. Again, many of these same arguments were made by OPAE on brief and were considered by the Commission in our opinion and order. As we noted in our September 29, 2004, opinion and order, there was no discussion regarding a return on CWIP in the RSP's establishment of the AAC. However, we based our determination in part on Duke's supplied calculations. We noted that the Attachment JPS-4 to the testimony of John Steffen clearly showed CWIP as a factor in the AAC, with no reference to percentage completion. We also found that, in the present market environment, ratemaking standards, such as the limitation on earning a return on CWIP, are not dispositive. Therefore, we found that the stage of completion of CWIP should not, under these specific circumstances, be a bar to Duke's earning a return on CWIP. In our opinion and order, we fully considered OPAE's and other parties' arguments that CWIP should be treated in these cases as is normally done with rate proceedings, i.e., to permit a return on CWIP when projects are 75 percent complete. OPAE has raised nothing new in this assignment of error. OPAE's second ground for rehearing will be denied.

(10) In its third assignment of error, OPAE claims that the Commission acted unreasonably and unlawfully in its treatment of the use of Duke Energy North America (DENA) assets. OPAE contends that the Commission's opinion and order does not provide a reasonable method to set the price for the capacity from the DENA assets and, therefore, that the Commission has not provided adequate protection for ratepayers against Duke potentially overcharging for capacity from the DENA assets. OPAE also claims that the use of broker quotes or third-party

transactions to arrive at a market price is inadequate because there are usually very few broker quotes and there is a limited market. OPAE urges that the guidelines for formulating a price for the DENA assets need to be more stringent, with a greater number of bids and a price cap. (OPAE application for rehearing at 17-19.)

(11) We find no merit to OPAE's third assignment of error. In our opinion and order, we found that the pricing mechanism for the DENA assets proposed in the stipulation was reasonable. We also noted that, while the market for capacity is not mature, the witness for Duke, Mr. Whitlock, provided testimony that he would likely be able to get multiple broker quotes for determining market prices. As to OPAE's claim that the pricing of DENA assets is flawed, we find no basis for this argument. We noted that the stipulation provides two different mechanisms for setting a price and also allows for the possibility that Commission staff might agree to a different system in appropriate circumstances. Further, we must not lose sight of the fact that Duke's use of the DENA assets is to be on an emergency basis only and will be subject to audit by the Commission. Therefore, we continue to believe that the method established by the stipulation for establishing prices for DENA assets is reasonable. OPAE's third ground for rehearing will be denied.

(12) Finally, in its fourth ground for rehearing, OPAE contends that the Commission acted unreasonably and unlawfully when it approved the stipulation, even though the stipulation failed, without sufficient reason, to adopt the recommendations of the management/performance auditor. In this regard, OPAE specifically references the auditor's recommendations regarding use of DENA assets, allowance of a return on CWIP, and cessation of Duke's active management. OPAE argues that the Commission should have rejected the stipulation to the extent that it allowed Duke to ignore such recommendations.

(13) In our November 20, 2007 opinion and order, we considered all of these issues and all of the arguments made by the parties. The fact that our decision did not fully accept the findings of the auditor on any of these issues does not, in and of itself, render such decisions to be unlawful or unreasonable. OPAE's fourth ground for rehearing will be denied.

(14) In its application for rehearing, OCC raises four assignments of error. OCC's first assignment of error states that the Commission's remand order is unreasonable and unlawful because the Commission failed, as a quasi-judicial decision-maker, to "permit a full hearing upon all subjects pertinent to the issue(s) and to base [its] conclusion upon competent evidence" in violation of case law and Section 4903.09, Revised Code. This assignment of error is broken down into three subparts:

(a) The auditor's report should be followed regarding FPP charges.

(b) Capacity costs should be based on actual costs, which exclude charges related to the DENA assets at this time.

(c) The order fails to eliminate additional AAC charges requested by Duke without any evidentiary basis.

(15) As to the first general assignment of error, there is no evidence that the Commission failed to permit a full hearing upon all subjects pertinent to the issues. OCC was permitted to introduce any evidence and sponsor any witnesses it deemed relevant, cross-examine any other party's witnesses, and make any legal argument it deemed relevant. A claim by OCC that a full and fair hearing was not conducted is dubious absent any specific examples of just how a full hearing on all subjects was not permitted. As to OCC's claim that the opinion and order was not supported by competent evidence, we find no merit.

(16) With regard to the first subpart of its first assignment of error, OCC claims that the Commission should have ordered Duke to follow the auditor's recommendations regarding its coal management policies. These recommendations concern the adoption of traditional utility procurement strategies related to the procurement of coal and emission allowances, the cessation of Duke's active management of coal and the development of portfolio strategy for coal purchases. OCC argues that Duke should develop a portfolio approach to the purchase of coal and, as support for its argument, it cites to the auditor's report that states that Duke has passed up attractive coal contracts, resulting in increased FPP charges. OCC also claims that the recommendation for Duke to adopt a traditional utility

procurement strategy for its coal purchases was supported by the auditor and it urges the Commission not to dismiss this expert opinion. Further, OCC argues that the order failed to address an issue raised by OCC regarding the recommendation by the auditor that, as long as the FPP is in effect, coal suppliers should not be required to allow the resale of their coal for the offers to be considered. OCC argues that the Commission should have adopted the recommendation of the auditor that Duke permit the consideration of bids from bidders who seek to limit the resale of their coal. (OCC application for rehearing at 5-9.)

(17) In response, Duke points out that, rather than arguing its lack of opportunity to litigate this issue, OCC is actually urging the Commission to require Duke to adopt the auditor's recommendation. Duke contends that the auditor's recommendation is not binding on the Commission or the parties. It also stresses that the evidence showed that Duke's active management has not increased costs and has not inhibited the audit process. In addition, Duke noted that shareholders, not customers, absorb transaction costs related to active management.

(18) We find no merit to this assignment of error. In our consideration of the stipulation, we reviewed all of the evidence, including the auditor's recommendations. We balanced the traditional utility strategies for the procurement of coal and emission allowances versus Duke's active management of coal and determined that Duke's active management of coal was reasonable. Short of claims that we should have followed the auditor's recommendations because OCC thinks we should have, OCC has identified no new evidence in the record that we have not considered. With regard to the auditor's recommendation that Duke permit the consideration of bids from bidders who seek to limit the resale of their coal, this recommendation was considered by us in our opinion and order. We note that testimony at the hearing showed that Duke does not require the ability to resell coal as a condition to its purchase and it does not exclude an offer from consideration if the supplier does not permit resale. (Duke Rem. Rider Ex. 2, at 9.) We would clarify that Duke's standard request for proposals should not prohibit bids from suppliers who do not allow resale.

(19) The second subpart to OCC's first assignment of error asserts that capacity costs should not include charges related to the DENA

assets at this time. OCC claims that the order unreasonably rejects the auditor's recommendations, citing the Commission's lack of concern over Duke's non-compliance with prior orders and its acceptance of the proposed pricing mechanism. OCC claims that the original stipulation in the SRT proceeding required Duke to submit an application for approval of the SRT market price associated with DENA assets and to provide OCC with work papers and other data supporting the use of DENA assets. OCC claims that it was provided no information other than that which was sought by the OCC in ordinary discovery. OCC contends that use of broker quotes or third-party transaction prices would not result in customers benefitting from the most reasonably priced capacity available. OCC also argues that allowing the DENA generation to be priced based on a method agreed to by Duke and the staff gives those two parties the opportunity to enter into negotiations and make decisions without the involvement of other parties in these cases. (OCC application for rehearing at 9-13.)

(20) Duke submits that the requirements of SRT stipulation have been met, as it has applied for Commission approval, has supplied all work papers to OCC, and will, in the event DENA assets are used, provide detailed information to OCC as required by the SRT stipulation. Duke stresses that reasonably priced generation options are critical for meeting capacity requirements in an emergency. The stipulation, according to Duke, sets forth pricing methodologies and defines the circumstances under which DENA assets could be used. This allows subsequent auditors the ability to audit any DENA transactions, Duke explains. (Duke memorandum contra at 10-12.)

(21) We find no merit to this assignment of error. First, we would note that, rather than having any "lack of concern over the Company's non-compliance with prior orders," as claimed by OCC, we found, in our opinion and order, that the process that has been followed in this proceeding has complied with the substance of our prior orders. We find nothing in what OCC has raised on rehearing to warrant a different finding. With regard to OCC's claims concerning the substance of the pricing mechanism, we also find no merit. Under the terms of the proposal, Duke is required to give notice of its intent to use the DENA assets and, thereafter, to allow discovery of relevant facts by interested parties and to provide sufficient detail to allow

analysis of the reasonableness of its proposal. (Opinion and Order at 20.) This ground for rehearing will be denied.

(22) The third subpart to OCC's first assignment of error asserts that a return on CWIP should not be included in the AAC charges. This assignment of error was similarly set forth by OPAE and was discussed above and rejected by the Commission. This ground for rehearing will be denied.

(23) OCC's second assignment of error states that the Commission's order is unreasonable and unlawful because the Commission improperly delegated its duties to the Company and the Commission's staff. OCC points to the language in the Commission's order that "Duke work with staff to determine a reasonable period over which the amounts authorized by this opinion and order should be trued-up." OCC claims that such a directive unreasonably delegates the Commission's decision-making responsibilities and the Commission should make these decisions regarding the adjustment of rates based on a record developed in these cases. OCC also argues that the order fails to clearly define the Commission's treatment of interest charges that could be associated with any true-up.

(24) Duke notes that any bill credit would have to be reflected in tariffs, subject to Commission approval. Thus, it says, the Commission has ceded no authority. (Duke memorandum contra at 15.)

(25) We find no merit to this assignment of error. Our directive to Duke, on page 30 of the opinion and order, was that it work with staff to determine a reasonable period over which the amount authorized by this opinion and order should be trued-up and collected. The Commission has only directed Duke to work with staff to determine the period of time for such calculations. Nothing in this directive authorizes any entity, other than the Commission, to determine the amount of said true-ups or the amounts to be collected. Furthermore, nothing in this directive cedes any review of any such amounts, since final tariffs must still be approved by the Commission. This ground for rehearing will be denied.

With regard to interest charges associated with the AAC true-up, we note that the stipulation in these proceedings provides for Duke to forego the collection of interest on the trued-up AAC

charges. To the extent that our opinion and order in these cases was unclear, we would clarify that this aspect of the stipulation should be implemented. Duke's agreement to forego the imposition of carrying charges was part of the basis for our conclusion that the stipulation benefitted ratepayers and was in the public interest. Therefore, although collection of trued-up AAC amounts by December 31, 2007, was not possible by the time the opinion and order was issued, our order did not permit Duke to collect any carrying charges on the AAC true-up.

(26) In its third assignment of error, OCC argues that the Commission's order is unreasonable and unlawful because the Commission failed to determine that certain entities had no standing in these cases. OCC claims that the Commission erred by basing its approval of the stipulation on the support by PWC, which represented residential customers, because PWC did not have standing in these proceedings. OCC claims that PWC and OHA never formally intervened in these proceedings and, therefore, are not parties to these proceedings. Further, OCC argues that it was deprived the opportunity to state its objection to any characterization that PWC represented residential customer in rate-setting matters. (OCC application for rehearing at 19-21.)

(27) At the initiation of the rider phase of the remand portion of these proceedings, the attorney examiners consolidated these cases with the cases that had been remanded from the Supreme Court. Thus, parties in the remanded RSP case were also parties to the rider proceedings that were consolidated with the RSP case. As such we find no merit to OCC's third assignment of error. It will be denied.

(28) Finally, OCC's fourth assignment of error asserts that the Commission's opinion and order is unreasonable and unlawful because the Commission failed to properly apply the test for approval of a partial stipulation. This assignment of error is broken down into three subparts. First, OCC claims that the settlement was not the product of serious bargaining. This same argument was made by OPAE. OCC claims that the option agreements that were discussed in the order on remand in the RSP case provide some of the signatory parties with protections against the increases that are the subject of the rider phase of these proceedings. OCC also contends that neither the city of Cincinnati nor PWC represents residential interests in these

proceedings and that they were not knowledgeable parties. OCC argues that the city did not appear at the hearings, did not file a brief, and has not demonstrated any knowledge of the issues in the rider cases. Therefore, OCC states, serious bargaining did not take place between Duke and the city in these cases. OCC also argues that PWC is not a party to these proceedings and, therefore, that no representatives of residential consumers were included in the stipulation.

(29) As with the similar arguments of OPAE, we find no merit in this assignment of error. As we noted in the opinion and order in these cases, there was no connection between the side agreements that had been negotiated prior to our decision in the RSP case and the stipulation filed in these cases. In addition, the signatory parties to the stipulation filed in these cases specifically confirmed that there were no side agreements related to the stipulation in these cases. As to OCC's contention that because the city of Cincinnati did not appear at a hearing nor file a brief means that it did not seriously bargain, we find no merit. We found that the city was a knowledgeable party during the initial phase of these cases. We have no basis to find that they have suddenly become less knowledgeable simply because they did not attend the hearings in these cases. On that basis, we would have to disqualify other, seemingly knowledgeable, parties. Similarly, the decision whether to file a brief in these cases should not constitute a bar to qualify as a knowledgeable party. We would also note that OCC has not demonstrated that it is privy to all of the discussions that may have occurred between the city and Duke and, therefore, it has no basis to state that serious bargaining did not take place between Duke and the city. As to PWC's party status in these proceedings, we have previously discussed this matter. This ground for rehearing will be denied.

(30) OCC's second subpart to this assignment of error is that the settlement package does not benefit the public interest. OCC claims that the Commission should have adopted the recommendations of its auditor and rejected the treatment given to the AAC. These same arguments were made by OCC in its post-hearing brief in these proceedings and were fully considered by the Commission. This ground for rehearing will be denied.

(31) Finally, OCC claims that the settlement package violates important regulatory policies and practices. OCC raises nothing new in this assignment of error that was not previously

considered by the Commission. This ground for rehearing will be denied.

It is, therefore,

ORDERED, That OCC's and OPAE's applications for rehearing be denied. It is, further,

ORDERED, That copies of this entry on rehearing be served upon parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

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Secretary