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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In The Matter of the Commission's Review and Adjustment of the Fuel and Purchased Power and System Reliability Tracker Components of Duke Energy Ohio, Inc., and Related Matters.	)	Case No. 07-723-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust and Set its 2008 System Reliability Tracker.	)	Case No. 07-975-EL-UNC

OPINION AND ORDER

The Commission, coming now to consider the testimony and other evidence presented in these proceeding, hereby issues its opinion and order.

APPEARANCES

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McNees, Wallace & Nurick, by Daniel J. Neilsen, Fifth Third Center, Suite 1700, 21 East State Street, 17th Floor, Columbus, Ohio 43215, on behalf of Industrial Energy Users-Ohio.

Boehm, Kurtz & Lowry, by Kurt J. Boehm, 1500 URS Center, 36 East Seventh Street, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group.

David C. Rinebolt and Colleen L. Mooney, 231 West Lima Street, Findlay, Ohio 45840, on behalf of Ohio Partners for Affordable Energy.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Jeffrey L. Small and Ann M. Hotz, Assistant Consumers' Counsel, Office of the Ohio Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215, on behalf of residential utility customers of Duke Energy Ohio, Inc.

Marc Dann, Attorney General of the State of Ohio, Duane W. Luckey, Section Chief, Thomas W. McNamee and Werner L. Margard III, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Commission.

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OPINION

I. BACKGROUND AND HISTORY OF THE PROCEEDINGS

Duke Energy Ohio, Inc., (Duke) provides electric service under its rate stabilization plan, approved 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.* (03-93). The fuel and purchased power (FPP) rider is intended to allow Duke to recover the costs associated with its purchases of fuel for its generating stations, emission allowances, and economy purchased power to serve its load. Case No. 07-723-EL-UNC, captioned above (07-723), serves as the Commission's annual audit of the FPP. The system reliability tracker (SRT) is intended to recover costs that Duke incurs in maintaining a reserve margin for switched and non-switched load. Case No. 07-723 also includes the annual audit of the SRT, while Case No. 07-975-EL-UNC, captioned above (07-975), serves as the vehicle for the Commission's establishment of the SRT to be charged during 2008.

The Commission last considered the audit of the FPP and SRT, and the establishment of allowable rates for those riders, in *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, *et al.*, Opinion and Order (November 20, 2007) (2007 proceeding). The 2007 proceeding audited the FPP charged between July 1, 2005, and June 30, 2006. The 2007 proceeding also included an audit of the accuracy of SRT calculations for the period of January 1, 2005, through May 31, 2006, as well as a prudence review of the period from January 1, 2006, through June 30, 2006. Finally, the 2007 proceeding approved Duke's resource plan for 2007 and, as a consequence, the SRT charges for 2007.

On June 27, 2007, the Commission initiated 07-723 by directing staff to issue a request for proposals to perform an audit of Duke's FPP and SRT. The audit period for both riders was established as July 1, 2006, through June 30, 2007. On July 25, 2007, the Commission selected Liberty Consulting Group (Liberty) to perform the required audits. On September 4, 2007, Duke filed an application in 07-723 to approve the FPP and SRT riders charged during the audit period. On that same date, Duke also filed an application in 07-975 to establish its 2008 SRT rate, as required by the Commission's orders in 03-93. On November 1, 2007, Liberty filed its audit report. The hearing was initially scheduled for November 27, 2007, by examiner entry dated November 7, 2007. That entry also granted motions to intervene, filed by the Office of the Ohio Consumers' Counsel (OCC), Ohio Partners for Affordable Energy (OPAE), Industrial Energy Users-Ohio (IEU), and the Ohio Energy Group (OEG). By entry of November 15, 2007, the hearing was continued to December 13,

2007. On December 13, 2007, a stipulation signed by Duke, OPAE, and staff was filed.[1] Also on that date, a hearing was held in this case.[2] At the portions of the hearing relating to the FPP and the SRT, William Don Wathen, Jr., testified on behalf of Duke and L'Nard E. Tufts testified on behalf of the Commission staff. Briefs were filed by OCC, OPAE, staff, and Duke on January 7, 2008. Reply briefs were filed by Duke and OCC on January 15, 2008.

II. DISCUSSION

A. FPP/SRT Audit Report

Liberty recommended the following actions by Duke:

1. Duke should develop standard commercial asset management (CAM) procedures for the procurement and management of fuel and emission allowances, including procedures, guidelines, and limits on active management. (Comm.-Ord. Exs. 1 and 1A at I-8 to I-9.) (CAM procedures.)

2. Duke should evaluate the procedures and methods for forecasting coal consumption, in an effort to bring forecasts more in line with actual coal consumption. (Comm.-Ord. Ex. 1 at II-18; Comm.-Ord. Ex. 1A at II-18 to II-19.) (Forecast accuracy.)

3. Duke should demonstrate the economic effectiveness of active management, as a condition to its continued use by Duke. (Comm.-Ord. Ex. 1 at II-18; Comm.-Ord. Ex. 1A at II-19.) (Active management effectiveness.)

4. Duke should institute a security program to protect the integrity of coal samples from the time samples are bagged and ready for shipment until the samples arrive at the Gibson Analytical Laboratory. (Comm.-Ord. Exs. 1 and 1A at III-11 to III-12.) (Coal sample security.)

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1 The stipulation was not signed by IEU, OEG, or OCC. However, counsel for IEU and counsel for OEG stated that such parties were not opposing the stipulation. (Tr. at 22.)

2 The hearing in this case was consolidated with another case involving Duke's RSP; however, this opinion and order only addresses the issues related to the FPP and SRT riders.

5. Duke should exclude replacement power costs associated with the Zimmer Station generating facility from FPP recovery. (Comm.-Ord. Exs. 1 and 1A at V-16.) (Zimmer power costs.)[3]

6. Duke should act swiftly to establish high expectations for safety consciousness, cleanliness, and employee attitude at the Beckjord Station generating facility. (Comm.-Ord. Exs. 1 and 1A at V-16.) (Beckjord expectations.)

7. Duke should not reduce the 2008 capital and operating and maintenance budgets at the Beckjord Station generating facility below the budgeted level, and should provide further budget support beyond 2008 for station maintenance, if required. (Comm.-Ord. Ex. 1 at V-16 through V-17; Comm.-Ord. Ex. 1A at V-16.) (Beckjord budgets.)

8. Duke should conduct a staffing level review of the Duke coal plants to assure that staffing reductions are not resulting in, and do not have a significant potential for resulting in, adverse operational performance. (Comm.-Ord. Ex. 1 at V-17; Comm.-Ord. Ex. 1A at V-16.) (Coal plant staffing.)

9. Duke should perform economic analyses to determine the level of spare parts at its generating stations, the ability to share parts among its generating stations, and the use of online maintenance and redundant equipment at its generating stations. (Comm.-Ord. Ex. 1 at V-17; Comm.-Ord. Ex. 1A at V-16 to V-17.) (Spare part analyses.)

10. Duke should examine the cause of its undercollection of fuel costs. (Comm.-Ord. Exs. 1 and 1A at VII-12.) (Fuel cost undercollection.)

B. Summary of the Stipulation

The stipulation, filed in these proceedings, (Jt. Ex. 1) is intended by its signatory parties to resolve all of the outstanding issues in these proceedings. It includes the following provisions:

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3 The Commission notes that the redacted version of the audit report shows the name of this generating facility as confidential. However, as it was publicly disclosed by the parties in the stipulation, as well as in at least one place in the audit report, we are not treating it as confidential.

1. Duke's 2008 SRT charges should be implemented as filed for rates effective in the first quarter of 2008, on a bills rendered basis, beginning with the first billing cycle for January 2008.

2. The 2008 SRT market price will include recovery of Duke's projected 2008 SRT planning reserve capacity purchases by December 31, 2008, approximately $16,800,000. In addition, the 2008 SRT should include recovery of another $11,300,000 related to prior years' underrecovery of SRT purchases.

3. Duke will resume its quarterly filings to reconcile differences between actual revenue collected and actual expenses for rider SRT.

4. Duke will accept Liberty's recommendation to formally document its procedures and guidelines for its commercial asset management group for the procurement and management of fuel and emission allowances. The documentation will include procedures and guidelines on active management.

5. Duke will accept Liberty's recommendation to evaluate its procedures and methods for forecasting coal consumption, in an effort to bring forecasts more in line with actual consumption.

6. Duke will work with Commission staff to develop documentation that will facilitate the auditing of active management transactions involved in rider FPP, including, but not limited to, the following: (a) a clear and comprehensive set of procedures that address the portions of the portfolio that are subject to transactions and the specific triggers that allow identified portions and magnitudes of the portfolio to be traded; (b) an effective system of controls over the procedures; (c) the daily positions, market conditions, and other relevant decision-making criteria; and (4) actual transactions conducted, including rationale for any transactions not conforming to the documented procedures.

7. Duke will evaluate the need and feasibility of additional security measures for transporting coal samples to the laboratory.

8. The FPP rate will not be adjusted to reflect any disallowance for replacement power costs associated with the outage of the Zimmer Station generating facility from April 13, 2007, through June 11, 2007, as a result of these proceedings. The parties further agree that the next audit shall, for the purpose of recommending an appropriate

adjustment, if any, to the FPP rate: (a) examine Duke's operation, maintenance, and turbine-related activities at the Zimmer Station generating facility; (b) determine if the extended portion of the April 13, 2007, through June 11, 2007, outage was prudent; and (c) make a recommendation regarding recovery of fuel and purchased power costs associated with the extended portion of the outage.

9. Duke will adopt Liberty's recommendation regarding safety consciousness, cleanliness, and employee attitude at its Beckjord Station generating facility.

10. Duke will fund all necessary capital and operating and maintenance required to maintain reliability and safety at its Beckjord Station generating facility in 2008.

11. Duke will adopt Liberty's recommendation to conduct a staffing review at its coal plants to assure that staffing reductions are not resulting in, and do not have a significant potential for resulting in, adverse operational performance.

12. Duke will adopt Liberty's recommendation to perform an economic analysis to determine the level of spare parts at, the ability to share parts among, and the use of online maintenance and redundant equipment at its generating stations.

13. Duke will adopt Liberty's recommendation to examine the cause of its undercollection of fuel costs.

14. During the first quarter of 2009, Duke will make a filing with the Commission proposing the manner of any true-up of rider SRT, the annually adjustable component reagents costs, and rider FPP.

C. Disputed Issues

Only OCC objects to the stipulation. OCC urges that all recommendations in Liberty's audit report be adopted by the Commission. It contends that Duke is resisting implementation of those recommendations, giving several examples. Because OCC and Duke disagree with regard to the extent of adoption of Liberty's recommendations, we will, in our consideration of the stipulation, review each recommendation in the audit report and how that recommendation is or is not addressed by the stipulation.

1. CAM procedures

Liberty's first recommendation suggests that Duke develop standard procedures for procurement and management of fuel and emission allowances. CAM is responsible for fuel procurement and management, emission allowance procurement and management, and power trading activities that affect Duke's FPP costs. (Comm.-Ord. Exs. 1 and 1A at I-1.) Those procedures would include active management. This recommendation is specifically addressed in paragraph four of the stipulation (Jt. Ex. 1, at 4). This was not disputed by OCC, although OCC did complain that Duke's response to the recommendation was a comment that the culture of Duke's organization protects customers from what OCC describes as "the operational losses that lie behind Liberty's recommendation." (OCC brief at 7.) Duke strongly disputes the notion that any operational losses were behind Liberty's first recommendation. In addition to pointing out that Liberty did not suggest such losses as a motivating factor for the recommendation, Duke also notes that this item merely suggests formalization of certain operating procedures and that it agreed to do so. (Duke reply at 4-5.)

The Commission finds no evidence that Liberty believed the lack of certain formalized procedures to have caused operating losses. (Comm.-Ord. Exs. 1 and 1A at I-1 to I-9.) In addition, the Commission finds that the fourth paragraph of the stipulation directly and reasonably addresses Liberty's first recommendation.

2. Forecast accuracy

Liberty's second recommendation covers changes designed to make Duke's forecasting more accurate. This recommendation is also specifically adopted in the stipulation, at paragraph 5 (Jt. Ex. 1, at 4), and is not disputed by OCC.

3. Active management effectiveness

The active management effectiveness recommendation was a matter of some dispute. The actual recommendation states that Duke should "demonstrate the effectiveness" of this approach, "as a condition to its continued use by Duke." In the stipulation, on the other hand, Duke agrees to work on the development of "documentation that will facilitate the auditing of active management transactions" and, in addition, specifies certain procedures, controls, decision-making criteria, and data collection that will be covered by this effort.

OCC recognizes that the Commission approved the use of active management in our last review of these riders but suggests that, because evidence now shows that active management has resulted in negative margins, we should reconsider that decision (OCC brief at 8). Noting that the stipulation provides for Duke to develop documentation, OCC argues that "[d]ocumentation is not the same thing as the 'demonstration of economic effectiveness,' and nothing in the Stipulation conditions continued active management upon such demonstration." (OCC reply at 4.)

Duke counters that the active management effectiveness recommendation by Liberty does not mean that active management should be discontinued. Rather, Duke points out that the recommendation asks that Duke "demonstrate" the economic effectiveness of the practice. Duke argues that the provisions in the stipulation provide a mechanism for review of active management by the next auditor. (Duke reply at 5-6.)

Duke also comments, from the standpoint of a substantive review of active management, on OCC's assertions that the practice has resulted in higher costs to ratepayers. Duke points out that its witness, Charles Whitlock, disputed this conclusion. Mr. Whitlock pointed out that, to measure the true net cost, the Commission must review the entire portfolio, including coal costs, emission allowances, and purchased power costs. He emphasized that even Liberty concluded that the net effect of active management was an overall savings in those months that were analyzed. (Duke Ex. 3, at 7.) As explained by Duke in its reply brief, OCC's references to losses resulting from active management ignored the components other than the cost of coal. Any such losses, Duke states, "were more than offset by the overall savings created when emission allowances and purchased power positions were considered in addition to the coal positions . . .." (Duke reply at 6.)

OPAE similarly references the terms of the stipulation and comments that the "next auditor should be in a better position to audit active management transactions in order to determine if active management benefits ratepayers and serves the public interest." As a result of this view, OPAE finds that this provision is valuable. (OPAE brief at 4.)

The Commission finds that this provision of the stipulation is reasonable. We have only recently ruled that active management should be allowed in these circumstances. *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, *et al.*, Opinion and Order (November 20, 2007), at 15. Although Liberty reported that active management had contributed to the generation of negative margins, thereby increasing the costs flowing through the FPP, Duke's witness Whitlock disagreed. Mr. Whitlock explained that the negative margin calculated by Liberty was a "single attribute that is not indicative of the total net cost to FPP consumers." He stressed that, to "measure the net cost, the entire portfolio must be reviewed, which includes the related reduction in coal, [emission allowances] and purchased power costs." He concluded that "the net effect of [a]ctive [m]anagement resulted in an overall net savings in the months analyzed," concluding that we should not find that active management has resulted in net losses. (Duke Ex. 3, at 7.) We are not convinced that we should alter our recent ruling regarding active management. In addition, we find that the approach taken by the stipulation is a reasonable response to Liberty's recommendation that Duke demonstrate the effectiveness of active management. As a result of the provision in the stipulation, adequate records will exist such that we will be able to judge the results of Duke's use of active management during the next periodic audit.

A secondary issue is also raised by OCC in connection with active management. OCC contends that Duke still, after its last FPP and SRT audit, includes language in its requests for proposals that would require suppliers to allow resale of their coal. OCC submits that the Commission should require discontinuation of this practice, expecting that Duke would then be able "to purchase coal at advantageous prices from coal suppliers who limit the resale of their coal." (OCC brief at 8-9.) The Commission notes that Liberty reported on this issue, finding that "[r]esale of coal appears not to have been an issue for fuel suppliers." Even with Duke's preference for dealing with suppliers that allow resale, Duke has maintained an "active business relationship" with the one fuel supplier that actually prohibits resale. (Comm.-Ord. Ex. 1 at II-13; Comm.-Ord. Ex. 1A at II-14.) Therefore, the Commission finds that this is a moot issue.[4]

4. Coal Sample Security

Liberty's fourth recommendation would have Duke instituting a security program to "protect the integrity of coal samples" between the bagging process and arrival at the testing laboratory. Liberty notes that samples are not "kept under lock and key." (Comm.-Ord. Exs. 1 and 1A at III-10.) The stipulation's comparable paragraph would require Duke to "evaluate the need and feasibility of additional security measures for transporting coal samples to the laboratory." According to Liberty, "[s]ample integrity is an ongoing issue because of the relationship between the results of coal sample analyses and penalties or premiums paid to coal suppliers for coal that is either below, or above, the specified contractual coal quality guarantee." (Comm.-Ord. Ex. 1 at III-12; Comm.-Ord. Ex. 1A at III-11 to III-12.)

OCC claims that Duke is resisting Liberty's repeated recommendations in this area, citing back to an audit from 1999 in which Liberty noted that Duke did not have a "vigorous sample security program . . .." OCC maintains that Liberty had previously recommended that Duke should disguise its coal samples. (OCC brief at 9-11, citing Liberty audit in Case No. 98-103-EL-EFC.)

Duke controverts OCC's arguments on this subject, pointing out that it agrees, in the stipulation, to implement the recommendation. Duke also stresses that the 1999 Liberty recommendation dealt with a different aspect of coal security. "In the 1999 audit report to which OCC cites, the Auditor recommended only that [Duke] label coal samples in a

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4 The Commission notes that, in *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-ATA, *et al.*, Entry on Rehearing (January 16, 2008), we indicated that Duke's standard request for proposals should not prohibit bids from suppliers who do not allow resale. From the language in the audit report in these proceedings, it appears that Duke is not prohibiting such bids.

manner that would conceal the source of the sample." Duke notes that it implemented that recommendation in 1999. It also offers that it has already taken several steps to comply with this most recent recommendation. These steps include "procurement of lock boxes to store coal samples prior to transport," with keys only held by laboratory personnel responsible for sending samples; sending samples in sealed containers that will show evidence of tampering; and using custody forms for document handling. (Duke reply at 8-9.)

The Commission finds that, with the clarification that Duke will not only evaluate the need and feasibility of security measures but, in addition, has adopted such measures, the stipulation is a reasonable manner of addressing Liberty's fourth recommendation.

5. Zimmer Power Costs.

Liberty's fifth recommendation suggests that Duke should exclude replacement power costs associated with the extended portion of an outage at the Zimmer Station generating facility from recovery through the FPP. (Comm.-Ord. Exs. 1 and 1A at V-16.) The stipulation addresses this issue by postponing the resolution until the next auditor has the opportunity to examine Duke's operation, maintenance, and turbine-related activities at the Zimmer Station, to determine whether the extended portion of the outage was prudent, and to make a recommendation regarding recovery of related costs.

While OCC does not dispute that the stipulation addresses the Zimmer issue by recommending postponement, it does disagree with that approach and questions the meaning of the language in the stipulation. OCC expresses its concern that the stipulation might allow Duke to direct the next auditor's methodologies. (OCC brief at 16-17.)

While Duke asseverates that the stipulation does not purport to limit the next auditor (Duke reply at 10), and testimony affirmed this position (Tr. II at 20-24), the Commission will make the point entirely clear. We read the eighth paragraph of the stipulation to preserve the issue regarding recovery of the costs of the extended portion of the Zimmer outage for the next audit, with no limitation being placed on the auditor's review. With that clarification, we find that the stipulation reasonably addresses this recommendation.

6. Beckjord Expectations

In Liberty's sixth recommendation, it advises that Duke should act swiftly to establish high expectations, at its Beckjord Station generating facility, relating to safety, cleanliness, and employee attitude. The stipulation provides, in paragraph 9, simply that Duke will adopt this recommendation. OCC does not contest this provision.

7. Beckjord Budgets

Liberty's seventh item is a recommendation that Duke not reduce its 2008 capital and operating and maintenance budgets and should provide further budget support for maintenance, if required. The stipulation states that Duke will fund all capital and operation and maintenance budgets as necessary to maintain reliability and safety at the Beckjord Station facility.

OCC believes that the stipulation provision is a "watered-down" version of the recommendation, as it does not assure that budgets will be maintained at their current levels. OCC points out that Duke's witness, Mr. Wathen, noted Duke's "different view" regarding Beckjord. (OCC brief at 17-18.)

Duke did not respond directly to OCC's assertion on this item. However, Duke apparently does consider the stipulation to have adopted the recommendation, as its initial brief states that there is only one recommendation, relating to the Zimmer plant, with which it cannot agree (Duke brief at 14).

The Commission does find, as OCC noted, that the stipulation does not directly adopt the recommendation on this point. However, that fact does not necessarily mean that the stipulation is unreasonable. Rather, the benefits and detriments, if any, must be weighed in the course of our standard consideration of the merits of adoption of a stipulation.

8. Coal Plant Staffing

Liberty recommends, in its eighth item, that Duke should conduct a review of the staffing level at its coal plants. Undisputed by OCC, paragraph 11 of the stipulation adopts that recommendation.

9. Spare Part Analyses

The ninth recommendation relates to Duke's performance of economic analyses relating to spare parts. OCC does not dispute that the twelfth paragraph of the stipulation directly addresses this issue.

10. Fuel Cost Undercollection

Finally, Liberty recommends that Duke examine the cause of its undercollection of fuel costs. In the stipulation, at paragraph thirteen, the parties agree that Duke will adopt this recommendation. OCC does not disagree.

D. Evaluation of the Stipulation

Rule 4901-1-30, Ohio Administrative Code, 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.*, 64 Ohio St.3d 123, at 125 (1992), *citing Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155 (1978).

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, 1994); *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 Supreme Court of Ohio 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.*, 68 Ohio St.3d 559 (1994) *(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.*).

As each of these criteria is debated by the parties, we will proceed to a discussion of the argument and our resolution.

1. Serious Bargaining

OCC contends that the first prong of the stipulation test is not met. It represents that the first criterion, asks "whether the negotiations over a settlement took place in an environment of sufficient conflict (i.e. 'serious bargaining') between signatories." OCC goes on to say that the Commission has found that diversity of interests provides strong support for a stipulation's reasonableness. In that vein, OCC suggests that this stipulation, being signed by Duke, staff and OPAE, is not supported by any representative of consumers who are subject to the FPP and SRT charges being considered. OCC explains that statement in a footnote discussing OPAE's representation of low-income customers, concluding that OPAE has "an extremely tenuous link to any customers, and no link to residential customers who are represented by the OCC." Further, OCC discounts the support of OPAE by insisting that OPAE made no contribution to the stipulation's negotiation. OCC concludes that diverse interests are not represented by the stipulation's signatories and, therefore, that serious bargaining did not occur. (OCC brief at 13-14.)

Duke, in response, points to the fact that the stipulation is opposed only by OCC. "The fact that one [p]arty involved in the settlement process does not advocate settlement, [*sic*] does not diminish the seriousness of the process or the fact that it occurred among knowledgeable parties." (Duke reply at 11.)

Staff argued that, even though negotiations were brief, there is no indication that the bargaining was not serious, either in process or result. Staff also noted that all negotiations were open to all parties and all parties were invited to participate. (Staff brief at 4.)

In its post-hearing brief, OPAE stated that it had two issues of concern, including the Zimmer outage issue and the auditor's ability to audit active management transactions. OPAE also argued that the stipulation was the product of serious bargaining among knowledgeable parties. OPAE claimed that concessions made by Duke, including the agreement to carry over the Zimmer extended outage issue to the next audit and the development of documentation of active management transactions for future audit, demonstrated that serious bargaining occurred. (OPAE brief at 3-4.)

As we found in 03-93, which was directly related to the above-captioned cases, the parties involved are knowledgeable and capable. We find that the evidence demonstrates that serious bargaining took place. As noted by the stipulating parties, all parties were invited to participate and, as pointed out by OPAE, concessions were made by Duke involving issues of importance to other stipulating parties. As to OCC's argument that we must consider whether "negotiations took place in an environment of sufficient conflict," we find no merit. It has never been a required part of our consideration that we evaluate the level of conflict among the parties. We find that the first criterion has been met.

2. Benefit to Customers and the Public Interest

As support for its contention that the stipulation does not meet the second criterion, OCC maintains that the stipulation shows Duke's resistance to expert advice, which advice it believes should be adopted by this Commission. Further, it asserts that the benefits claimed for the stipulation do not add to the benefits that would be attained by adoption of Liberty's recommendations. (OCC brief at 14-19.)

Duke argues, on the other hand, that the stipulation benefits consumers and the public interest by affording appropriate recovery and financial stability. Duke again advocates for the position that the stipulation does not display resistance to expert advice and points out that there is no requirement that "simply because there is an audit report containing certain recommendations, that . . . the Commission . . . must blindly abide by all those recommendations in order to resolve the matter." (Duke reply at 12.)

We find that the stipulation does provide benefits to customers and the public. As we discussed above, we do not find that the stipulation reflects resistance to the advice of the auditor. Rather, all but two of Liberty's recommendations were reasonably addressed and adopted in the stipulation. The provision that preserves the Zimmer issue for the next auditor will allow further investigation, by that auditor, into the facts and circumstances of the extended Zimmer outage and will, therefore, allow a more comprehensive evaluation of its prudence and the appropriate cost recovery, if any. We also find that, in light of Duke's willingness to submit to further investigation of the Zimmer power costs issue, the modest compromise relating to the Beckjord budgets is reasonable.

3. Violation of Policies and Practices

By adopting the stipulation, OCC claims that the Commission will be ceding its review of the FPP and SRT to a process "dominated" by Duke, in light of the fact that certain Liberty recommendations are not adopted. (OCC brief at 19.) The Commission disagrees. We find that this stipulation does not violate any important regulatory policies or practices.

Therefore, after reviewing the stipulation and other evidence of record, we conclude that the stipulation, as a whole, represents a reasonable resolution of the issues presented in this proceeding. The stipulation appears to be the product of serious bargaining among knowledgeable, experienced parties; to benefit the public interest; and not to violate any important regulatory principle or practice. Accordingly, we find that the stipulation submitted in this case should be adopted and approved in its entirety. We also find that the FPP rates charged during the audit period were fair, just, and reasonable in light of the terms of the stipulation. Any adjustment in the FPP rate which is required to be made as a result of our adoption of the stipulation must be reflected in the FPP rate in the next quarterly FPP filing. Compliance with this directive will be reviewed in the next annual FPP audit.

E. Implementation

The Commission notes that the stipulation, in the first numbered paragraph, provides that the 2008 SRT rate would be implemented, on a bills-rendered basis, beginning with the first billing cycle for January 2008. As that date has passed, we find that it is reasonable for the amounts that would have been collected over the entire calendar year to be collected over the time remaining in 2008. In addition, we are aware that OCC disputed the reference to prior years' underrecovery, in paragraph two. The recovery of these amounts was previously approved by us. We find that this is merely an implementation of our prior order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) On June 27, 2007, the Commission initiated 07-723 by directing staff to issue a request for proposals to perform an audit of Duke's FPP and SRT. The audit period for both riders was established as July 1, 2006, through June 30, 2007.

(2) On July 25, 2007, the Commission selected Liberty to perform the required audits.

(3) On September 4, 2007, Duke filed an application in 07-723 to approve the FPP and SRT riders charged during the audit period. On that same date, Duke also filed an application in 07-975 to establish its 2008 SRT rate, as required by the Commission's orders in 03-93.

(4) On November 1, 2007, Liberty filed its audit report.

(5) The hearing in these proceedings was initially scheduled for November 27, 2007, by examiner entry dated November 7, 2007. That entry also granted motions to intervene, filed by the Office of the OCC, OPAE, IEU, and OEG.

(6) By entry of November 15, 2007, the hearing was continued to December 13, 2007.

(7) On December 13, 2007, a stipulation signed by Duke, OPAE, and staff was filed. Also on that date, a hearing was held in this case.

(8) Briefs were filed by OCC, OPAE, staff, and Duke on January 7, 2008. Reply briefs were filed by Duke and OCC on January 15, 2008.

(9) The issue for the Commission's determination is whether the stipulation is reasonable and should be adopted.

(10) The Commission finds that the stipulation meets the three criteria for adoption of stipulations and should, therefore, be adopted.

It is, therefore,

ORDERED, That the stipulation filed in these proceedings be adopted. It is, further,

ORDERED, That Duke file, in final form, four complete copies of tariffs consistent with this opinion and order. Duke shall file one copy in this case docket and one copy in its TRF docket (or may make such filing electronically, as directed in Case No. 06-900-AU-WVR). The remaining two copies shall be designated for distribution to Commission staff. 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

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Donald L. Mason

JWK/ SEF:geb

Entered in the Journal
FEB 27 2008

Reneé J. Jenkins
Secretary