

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application for Recovery )  
of Costs, Lost Margin, and Performance )  
Incentives Associated with the ) Case No. 08-1227-EL-UNC  
Implementation of Electric Residential )  
Demand Side Management Programs by )  
Duke Energy Ohio. )

In the Matter of the Application for Recovery )  
of Costs, Lost Margin, and Performance )  
Incentives Associated with the ) Case No. 08-1228-EL-UNC  
Implementation of Electric Non-Residential )  
Demand Side Management Programs by )  
Duke Energy Ohio. )

OPINION AND ORDER

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

APPEARANCES

Amy B. Spiller, Rocco O. D'Ascenzo, and Elizabeth H. Watts, Duke Energy Ohio, Inc., 155 East Broad Street, 21<sup>st</sup> Floor, Columbus, Ohio 43215, on behalf of Duke Energy Ohio, Inc.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and Werner L. Margard, III, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of Staff of the Commission.

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

Boehm, Kurtz & Lowry, by David F. Boehm and Michael L. Kurtz, 36 East Seventh Street, Suite 1510, 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.

Chester, Wilcox & Saxby, by John W. Bentine, Mark S. Yurick, and Matthew M. White, 65 East State St., Suite 1000, Columbus, Ohio 43215, on behalf of The Kroger Company.

## OPINION:

### I. Background

On July 11, 2007, the Commission issued a finding and order that approved the implementation of Duke Energy Ohio, Inc.'s (Duke) proposed demand side management (DSM) programs, including ten residential programs, one commercial/industrial program, one research program, and one demonstration program. See, *In the Matter of the Application for Recovery of Costs, Lost Margin, and Performance Incentive Association with the Implementation of Electric Residential Demand Side Management Programs by The Cincinnati Gas & Electric Company*, Case No. 06-91-EL-UNC (06-91) and *In the Matter of the Application for Recovery of Costs, Lost Margin, and Performance Incentive Association with the Implementation of Electric Non-Residential Demand Side Management Programs by The Cincinnati Gas & Electric Company*, Case No. 06-92-EL-UNC (06-92).<sup>1</sup> The July 11, 2007 finding and order also approved the establishment of DSM riders to recover the program costs, lost margins, and shared savings associated with those programs. However, the Commission directed that shared savings not be collected by Duke for each program until such program achieved at least 65 percent of its targeted savings.

In its December 17, 2009 opinion and order in *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, et al. (08-920), the Commission approved a stipulation under which Duke agreed to implement a new set of energy efficiency programs to begin January 1, 2009, which would replace those approved in 06-91 and 06-92, and a plan for reconciliation of the costs, lost margins, and shared savings for Duke's energy efficiency and DSM programs.

On November 17, 2008, Duke filed the current applications. These applications reconcile and update Duke's DSM riders which are intended to recover the associated program costs, lost margins, and shared savings for the period July 1, 2007, through June 30, 2008.<sup>2</sup>

Motions to intervene in these proceedings were filed on various dates by The Ohio Energy Group (OEG), the Office of the Ohio Consumers' Counsel (OCC), The Kroger Company (Kroger), and Ohio Partners for Affordable Energy (OPAE). By entries of

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<sup>1</sup> Duke was, at that time, known as the Cincinnati Gas & Electric Company.

<sup>2</sup> Another application in Case No. 09-283-EL-UNC was filed by Duke to recover program costs, lost margins, and shared savings associated with its DSM programs for the period July 1, 2008, through December 31, 2008.

February 20, 2009, and March 16, 2009, all of the motions to intervene were granted. Additionally, a motion to admit David C. Rinebolt to practice pro hac vice before the Commission in these proceedings was granted on March 16, 2009.

On September 10, 2009, a stipulation and recommendation (stipulation) that purports to resolve all of the issues was entered into by Duke, staff of the Commission, and OPAE was filed in these proceedings. The other parties to these cases were not signatories to the stipulation. By entry of September 15, 2009, a hearing was scheduled for October 15, 2009. The hearing was held as scheduled. At the hearing, staff provided testimony with regard to the stipulation. No party presented testimony in opposition to the applications or the stipulation or actively opposed the stipulation at hearing<sup>3</sup>.

## II. Summary of the Applications

The applications include a status report on Duke's DSM programs and a comparison of projected program costs and lost revenue with actual program costs and lost revenue. According to the applications, Duke's overall efforts to implement programs that saved energy did not reach the goals for the kilowatt hour (kWh) impacts set out of the first year of the program. In his testimony, staff witness Greg Scheck testified that he was familiar with Duke's applications and he indicated that only three of the DSM programs met the 65 percent threshold for the company to recover the shared savings, including the Energy Star Products program, the Smart Saver Heat Pump program, and the Personalized Energy Report (Tr. at 8, 10). Staff witness Scheck also explained the parameters of the program costs, lost margins, and shared savings associated with each of the DSM programs (Tr. at 9-10). According to the applications, Duke's projected program costs and lost revenue amounted to \$8,959,723 and \$2,616,765, respectively; however, its actual program costs and lost revenue equaled \$6,854,318 and \$631,979, respectively. While Duke's shared savings were projected to be \$6,854,318, its actual shared savings were \$494,770 (Duke Application, Appendix J).

According to the applications, Duke's DSM riders became effective with the first billing cycle in January 2009. The proposed residential and non-residential charges include the total implementation costs, plus program rebates, lost revenue, and shared savings. The proposed residential and non-residential charges were calculated by dividing the sum of the reconciliation amount and the DSM revenue requirement associated with the DSM programs projected for the calendar year, by the projected sales for the calendar year. DSM program costs for the year include the total implementation costs plus program rebates, lost revenue, and shared savings. The applications also indicate that the DSM cost recovery mechanism attributed the costs to be recovered to each respective class that benefited from the programs. For example, the costs for the Power

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<sup>3</sup> Although not part of the record, OCC filed on September 22, 2009, a letter stating its position on the stipulation.

Manager program were fully allocated to the electric residential class, since this is the class directly benefiting from the implementation of the program (Duke Application at 44-46).

### III. Stipulation

The signatory parties state that the stipulation is intended to resolve all of the outstanding issues in these proceedings. Under the stipulation, the parties agree and recommend that Duke's reconciliation and update provides sufficient data in order for the parties to adequately monitor progress of Duke's implementation of electric residential and nonresidential DSM programs. The parties also agree and recommend that the Commission adopt Duke's application in its entirety, except that ratepayers shall not be required to pay \$37,187 of the shared savings that was included in the applications in order to reflect the fact that most of the programs have not yet met 65 percent of their energy savings targets, the threshold level for permitting the company recovery of shared savings. In addition, the parties agree that this stipulation will true-up and provide cost recovery for the time period ending on June 30, 2008.

### IV. Consideration of the Stipulation

Rule 4901-1-30, O.A.C., authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. See *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 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, 1004); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al. (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus.*

*Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 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.*).

Staff witness Scheck testified that he was present during the settlement negotiations that resulted in the stipulation, that all of the parties were aware of the settlement negotiations, and that all of the parties had the opportunity to participate in settlement negotiations (Tr. at 17). In this case, we find that the stipulation is supported by adequate data and information. In addition, the stipulation represents a just and reasonable resolution of the issues raised in these proceedings and violates no regulatory principle or precedent. Further, we find that the stipulation is the product of lengthy, serious bargaining among knowledgeable and capable parties in a cooperative process, encouraged by this Commission and undertaken by the parties representing a wide range of interests, including the Commission staff, to resolve the aforementioned issues (Stipulation at 4). Accordingly, the stipulation should be adopted in its entirety.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) Duke is a public utility as defined in Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission.
- (2) On November 17, 2008, Duke filed an application for recovery of costs, lost margin, and performance incentives associated with the implementation of electric residential and nonresidential DSM programs.
- (3) Motions to intervene were filed and granted, on various dates, allowing intervention by OEG, OCC, Kroger, and OPAE.
- (4) On September 10, 2009, Duke, staff, and OPAE filed a stipulation that purports to resolve all of the issues in these proceedings. OCC, OEG, and Kroger did not sign the stipulation, but did not file testimony in opposition or oppose the stipulation at hearing.
- (5) The evidentiary hearing was held on October 15, 2009.
- (6) The stipulation is reasonable and should be approved and adopted.

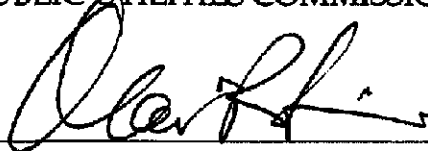
#### ORDER

It is, therefore,

ORDERED, That the stipulation filed in these proceedings be approved and adopted. 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



Cheryl L. Roberto

Valerie A. Lemmie

SEF/KLS:ct

Entered in the Journal



Renee J. Jenkins  
Secretary