FILE

13

RECEIVED-DOCKETING DIV
2011 MAY 16 PM 12:44
PUCO

**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | |
|---|---|
| In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Associated Tariffs. | Case No. 11-2641-EL-RDR |
| In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider RTO and Associated Tariffs. | Case No. 11-2642-EL-RDR |

# OHIO PARTNERS FOR AFFORDABLE ENERGY'S POST-HEARING BRIEF

## I. Introduction

Ohio Partners for Affordable Energy ("OPAE") hereby submits to the Public Utilities Commission of Ohio ("Commission") this post-hearing brief in these proceedings concerning the applications of Duke Energy Ohio, Inc., ("Duke") for approval of the establishment of Riders BTR and RTO and associated tariffs. Herein, OPAE argues that the stipulation and recommendation filed April 26, 2011 in these dockets is unlawful and violates all three parts of the Commission's three-part test for the reasonableness of stipulations; therefore the stipulation must be rejected. Moreover, the Commission has already found that Duke must demonstrate the reasonableness and prudence of its move from the Midwest Independent System Operator ("MISO") to PJM; therefore, the Commission should not approve Riders BTR and RTO absent such a demonstration by Duke. Because Duke has not made such a demonstration, the applications should be rejected or set for hearing to allow Duke to make its case. Even if a hearing is set, however, it is still premature for the Commission to determine the reasonableness and prudence of Duke's move to PJM because the costs of the move to Ohio ratepayers are not yet known.

## II. Argument -- The stipulation and recommendation filed April 26, 2011 in these cases is unlawful and fails all three parts of the Commission's test for the reasonableness of stipulations; therefore, the stipulation must be rejected.

### A. The stipulation violates Rule 4901-1-30, Ohio Administrative Code.

The stipulation must be rejected because it was filed by entities who were not parties to the proceedings. The stipulation states, at 1, that "parties" to a proceeding may enter into a written stipulation but two of the "Stipulating Parties," the Office of the Ohio Consumers' Counsel ("OCC") and Ohio Energy Group ("OEG"), were, in fact, not parties to the proceedings when the stipulation and applications were filed. Joint Exhibit ("Jt. Ex.") 1 at 1. Only parties to a proceeding may enter into a written stipulation covering the issues presented in a proceeding. Rule 4901-1-30(A), Ohio Administrative Code ("O.A.C."). Rule 4901-1-10, O.A.C., defines non-utility parties as those who have filed to intervene. Only the utility applicant, Duke, was a party to the proceedings when the stipulation was filed.

The violation of Rule 4901-1-30, O.A.C., is not a trivial matter. Given that the stipulation was filed on the same day as the applications, no one had the opportunity to intervene in these cases in order to demonstrate an interest in these applications and any settlement process that would ensue with the filing of the applications. Rule 4901-1-30, O.A.C., prevents stipulations from being filed before any person has an opportunity to intervene. The stipulation violates Rule 4901-1-30, O.A.C., and should be rejected.

### B. The stipulation should be given no weight by the Commission.

The Commission gives substantial weight to a stipulation "where the stipulation is supported or unopposed by the vast majority of parties in the proceeding in which it is offered." *Cincinnati Gas & Electric Company*, Case No. 03-93-EL-ATA, Opinion and Order (September 29, 2004) at 11 ("*CG&E*"). By that standard, the Commission should give no weight to this stipulation at all. When the stipulation was filed, Duke

was the only party. At this point, other parties have intervened, but the stipulation is clearly not supported or unopposed by "the vast majority of parties." Id.

Even if the Commission considers the stipulation, it should be rejected because it fails the Commission's test for the reasonableness of stipulations. The Commission uses the following criteria in considering the reasonableness of stipulations:

(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 has endorsed the Commission's analysis using these criteria. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125 (1992); *CG&E* at 12. The stipulation in these proceedings fails all three parts of the Commission's test.

**1. The stipulation is not the product of serious bargaining among capable, knowledgeable parties.**

First, the stipulation is not the product of serious bargaining among the "parties" because there were no parties to the proceedings other than Duke when the stipulation was produced and filed. The stipulation was the product of an exclusionary settlement process. An exclusionary settlement process is contrary to sound public policy and also raises questions concerning the procedural due process rights of interested stakeholders. In *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 233, footnote 2, the Supreme Court noted concern with the fact that the stipulation arose from "exclusionary settlement meetings." See also, The Ohio Consumers' Counsel's Application for Rehearing, *In the Matter of the Commission Consideration of a Settlement Agreement between the Staff of the Public Utilities*

*Commission of Ohio, Columbus Southern Power Company and Ohio Power Company*, Case No. 03-2570-EL-UNC (February 20, 2004) at 6-7.

OPAE was excluded from the settlement negotiations even though OPAE's interest in Riders BTR and RTO was well known. OPAE filed its post-hearing brief in Case No. 10-2586-EL-SSO on January 28, 2011 and argued against the approval of riders BTR and RTO. OPAE Post-Hearing Brief, Case No. 10-2586-EL-SSO (January 28, 2011) at 11-13. OPAE also filed on April 4, 2011 a memorandum contra Duke's application for rehearing and again argued against the approval of the riders. OPAE Memorandum Contra, Case No. 10-2586-EL-SSO (April 4, 2011) at 7-9. At the hearing in these proceedings, Duke's witness Wathen testified that OPAE was not invited to the settlement negotiations because OCC represented the residential group of customers and "we didn't think it was necessary to invite the OPAE." Transcript ("Tr.") at 21. Duke is wrong about OPAE's being a "residential group" identical to OCC. Id. OPAE's exclusion from the settlement negotiations cannot be justified by the inclusion of OCC in the settlement negotiations. As OPAE states in its motion to intervene, OPAE is an Ohio corporation with a stated purpose of advocating for affordable energy policies for low- and moderate-income Ohioans. OPAE also provides essential services in the form of bill payment assistance programs and weatherization and energy efficiency services to low-income customers of Duke. OPAE also represents its member agencies, several of which have commercial accounts with Duke. Thus, OPAE's interest is distinct from the interests of OCC, which represents only residential customers. Further, OPAE has been granted intervention in numerous proceedings by the Commission as an advocate for consumers and particularly low-income consumers. No other party adequately represents the interests of OPAE. OPAE is a rare organization that serves as an advocate and service provider and represents the interests of a non-profit commercial

customer group. The inclusion of OCC in the settlement negotiations did not absolve the negotiators from inviting the customer group represented by OPAE.

Nor was OPAE the only customer group excluded from the negotiations. The May 4, 2011 comments of the City of Cincinnati ("City") filed in these dockets state that the City was also excluded from the settlement discussions on the stipulation. The City also states that the recovery of costs arising from Duke's pending move from MISO to PJM is a concern to the City. OPAE's and the City's opposition to the riders in the SSO case also does not justify their exclusion from the settlement negotiations. This is because the Staff and OEG also opposed the riders in Case No. 10-2586-EL-SSO but were included in the exclusionary settlement negotiations. Duke did not bargain with OPAE, the City, and other intervenors in the SSO case such as the various marketers; therefore, the exclusionary settlement negotiations cannot be considered serious. The settlement negotiations were a small gathering of entities chosen for some unknown reason by some unknown persons.

The exclusion of the SSO parties from the settlement negotiations means that no serious bargaining occurred. Because the stipulation does not pass the first part of the Commission's test for the reasonableness of stipulations, it must be rejected.

**2. The stipulation violates important regulatory principle and practice.**

The position of the Staff of the Commission in the SSO case was as follows:

> The Commission should not pre-approve any other future costs in proposed Rider BTR. As discussed in the staff's initial brief, the [Federal Energy Regulatory Commission] FERC has not yet approved in tariffs any charges relating to MISO exit fees, PJM entrance fees, and [PJM Regional Transmission Expansion Plan] RTEP costs for Duke. Deciding the appropriateness, at this time, of future MISO exit fees, PJM entrance fees, and RTEP expansion planning fees is premature and unwarranted. These decisions should be the subject of future Commission proceedings and not part of this MRO proceeding. Once Duke obtains specific approval from FERC on the costs associated with any exit fees or [Midwest ISO Transmission Expansion Plan] MTEP costs imposed by MISO on Duke, Duke should, at that

> time, seek Commission approval for a mechanism in which to recover those costs. The MRO has an accelerated statutory time frame for a Commission decision. The issues surrounding proposed Rider BTR's transmission cost recovery are complex and require a full evaluation by the Commission in a separate proceeding.

Reply Brief submitted by Staff, Case No. 10-2586-EL-SSO, at 13. Staff witness Turkenton testified in the SSO case that FERC had not yet approved tariff charges relating to MISO exit fees, PJM entrance fees, and RTEP and MTEP costs for Duke. Staff believed that Duke would seek approval after FERC approved the costs. Since these costs have not yet been approved by FERC or the Commission, the Staff recommended that the Commission find the creation of Rider BTR is premature.

The Staff was not the only one to recommend that any decision on the transmission issues should wait until FERC had approved costs associated with exit fees and MTEP costs. OEG witness Baron testified in the SSO case that Rider BTR would permit Duke to recover fully all MISO exit fees and MTEP charges from ratepayers. Mr. Baron testified that Ohio ratepayers will receive little or no benefit from MTEP because Duke would no longer be a member of MISO. Case No. 10-2586-EL-SSO, OEG Ex. 1 at 20. Moreover, Duke would incur PJM RTEP costs that Duke would also ask Ohio ratepayers to pay. OEG witness Baron recommended that the Commission reject Riders BTR and RTO and require Duke to re-file its request for riders in a separate proceeding. He also testified that the issues raised by transmission cost recovery are complex and require full evaluation by the Commission through a prudence review, particularly with regard to the costs caused by Duke's own voluntary decision to exit MISO and join PJM. Because Duke would not be joining

PJM until January 2012, there was sufficient time for a full consideration of the issues outside the MRO proceeding.

The outcome of the SSO case was that Duke would file a "proper application" to recover the costs associated with its move from MISO to PJM. The Commission stated as follows:

> The Commission believes that a proper application to recover transmission costs should be made pursuant to Section 4928.05, Revised Code. Accordingly, Riders BTR and RTO would not be approved as part of this application or as part of any MRO application. Moreover, the commission believes that the General Assembly intended the FERC-approved tariff pass-through contained in section 4928.05, Revised Code, to include ordinary costs, not extraordinary costs. Therefore, when Duke makes a proper application to this commission to recover the costs associated with its move from the Midwest ISO to PJM, it will be required to demonstrate that its incurred costs are not extraordinary, and that its decision to move to the PJM RTO was reasonable and prudent, before it can recover any of the costs of its move from ratepayers.

Opinion and Order, Case No. 10-2586-EL-SSO (February 23, 2011) at 75.

Duke witness Wathen testified that because these transmission cases are separate cases, Duke was free to exclude many of the parties to the SSO case from the settlement negotiations on the transmission issues. Tr. 19. However, it is obvious from the Commission's Opinion and Order cited above that the Commission found that Duke would demonstrate that its incurred costs were reasonable and prudent before Duke could recover any costs of its move from MISO to PJM from ratepayers. Duke could only make such a demonstration at an evidentiary hearing. The parties to the SSO case could reasonably rely on an application and a hearing. Instead, Duke filed an application and a settlement agreement on the same day and excluded parties to the SSO case from the settlement negotiations. The settlement was concluded before the applications were filed, and the parties to the SSO case who were excluded from the settlement negotiations had no knowledge that Duke was settling these issues that the Commission had already determined would require a demonstration by Duke of

reasonableness and prudence. Opinion and Order, Case No. 10-2586-EL-SSO (February 23, 2011) at 75.

Therefore, the settlement package violates important regulatory principle and practice. Duke can only make the demonstration required by the Commission at an evidentiary hearing. Moreover, Duke cannot make such demonstration at this time because the costs are unknown. Nothing has changed since the Commission's findings in the SSO case. There is still no FERC ruling approving charges relating to MISO exit fees, PJM entrance fees, and RTEP and MTEP costs for Duke. Mr. Wathem could not say when Duke's MTEP obligations would end. Tr. at 30. Duke could "negotiate with MISO to get a flat number, a period of payments for some time to end our obligation. Most likely it will – our MTEP will last as long as the life of the longest lived asset being charged in that project, in that group." Tr. at 30. Transmission projects may last as long as 25 to 40 years depending on the asset. Id. Duke has only an estimate of the capital dollars that would be associated with its obligation. Tr. at 31. Then that would have to be translated into a revenue requirement and then Duke would pay its load ratio share of the revenue requirement for as long as the asset lives. Tr. at 31. Although Duke plans to exit MISO as of December 31, 2011, Duke will be a member of MISO until Duke's physical exit from MISO and physical integration into PJM. The full extent of Duke's cost responsibilities to MISO will remain unknown until Duke has physically exited from MISO. Duke will be liable for 2011 MTEP costs, but the 2011 MTEP has not yet been approved. Tr. at 33. The 2011 projects could increase Duke's obligation. Id.

As the Staff and OEG so persuasively argued in the SSO case, it is premature to commit Ohio ratepayers to an unknown amount of financial obligation. Duke has not provided a date upon which its cost obligations to MISO expire; in fact, Duke's MISO obligations could continue indefinitely. Under the circumstances, the stipulation

violates important regulatory principle and practice. A prudence review has not taken place; the amount that Duke's Ohio ratepayers will pay is unknown at this time.

**3. The stipulation does not benefit ratepayers and the public interest.**

The settlement, as a package, does not benefit ratepayers and the public interest. Under the stipulation, Duke "shall recover" through retail rates all MTEP costs, including multi-value project ("MVP") costs directly or indirectly charged to Duke. Jt. Ex. 1 at 6. FERC has already determined that Duke is obligated to pay for MVPs on a non-usage based allocation of costs of MVPs to withdrawing transmission owners on the basis of project approval. Id. Under the stipulation, Duke merely agrees to seek rehearing of the FERC decision, which has not yet been made. The stipulation recognizes that any FERC decision to allocate MVP costs to Duke may not agree with Duke's argument on rehearing; however, the Stipulating Parties agree that any MVP costs allocated to Duke shall be recoverable. Jt. Ex. 1 at 7.

The stipulation was reached without proper consumer protections. At a minimum, a cap and termination date for ratepayer-funded MISO costs should have been established. Duke's decision to move from MISO to PJM was a business decision on Duke's part; and ratepayers should not be held liable for such a business decision that is intended to benefit Duke's shareholders, not ratepayers. Duke claims that the stipulation assures customers that they will not be exposed to certain costs imposed by FERC or an RTO and that Duke is foregoing its "statutory right" to seek recovery of certain transmission costs. Duke also claims falsely that the stipulation negates the potential for protracted litigation. Likewise, Duke also claims that customers are insulated from a "pending matter before the FERC" so that customers are not affected by the FERC outcome. Duke Ex. 2 at 7-8.

The question, which cannot be resolved now, is what are Duke's costs associated with its business decision to exit MISO and join PJM. While Duke argues

that if it had stayed in MISO, it would pay MTEP costs, Duke must admit that if Duke had stayed in MISO, customers would benefit from MTEP and would not be facing any RTEP costs at all. The stipulation does not benefit ratepayers and the public interest. Its purpose is to deny parties the opportunity to argue against the recovery from Ohio ratepayers of transmission costs associated with Duke's voluntary business decision to switch RTOs.

## III. Conclusion

On May 2, 2011, OPAE filed a motion to strike the stipulation filed at the same time as these applications. OPAE renews its motion to strike and incorporates it in this post-hearing brief.

The Commission should reject the stipulation filed in these dockets the same day as the applications. First, the stipulation was filed by Stipulating Parties who were not parties to the cases, thus violating Rule 4901-1-30, O. A. C. Second, the stipulation fails all three parts of the Commission's test for the reasonableness of stipulations. It is not the product of serious bargaining but the product of exclusionary settlement negotiations that were designed to avoid serious bargaining. It violates important regulatory practice and policy because the Commission has already found that transmission cost recovery would be subject to a prudence review. It is premature at this time to make any findings or to consider any applications concerning the cost obligations of Duke for its business decision to exit MISO and join PJM. The stipulation also does not benefit ratepayers and the public interest. Its intent is to prevent parties from arguing against cost recovery for Duke's own voluntary business decision. For these reasons the stipulation must be rejected. The Commission should also reject the applications as premature at this time or set the matters for hearing at which Duke would be required to demonstrate the reasonableness and prudence of its voluntary business decision to exit MISO and join PJM.

Respectfully submitted,

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45840
Telephone: (419) 425-8860
FAX: (419) 425-8862
cmooney2@columbus.rr.com

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Post Hearing Brief was served electronically upon the following persons identified below on this 16th day of May 2011.

Colleen Mooney

Colleen L. Mooney

Amy B. Spiller
Elizabeth H. Watts
Duke Energy Ohio, Inc.
139 East Fourth Street
Cincinnati, Ohio 45201-0960
amy.spiller@duke-energy.com
elizabeth.watts@duke-energy.com

Grant W. Garber
Jones Day
325 John H. McConnell Blvd.
Suite 600
Columbus, Ohio 43215
gwgarber@jonesday.com

William Wright
John H. Jones
Steven L. Beeler
Attorney General's Office
Public Utilities Commission Section
180 E. Broad Street, 9th Floor
Columbus, Ohio 43215-3793
John.Jones@puc.state.oh.us
Steven.Beeler@puc.state.oh.us

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com

Jody M. Kyler
Jeffrey Small
Office of the Consumers' Counsel
10 W. Broad Street, 18th Floor
Columbus, Ohio 43215-3485
kyler@occ.state.oh.us
small@occ.state.oh.us

Joseph E. Oliker
McNees Wallace & Nurick
Fifth Third Center, Suite 1700
21 East State Street
Columbus, Ohio 43215-4228
jolikder@mwncmh.com

M. Howard Petricoff
Lija Kaleps-Clark
Vorys, Sater, Seymour and Pease
52 East Gay Street
PO Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, Ohio 43215-3927
BarthRoyer@aol.com

Thomas J. O'Brien
Bricker & Eckler
100 South Third Street
Columbus, Ohio 43215-4291
tobrien@bricker.com

Christine M.T. Pirik
pirik@puc.state.oh.us

Katie Stenman
stenman@puc.state.oh.us

Matthew W. Warnock
Bricker & Eckler
100 South Third Street
Columbus, Ohio 43215-4291
mwarnock@bricker.com