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**BEFORE THE
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 **PUCO**

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

**BRIEF IN SUPPORT
OF THE
STIPULATION AND RECOMMENDATION
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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May 16, 2011

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INTRODUCTION

On April 26, 2011, Duke Energy Ohio, Inc. (Duke) filed its Application for approval of the establishment of a base transmission rider (Rider BTR) and regional transmission organization (RTO) rider (Rider RTO) (Application), the Direct Testimony of William Don Wathen Jr., on behalf of Duke, and the Stipulation and Recommendation (Stipulation). Duke filed its Application pursuant to R.C. 4928.05, which allows recovery of all transmission and transmission-related charges imposed or charged by the Federal Energy Regulatory Commission (FERC) or a regional transmission organization. The Stipulation is signed and supported by Duke, the Staff of the Public Utilities Commission of Ohio (Staff), the Office of the Ohio Consumers' Counsel (OCC), and the Ohio Energy Group (OEG).

The Stipulation resulted from extensive negotiations, between knowledgeable and capable parties, that occurred over several weeks preceding the April 26th filing date.¹ Included in the discussions were all of the signatory parties identified above and some non-signatory parties, such as the Industrial Energy Users of Ohio (IEU) and the Ohio Manufacturers' Association (OMA). All customer classes of Duke were represented in the settlement negotiations leading-up to the filing of the Stipulation. Although not signatory parties to the Stipulation, IEU and OMA do not oppose the Stipulation.

Subsequently, the Ohio Partners for Affordable Energy (OPAE) moved to intervene and strike the Stipulation on two grounds: 1) the Stipulation did not comply

with a Commission rule requiring there must be at least two parties to a proceeding to enter into a written stipulation; and 2) the Stipulation was not the product of serious bargaining among knowledgeable and capable parties representing a wide range of interests because OPAE was allegedly excluded from the settlement negotiations. An Entry was issued on May 9, 2011 granting intervention to OCC, OMA, FirstEnergy Solutions Corp. (FES), OEG, OPAE, Constellation NewEnergy, Exelon Generation Company, LLC, city of Cincinnati, and IEU.² OPAE's motion to strike the Stipulation is without merit and should be denied.

As discussed in more detail below, the Stipulation satisfies the Commission's three-prong test for the Public Utilities Commission of Ohio (Commission) to find that the Stipulation is reasonable and lawful. Accordingly, the Stipulation, which is supported by sufficient evidence in the record, violates no regulatory principle, is the product of serious bargaining among knowledgeable and capable parties, and benefits ratepayers and is in the public interest.

The Staff recommends that the Stipulation be adopted and approved by the Commission.

² *In re Duke Application for Approval of the Establishment of Riders BTR and RTO and Associated Tariff Approval*, Case Nos. 11-2641-EL-RDR and 11-2642-EL-RDR (Entry) (May 9, 2011).

ARGUMENT

On December 17, 2008, in case No. 08-920-EL-SSO, the Commission approved Duke's current transmission rider, Rider TCR.³ Duke's Rider TCR was approved for the period of the Company's current electric security plan, which is through December 31, 2011. Riders BTR and RTO in this case are designed to supplant Rider TCR at its expiration on December 31, 2011.⁴

Originally, Riders BTR and RTO were proposed in Duke's application for a standard service offer that consisted of a market rate offer (MRO) in Case No. 10-2586-EL-SSO.⁵ On rehearing in the MRO case, the Commission offered guidance that RTO costs passed through Riders RTO and BTR should be explored in a separate proceeding.⁶ The BTR and RTO riders proposed in Duke's MRO case are the same two riders being

³ *In re Duke Application for Approval of the Establishment of Riders BTR and RTO and Associated Tariff Approval*, Case Nos. 11-2641-EL-RDR and 11-2642-EL-RDR Application, Duke Ex. 1, at 2) (April 26, 2011) (Application).

⁴ Application at 3; *In re Duke Application for Approval of the Establishment of Riders BTR and RTO and Associated Tariff Approval*, Case Nos. 11-2641-EL-RDR and 11-2642-EL-RDR (Stipulation and Recommendation, Joint Ex. 1, at 9) (April 26, 2011), (Stipulation).

⁵ By opinion and order issued February 23, 2011, the Commission found that Duke had not presented a complete MRO application and the application was in noncompliance with R.C. 4928.142. The Commission issued an Entry on Rehearing on May 4, 2011 denying Duke's and FirstEnergy Solutions applications for rehearing. Administrative notice was taken in this proceeding of both decisions (*In re Duke*, Case No. 10-2586-EL-SSO) at Transcript page 17.

⁶ *In re Duke*, Case No. 10-2586-EL-SSO (Entry on Rehearing at 15) (May 4, 2011).

proposed in this case.⁷ The record supports the Commission's three-prong test for the Stipulation that addresses Riders BTR and RTO in this case.

A. Standard of Review for Considering Reasonableness of Stipulation

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings.⁸ 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?⁹

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.¹⁰ 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.

⁷ Tr. at 16.

⁸ 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, 2004).

⁹ *In re the Application of Aqua Ohio, Inc.*, Case No. 09-1044-WW-AIR (Opinion and Order at 6) (September 1, 2010).

¹⁰ *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm'n*, 68 Ohio St. 3d 547 (1994) (citing *Consumers' Counsel v. Pub. Util. Comm'n*, 64 Ohio St. 3d 123, at 126) (1992).

B. The Stipulation is a Product of Serious Bargaining.

The Stipulation was negotiated by Duke, Staff, OCC, OEG, and other non-signatory parties such as IEU and OMA.¹¹ The discussions involved all stakeholders or customer classes of Duke, which were represented in the negotiations.¹²

Mr. Wathen testified in support of the Stipulation that the Stipulating parties regularly participate in rate proceedings before the Commission, are knowledgeable in regulatory matters, represent a broad range of interests, and were represented by experienced and competent counsel.¹³

OPAE's motion to strike, which advances the argument that the Stipulation is not the product of serious bargaining because OPAE was allegedly excluded, has no merit. OPAE offered no proof or evidence at the hearing that anyone intentionally excluded it from the negotiations that occurred with the Stipulation, so no weight should go to this specious argument. And OPAE's cite to *Time Warner AxS v. Pub. Util. Comm'n*, 75 Ohio St. 3d 229, 233, n. 2 (1996) (*Time Warner*), in support of its argument is, likewise, off point. In *Time Warner* the Court specifically noted the stipulation there arose from settlement negotiations that excluded an entire customer class. In this case, which can easily be distinguished from *Time Warner*, OCC represented all residential customers,

¹¹ Tr. at 19-20 and 40-41.

¹² *Id.* at 40-41.

¹³ Direct Testimony of William Don Wathen Jr., on Behalf of Duke Energy Ohio, Inc. (April 26, 2011) Duke Ex. 2 at 6 (Wathen Testimony).

including the same low-income residents that OPAE, a nonprofit organization, provides assistance too.¹⁴

Another argument OPAE advances to strike the Stipulation is there were not at least two parties to the proceeding to sign the Stipulation. This argument likewise fails. On April 26, 2011, the date the Application and Stipulation were filed in this case, Staff was a party to the proceeding, in addition to Duke, pursuant to O.A.C. 4901-1-10(C), which authorizes Staff to be a party to a proceeding for the purpose of O.A.C. 4901-1-30. Moreover, no Commission rule prohibits OCC and OEG from being signatory parties to a stipulation that was negotiated prior to a case being filed with the Commission and any opportunity being provided to them to move for formal intervention as a party. The fact OCC and OEG signed this Stipulation, which was filed contemporaneously with Duke's Application, should not disqualify their status as signatory parties. Besides, intervention was granted to OCC and OEG shortly after the Stipulation was filed, so the only difference here is one of form over substance that should not disqualify them as parties. OPAE's argument should be given no weight because it's devoid of any merit.

For the foregoing reasons, the first prong of the Commission's test has been satisfied.

¹⁴ Tr. at 21, 26; OPAE Motion to Intervene and Memorandum in Support at 1-2 (May 2, 2011).

C. The Stipulation Does Not Violate Any Regulatory Principle or Practice.

Mr. Wathen testified based on his experience as General Manager and Vice President for Rates for Duke, and his involvement in the case, the Stipulation complies with all relevant and important regulatory ratemaking principles and practices.¹⁵

No party that was granted intervention on May 9, 2011 has presented an argument against this prong of the Commission's three-prong test being satisfied in the case.

D. The Stipulation Benefits Customers and is in the Public Interest.

Mr. Wathen testified that the Stipulation provides several significant benefits across all customer groups and other interested stakeholders, such as: 1) Duke's timely realignment of RTOs; 2) Duke customers will not be exposed to certain costs imposed or charged by FERC or an RTO regarding the first \$121 million in RTEP costs billed to Duke by PJM, Midwest ISO exit fees, PJM integration fees, and internal costs associated with the RTO realignment; 3) removes obligation of CRES providers, effective January 1, 2012, to pay NITS and other non-market-based transmission costs, which should result in CRES providers to lower the price of their offers; and 4) removes requirement of wholesale suppliers to provide for transmission services included in Rider BTR, which should enhance the competitive environment for all potential auction participants.¹⁶

Comments filed in the docket by Eagle Energy, Inc., raising several concerns, have subsequently been withdrawn by the President of that Company on May 13, 2011.

¹⁵ Wathen Testimony at 7.

¹⁶ *Id.* at 5, 7, 8.

Also, comments were filed by the city of Cincinnati raising a concern that FERC or an RTO may allocate the recovery of Duke's realignment costs disproportionately between Kentucky and Ohio customers. But, the city of Cincinnati didn't present a witness to address this issue nor did it cross examine Mr. Wathen, who testified in support of the Stipulation. Accordingly, no weight should be given to the comments submitted by either Eagle Energy, Inc. or the city of Cincinnati, as it concerns the Commission's consideration of the reasonableness of the Stipulation.

CONCLUSION

Accordingly, the Commission should deny OPAE's motion to strike and adopt and approve the Stipulation, which satisfies the Commission's three-part test for the Commission to find it reasonable.

Respectfully submitted,

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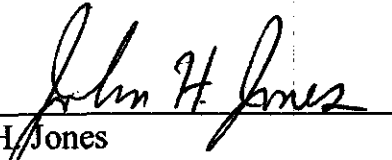

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served by electronic mail, upon the following parties of record, this 16th day of May, 2011.



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