

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 ) Case No. 11-2641-EL-RDR  
Associated Tariff Approval. )

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

OPINION AND ORDER

The Public Utilities Commission of Ohio, having considered the record in this matter and the stipulation and recommendation submitted by the signatory parties, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

Amy B. Spiller, Elizabeth H. Watts, and Rocco O. D'Ascenzo, 2500 Atrium II, 139 East Forth Street, Cincinnati, Ohio 45201, on behalf of Duke Energy Ohio, Inc.

Mike DeWine, Ohio Attorney General, by John H. Jones, Assistant Section Chief, and Steven L. Beeler, 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 Jody M. Kyler and Jeffrey L. Small, Assistant Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215, on behalf of the residential utility consumers of Duke Energy Ohio, Inc.

Boehm, Kurtz & Lowry, by Michael L. Kurtz, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of the Ohio Energy Group.

McNees, Wallace & Nurick, LLC, by Samuel C. Randazzo and Joseph E. Olikier, 21 East State Street, 17<sup>th</sup> Floor, Columbus, Ohio 43215, on behalf of Industrial Energy Users-Ohio.

Colleen L. Mooney, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839, on behalf of Ohio Partners for Affordable Energy.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Lija Kaleps-Clark, 52 East Gay Street, Columbus, Ohio 43216, on behalf of Constellation New Energy, Inc., and the Exelon Generation Company, LLC.

Jones Day, by Grant W. Garber, 325 John H. McConnell Blvd., Suite 600, Columbus, Ohio 43215, and David Kutik, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114, on behalf of FirstEnergy Solutions Corp.

Bricker & Eckler, LLP, by Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215, on behalf of the city of Cincinnati.

Bricker & Eckler, LLP, by Matthew W. Warnock, 100 South Third Street, Columbus, Ohio 43215, on behalf of Ohio Manufacturers Association.

### OPINION:

#### I. Background

Duke Energy Ohio, Inc. (Duke) is an electric light company, as defined in Section 4905.03(A)(3), Revised Code, and a public utility under Section 4905.02, Revised Code. Duke supplies electric transmission, distribution, and generation service in Adams, Brown, Butler, Clinton, Clermont, Hamilton, Montgomery, and Warren Counties in southwestern Ohio to approximately 500,000 consumers, and supplies electric transmission and distribution service to approximately 180,000 customers who receive generation service from competitive retail electric service (CRES) providers.

On April 26, 2011, Duke filed an application in these cases for approval and establishment of a base transmission rate rider (Rider BTR) and a regional transmission organization (RTO) rider (Rider RTO). In its application, Duke explains that 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., the Commission approved Duke's current transmission cost recovery rider (Rider TCR) through December 31, 2011. Through Rider TCR, Duke recovers its network integration transmission services (NITS) revenue requirement from nonshopping customers. CRES providers pay Duke separately for the use of the transmission system to provide service to their customers. Charges incurred from the Midwest Independent System Operator (Midwest ISO) related to Midwest Transmission Expansion Planning (MTEP) are also included in Duke's Rider TCR. In the present application, Duke proposes Rider BTR and Rider RTO to supplant Rider TCR at its expiration on December 31, 2011.

On April 26, 2011, a stipulation and recommendation (stipulation) (Jt. Ex. 1), along with supporting testimony, was also filed in these dockets. The stipulation was

signed by Duke, the Commission's Staff, the Ohio Energy Group (OEG), and the Ohio Consumers' Counsel (OCC), and it purports to resolve all of the issues raised by the signatories relative to the instant application filed by Duke.

By entry issued April 28, 2011, the attorney examiner established the procedural schedule in these cases. Specifically, May 4, 2011, was set as the deadline for the filing of motions to intervene, comments, and expert testimony, and May 6, 2011, was set as the deadline for the filing of memorandum contra motions to intervene. The April 28, 2011, entry also scheduled the hearing in these matters to commence on May 11, 2011.

Comments on Duke's application were filed by Ohio Partners for Affordable Energy (OPAE), the city of Cincinnati (Cincinnati), and Eagle Energy, LLC (Eagle). On May 13, 2011, Eagle filed a request to withdraw its comments. On May 6, 2011, Duke filed a motion to strike the comments filed by Cincinnati and a memorandum contra Duke's motion was filed by Cincinnati on May 9, 2011. In light of the fact that Cincinnati did not move for admission of the comments on the record at the hearing held in this matter on May 11, 2011, the Commission finds that Duke's motion to strike is without merit and should be denied.

On May 3, 2011, OPAE filed a motion to strike the stipulation. In its motion, OPAE argues that the stipulation was filed by entities that were not parties to the case at the time the stipulation was filed. OPAE also argues that its exclusion from settlement discussions raises issues regarding whether the stipulation is the product of exclusionary settlement meetings. Because OPAE's motion to strike goes directly to the Commission's consideration of the stipulation, it will be considered along with the stipulation in this order. Duke filed a memorandum contra OPAE's motion to strike on May 5, 2011.

By entry issued May 9, 2011, the attorney examiner granted motions to intervene in this case filed by OCC, Ohio Manufacturers' Association (OMA), FirstEnergy Solutions (FES), OEG, OPAE, Constellation NewEnergy (Constellation), Exelon Generation Company, LLC (Exelon), Cincinnati, and Industrial Energy Users-Ohio (IEU).

The hearing in this matter commenced, as scheduled, on May 11, 2011, at the offices of the Commission. At the hearing, Duke witness Wathen testified in support of the stipulation (Duke Ex. 2). Duke's April 26, 2011, application (Duke Ex. 1) and Duke's responses to FES's first set of interrogatories (FES Ex. 1) were also admitted into the record without objection. Briefs were filed by Duke, Staff, OCC, OPAE, and Constellation on May 16, 2011. IEU filed a letter on May 16, 2011, stating that it takes no position on the stipulation.

## II. Summary of the Application

In its application, Duke seeks approval of Riders BTR and RTO and also seeks approval of the tariffs attached to the application for the riders. As proposed, Rider BTR is an unavoidable rider which will recover NITS costs and MTEP costs from all customers. Duke also proposes to recover all other costs billed to Duke under tariffs approved by the Federal Energy Regulatory Commission (FERC) through Rider BTR. FERC-approved costs will include fees associated with the realignment of RTO membership, such as exit and entrance fees and integration costs, as well as transmission expansion planning costs assessed by the RTO into which the company may realign. This would include all transmission expansion project costs allocated, directly or indirectly, to Duke by the Midwest ISO or PJM Interconnection, LLC (PJM). Rider BTR would also include all exit and entrance fees required by the Midwest ISO and PJM, as well as all internal and external integration costs. (Duke Ex. 1 at 2-3.)

Rider RTO, as proposed, would be used to recover charges billed by a FERC-approved RTO, in proportion to its standard service offer (SSO) load. Therefore, Rider RTO would be avoidable for customers not taking generation from Duke. Duke explains that CRES providers will continue to be charged certain RTO costs, excluding NITS costs, in proportion to the load they serve. (Duke Ex. 1 at 4.)

Duke explains that it will more accurately be able to identify the rates for Riders BTR and RTO after the resolution of events relating to its planned RTO realignment. Therefore, Duke expects to return to the Commission at a later date to set the rates for Rider BTR and Rider RTO, closer to the proposed effective date of January 1, 2012. (Duke Ex. 1 at 4-5.)

As proposed, Riders BTR and RTO will be trued-up annually in approximately July of each year, beginning in 2013.<sup>1</sup> Duke further proposes that each annual true-up for Rider BTR will strictly reconcile the differences between costs actually billed by the RTOs and the revenue collected by Duke. (Duke Ex. 1 at 5.)

## III. Summary of the Stipulation

As stated previously, a stipulation signed by Duke, Staff, OCC, and OEG was filed in these cases on April 26, 2011. The stipulation was intended by the signatory parties to resolve all outstanding issues in these proceedings. The following is a summary of the provisions agreed to by the stipulating parties and is not intended to replace or supersede the stipulation:

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<sup>1</sup> With respect to Rider TCR, Duke proposes a final true-up to occur in July of 2012, with the costs and revenues to be trued up being split between Rider BTR and Rider RTO based on the types of costs.

- (1) The terms of the stipulation are contingent upon Duke exiting the Midwest ISO and realigning its RTO membership with PJM. Duke anticipates joining PJM effective January 1, 2012. In the event that Duke does not realign its RTO membership by January 1, 2012, any signatory party may seek Commission approval to declare this stipulation null and void.
- (2) Duke agrees not to seek recovery from retail customers of:
  - (a) Midwest ISO exit fees, except as otherwise provided with respect to Midwest ISO transmission expansion project costs defined in the stipulation;
  - (b) PJM integration fees imposed upon Duke through the Agreement to Implement Expansion of PJM Region for Duke and Duke Energy Kentucky signed June 11, 2010, or subsequent revisions of such agreement; and
  - (c) Internal costs associated with the RTO realignment including Energy Management System upgrades, legal expenses, and other internal costs.

The Midwest ISO exit fee has not yet been determined. The PJM integration fees are estimated at \$1.7 million and Duke's internal costs are estimated at \$2 million.

- (3) Duke shall recover through retail rates all MTEP costs, including but not limited to multi-value project (MVP) costs directly or indirectly charged to Duke, other than such costs properly attributable to one or more of Duke's operating company affiliates. Duke shall recover MTEP costs through Rider BTR or any successor thereto.
  - (a) On January 18, 2011, Duke filed for rehearing of FERC's order in Docket No. ER10-1791 (MVP Order) arguing, *inter alia*, that a nonusage-based allocation of MVP costs to a withdrawing transmission owner on the basis of project approval is unlawful. If Duke's request for rehearing is denied by FERC on substantive grounds and it is determined that Duke remains obligated to pay for such MVP costs based upon a nonusage-based allocation of costs of MVP costs to withdrawing transmission owners on the basis of project approval, Duke agrees to appeal the

FERC decision. If FERC rejects Duke's request for rehearing of the MVP Order based upon a finding that the issue should instead be resolved in a subsequent proceeding on exit fees, Duke agrees to argue the issue in that subsequent proceeding on exit fees, and to seek rehearing and appeal with respect to any finding in such a proceeding that Duke must pay an exit fee based upon a nonusage-based allocation of MVP costs to withdrawing transmission owners on the basis of project approval. Duke will diligently prosecute its appeal of the MVP Order.

- (b) Duke has argued in its request for rehearing of the MVP Order that Duke will not incur MVP obligations before Duke withdraws from the Midwest ISO. Recognizing that any FERC decision to allocate MVP costs to Duke may or may not expressly agree with or address Duke's argument, the parties recommend that any MVP costs allocated to Duke on a basis deemed consistent with the limits on transmission owner withdrawal obligations set forth in Article 5, Section 2 of the Midwest ISO Transmission Owner's Agreement shall be recoverable.
- (4) Duke shall recover through retail rates all costs that arise from Regional Transmission Expansion Plan (RTEP) projects that are charged to Duke by PJM under PJM's FERC-approved rates. For the first \$121 million in RTEP costs, which include Legacy RTEP<sup>2</sup> and Future RTEP<sup>3</sup> costs, that are billed to Duke by PJM, Duke shall provide a credit to customers as described below in the stipulation. After the RTEP commitment is fulfilled, Duke shall recover through Rider BTR or any successor thereto, all RTEP costs charged to it by PJM, which may include Legacy RTEP costs and Future RTEP costs that are billed by PJM.
- (5) The stipulating parties reserve the right to contest, at FERC or any federal court, the costs to be included in MTEP or RTEP and the propriety of allocating such costs to Duke. Any opposition will not

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<sup>2</sup> Legacy RTEP costs are defined as costs billed by PJM for projects that are approved by the PJM Board prior to the time Duke joins PJM.

<sup>3</sup> Future RTEP costs are those costs billed by PJM for projects that are approved by the PJM Board after the time Duke joins PJM.

be inconsistent with the terms of the stipulation. Under no circumstances will the parties oppose or in any way contest in any forum Duke's right to recover, through retail rates, MTEP and/or RTEP costs consistent with this stipulation.

- (6) The stipulating parties shall not, directly or indirectly, object to or otherwise contest, in any forum, Duke's decision to exit the Midwest ISO and realign with PJM or any aspect of the process by which such decision was made or challenge the prudence of Duke's RTO realignment or the costs associated with the same, including but not limited to MTEP or RTEP costs.
- (7) Duke commits to not charging its SSO customers twice for the same capacity under whatever SSO supersedes the current electric security plan.
- (8) Effective January 1, 2012, Rider BTR shall be created as an unavoidable rider to allow for recovery of MTEP and RTEP charges, NITS charges that will be paid by Duke for all shopping and nonshopping load, and other nonmarket-based charges, including but not limited to Commission audits.
- (9) Effective January 1, 2012, Rider RTO shall be created as an avoidable rider to allow for recovery of market-based FERC and RTO charges billed to Duke in proportion to its SSO order load.
- (10) With the approval of Riders BTR and RTO, Duke's Rider TCR shall expire effective December 31, 2011, and a final true-up shall occur as part of the annual adjustment of Rider BTR and Rider RTO.
- (11) Duke shall seek recovery, through retail rates, of all transmission expansion project costs, including MTEP, Legacy RTEP, RTEP, and all other FERC-approved costs billed to it by either the Midwest ISO or PJM that are not specifically excluded as part of the stipulation. The allocation to each rate schedule of MTEP, Legacy RTEP, and RTEP costs shall be done on a demand basis, using the 12 coincidental peak (CP) results for each rate schedule. As Legacy RTEP or RTEP costs are billed by PJM, Duke shall credit back to customers, via Rider BTR, the RTEP commitment. The amount of the RTEP commitment to be credited via Rider BTR will first be allocated between residential and nonresidential customers using the 12 CP allocation method. The amount of the credit allocated to residential customers will be credited to these customers on an energy basis. The amount of the credit allocable to nonresidential

customers will also be credited back to nonresidential customers on an equivalent energy basis. Within 30 days of the RTEP commitment having been fully credited back to customers, Duke shall inform the Commission that said credits have ceased by filing a letter of termination.

- (12) To the extent the fees and costs described in the stipulation are fixed costs, they will not be reflected in any attachment or schedule from which retail transmission rates for recovery by Duke are derived. In the event such fees or costs are not fixed costs and are, therefore, incorporated into an attachment or schedule, Duke will demonstrate, in its annual filings to adjust Rider BTR and Rider RTO, that retail customers neither have paid nor will pay for said fees and costs.
- (13) Approval of Duke's application will serve as authorization for Duke to recover costs consistent with the terms of this stipulation beginning on January 1, 2012.
- (14) Once Duke has the information necessary to calculate actual transmission rates and rates for the recovery of RTEP charges consistent with the terms of this stipulation it will, prior to January 1, 2012, provide such calculation to the stipulating parties and file final tariff pages for Riders BTR and RTO, within 10 days.
- (15) Duke will reconcile and update its Rider BTR and Rider RTO consistent with Chapter 4901:1-36, Ohio Administrative Code (O.A.C.).
- (16) Duke will not institute a filing at FERC under Section D of Schedule 8.1 of the PJM Reliability Assurance Agreement that requests FERC approval of a wholesale capacity charge applicable to load serving entities based upon Duke's costs as a Fixed Resource Requirement entity in PJM for the period between January 1, 2012, and May 31, 2016.
- (17) Duke's customers shall not incur an obligation as a result of any settlement or final disposition of the FERC proceeding filed by the Midwest ISO under FERC Docket No. ER11-2059.

(Joint Ex. 1 at 5-12.)



#### IV. Consideration of the Stipulation and Conclusion

##### A. Standard of Review

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. *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). This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented in the proceeding in which it is offered.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *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 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, 561 (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.*).

##### B. Application of the Stipulation Criteria

As previously mentioned, on May 3, 2011, OPAE filed a motion to strike the stipulation. In its motion, OPAE argues two main points: that, in contravention of Rule 4901-30, O.A.C., the stipulation was filed by entities that were not parties to the case at

the time the stipulation was filed; and that the exclusion of OPAE from settlement discussions raises issues regarding whether the stipulation is the product of exclusionary settlement meetings, which was prohibited in *Time Warner AxS v. Pub Util Comm.*, 75 Ohio St.3d 229 (1996) (*Time Warner*). In addition, on brief, Constellation requests that the Commission's approval of Rider BTR be subject to a compliance filing that clarifies the billing obligations of Duke and the CRES providers (Constellation Br. at 2). In our consideration of the stipulation and the application of the criteria set forth above, the Commission will address the issues raised by OPAE in its motion to strike, as well as Constellation's request.

1. Rule 4901-1-30, O.A.C.

OPAE argues, both in its May 3, 2011, motion to strike and May 16, 2011, brief, that the stipulation should be rejected because the entities who were signatories to the stipulation were not parties to the proceeding at the time the stipulation was filed. In support of its contention, OPAE explains Rule 4901-1-30(A), O.A.C., provides that "[a]ny two or more parties may enter into a written or oral stipulation concerning issues of fact or the authenticity of documents," but avers that OCC and OEG were not parties to this proceeding when the application and stipulation were filed. Rule 4901-1-10, O.A.C., defines nonutility parties as those who have filed to intervene; therefore, according to OPAE, only Duke met the definition of party to this proceeding at the time the stipulation was filed. In sum, OPAE contends that Rule 4901-1-30, O.A.C., was designed to assure that stipulations would not be filed before parties had an opportunity to intervene, which did not occur in this case. Therefore, OPAE argues that the stipulation should be rejected. (OPAE Motion at 1-2; OPAE Br. at 2.)

In response, both Duke and Staff argue that, for purposes of Rule 4901-1-30, O.A.C., Staff is considered a party; therefore, there are more than two parties to the stipulation. Specifically, Duke and Staff explain that Rule 4901-1-10(C), O.A.C., provides that "[e]xcept for purposes of rules . . . 4901-1-30 . . . of the Administrative Code, the commission staff shall not be considered a party to any proceeding." Pursuant to Rule 4901-1-10(C), O.A.C., Staff is a party for purposes of entering into a stipulation with a utility. Moreover, Staff contends that nothing prohibits OCC and OEG from being considered parties simply because the stipulation was negotiated and filed prior to their filing motions for intervention. Duke also asserts that the Commission has, in the past, afforded interested persons and parties that have not yet formally intervened wide latitude to function as signatory parties to a stipulation and then file a subsequent motion to intervene. (Staff Br. at 6; Duke Memo Contra at 3.)

In considering OPAE's argument, the Commission is mindful of the definitions of parties contained in Rule 4901-1-10, O.A.C., and agrees with the assertion of Duke and Staff that Staff is a party for purposes of entering into a stipulation. Moreover, with

respect to OCC and OEG, the Commission does not believe that their filing of motions to intervene several days after the filing of the stipulation is a fatal flaw to the stipulation. Duke and Staff could have filed the stipulation as the only signatory parties, with OCC and OEG joining the stipulation after their motions to intervene had been filed. Therefore, with respect to OPAE's motion to strike based on Rule 4901-1-30, O.A.C., OPAE's motion is without merit and should be denied.

## 2. *Time Warner*

Duke witness Wathen explains that, when setting up the settlement negotiations in this matter, Duke sought to have representatives from various customer groups involved in the negotiations. Mr. Wathen states that, in the discussions, OCC represented the interests of residential customers. (Duke Ex. 2 at 6-7; Tr. at 20-22.)

To the contrary, OPAE submits that it was excluded from the settlement discussions in this case and argues that, because the stipulation was filed along with the application, potential intervenors were not put on notice that settlement negotiations may occur until after those negotiations had concluded. Moreover, OPAE contends that it was excluded from settlement negotiations even though OPAE's interest in Rider BTR and Rider RTO was well known, given its participation in *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO (Duke MRO Case). Therefore, because it was excluded from the settlement negotiations, along with other parties, OPAE argues that an exclusionary settlement process occurred which is contrary to sound public policy and raises questions concerning the procedural due process rights of interested stakeholders. Specifically, OPAE relies on *Time Warner* to argue that the stipulation should be stricken because it is the result of exclusionary settlement discussions. (OPAE Br. at 3-5; Motion at 1-2)

Moreover, OPAE points out that, although Duke witness Wathen asserts that all customer classes were represented in the settlement negotiations, because OCC is a residential group, OPAE is not necessarily a "residential group" with interests identical to OCC. OPAE avers that it is an Ohio corporation with a stated purpose of advocating for affordable energy policies for low- and moderate-income Ohioans and also represents its member agencies. OPAE explains that its interests are distinct from OCC's; therefore, OPAE argues that the inclusion of OCC in negotiations did not absolve the negotiators from inviting OPAE. OPAE also asserts that it was not the only customer group excluded from negotiations, as Cincinnati was also excluded and its intervention in the *Duke MRO Case* indicated its interest in the topic of these proceedings. In sum, OPAE concludes that, because Duke did not bargain with OPAE, Cincinnati, and other intervenors to the *Duke MRO Case*, the settlement negotiations

cannot be considered serious, meaning that no serious bargaining occurred and the stipulation should be rejected. (OPAE Br. at 4-5; Tr. at 21.)

In response, Staff argues that OPAE offered no proof that it was intentionally excluded from the negotiations or, moreover, that, because OPAE was excluded, no weight should be given to the stipulation. Specifically, Staff asserts that OPAE's reliance on *Time Warner* is misplaced because the entire customer class of residential customers was not excluded from the negotiations. Instead, OCC represented residential customers in this negotiation. (Staff Br. at 4-5.)

Duke also explains that no person or party was intentionally excluded from any of the negotiations leading up to the stipulation. Specifically, Duke explains that Riders BTR and RTO were first raised in the context of the *Duke MRO Case*, wherein numerous settlement discussions occurred and OPAE was invited to those discussions. Duke also argues that the facts of the instant case are easily distinguished from *Time Warner*, wherein an entire customer class was intentionally excluded from the settlement discussions. In this case, Duke avers that OCC represented all of Ohio's residential consumers and, although OPAE represents low-income consumers, there is a clear overlap of those interests. Furthermore, Duke argues that *Time Warner* cannot apply where settlement discussions occurred prior to the filing of the application. (Duke Memo Contra at 3-5.)

In considering whether the stipulation violates the Court's directive in *Time Warner*, the Commission is mindful that, although the Court stated that it had concerns regarding the Commission's adoption of a partial stipulation arising from exclusionary settlement meetings, the Court also stated that it "would not create a requirement that all parties participate in all settlement meetings." *Time Warner* (ft. nt. 2). The Commission does not believe that the stipulation at issue in this case resulted from exclusionary settlement meetings in that all customer classes were represented at the table. Therefore, OPAE's motion to strike based on *Time Warner* is without merit and should be denied. However, in future proceedings, Duke should be mindful of parties' issues in recent cases and attempt to include interested parties in settlement discussions. Having determined that OPAE's motion to strike the stipulation should be denied in its entirety, the Commission will consider other requests before turning to the application of the three-prong test for stipulations and our evaluation of the evidence presented by the signatory parties supporting the stipulation.

### 3. Constellation's Request

Constellation states that it supports Duke's application in these cases, provided that the Commission's approval be conditioned upon: Duke arranging with PJM for billing line item transfer agreements that are available to all CRES providers; the billing

line item transfer agreements must ensure that all nonmarket-based transmission costs collected through Rider BTR are charged directly to Duke's account by PJM, on behalf of the CRES providers; Duke's affirmative commit to assist CRES providers in the event of disagreements with PJM over the billing line item transfer agreements, particularly agreeing to reimburse CRES providers for any double-charging; and Duke's submittal of a compliance tariff consistent with these conditions. According to Constellation, failure to provide clarification on this issue could result in customers paying twice for certain RTO or transmission-related expenses. Constellation acknowledges that, on cross, Duke witness Wathen indicated that, once the transfer to PJM was complete, Duke would make suitable arrangements with PJM. (Constellation Br. at 1, 4; Tr. at 13.)

The Commission notes that, at the hearing, Mr. Wathen states that Duke would work with the CRES providers to get their input on the method to be used so that Duke makes the payments directly and relieves the CRES providers from paying the network integrated charges (Tr. at 13-14). Therefore, upon consideration of Constellation's request, the Commission finds that, while we do not find it necessary to condition approval of this application on the coordination of the issues raised, we believe that it is reasonable for Duke to work with the CRES providers to develop the necessary processes and agreements regarding billing as a result of Duke's move to PJM. Duke should take the steps needed to make sure that customers do not pay twice for certain RTO or transmission-related expenses. In addition, Duke should keep Staff informed as to the progress of these discussions and the resolution of the issues raised by Constellation.

#### 4. The Three-Prong Test

Duke witness Wathen testified that the stipulation is the product of an open process in which all stipulating parties were represented by able counsel. The witness further explains that all of the issues raised by the stipulating parties in these proceedings were thoroughly addressed during negotiations and all parties had an opportunity to express their opinions in the negotiation process. (Duke Ex. 2 at 6-7.)

Upon review of the terms of the stipulation, based upon our three-prong standard of review, the Commission finds that the first criterion, that the process involved serious bargaining by knowledgeable, capable parties, is met. The parties to this stipulation represent a wide array of interest and customer classes.

With regard to the second criterion, Mr. Wathen testified that the stipulation benefits ratepayers and is in the public interest. Specifically, Duke witness Wathen explains that the stipulation provides benefits across all customers groups and other interested stakeholders, including providing for Duke's timely realignment of RTOs. In addition, the stipulation provides assurance to Duke's customers that they will not be

exposed to certain costs imposed or charged by FERC or an RTO because Duke is foregoing its statutory right to seek recovery of certain transmission and transmission-related costs, thereby providing customers certainty with regard to what costs will be avoided. Accordingly, the stipulation negates the potential for protracted litigation and the costs and risks associated with such litigation. Moreover, under the terms of the stipulation, customers are insulated from the outcome of a matter pending at FERC. Witness Wathen also explains that the stipulation benefits CRES providers by removing the obligation to pay NITS and other nonmarket-based transmission costs, which may result in a reduced risk premium that CRES providers incorporate into their offers to customers, resulting in lower offer prices for shopping customers. Finally, Mr. Wathen contends that the stipulation terms will remove the requirement of wholesale suppliers to provide for transmission service included in Rider BTR. Thus, to the extent Duke's next SSO incorporates wholesale auctions, this provision enhances and further levels the competitive environment for all auction participants. (Duke Ex. 2 at 7-8.)

OPAE contends that the settlement does not benefit ratepayers and the public interest because it allows Duke to recover MTEP costs, including MVP costs directly or indirectly charged to Duke. According to OPAE, the stipulation lacks proper consumer protections and, at minimum, a cap and termination date for ratepayer-funded Midwest ISO costs should have been established, because customers should not be held liable for Duke's business decision to move from one RTO to another. OPAE explains that, if Duke had stayed in the Midwest ISO, customers would not be faced with any RTEP costs and would benefit from MTEP costs. (OPAE Br. at 6-8.)

OCC explains that the settlement provides multiple potential benefits for Duke's customers. Under the stipulation, customers are protected from the first \$121 million of PJM's RTEP costs. Duke's customers are also protected from paying PJM integration fees, Midwest ISO exit fees, and Duke's internal costs associated with its move to PJM. Additionally, OCC and Staff respond to OPAE's concerns by stating that there are a number of benefits to the stipulation, testified to by Mr. Wathen, including the potential for an enhanced competitive environment for all potential auction participants. (OCC Br. at 4; Staff Br. at 7.)

Upon review of the stipulation, we find that, as a package, it satisfies the second criterion by providing benefits to residential customers, regulatory certainty, and an enhanced competitive environment.

Finally, the signatory parties agree that the stipulation violates no regulatory principle or precedent. Specifically, Mr. Wathen explains that the stipulation does not violate any regulatory ratemaking principle and creates no interclass subsidies in its allocation of Duke's RTEP commitment to customers. (Duke Ex. 2 at 7.)

OPAE argues that the stipulation violates important regulatory principles and practices. Specifically, OPAE relies on the position of the parties in the *Duke MRO Case* to question whether the issues in this case should have been resolved without knowing the approved tariff charges relating to exit fees, entrance fees, RTEP, and MTEP costs. (OPAE Br. at 5-8.)

The Commission notes that our disposition of, and the positions of the parties in, the *Duke MRO Case* is a separate matter. Moreover, the Commission's discussion of proposed Rider BTR and Rider RTO as proposed in the *Duke MRO Case* was intended only as guidance. In the present cases, the riders are being considered within the context of a stipulation that was supported on the record and subject to cross examination and briefs. Upon consideration of the record in these cases, the Commission finds that there is no evidence that the stipulation violates any important regulatory principle or practice and, therefore, the stipulation meets the third criterion.

Accordingly, the Commission concludes that the stipulation entered into by the signatory parties is reasonable and should be adopted. Therefore, Duke should be authorized to create Rider BTR and Rider RTO, and the proposed tariff pages contained in Joint Ex. 1 at Exs. 1 and 2 should be approved. The Commission finds that Duke should file, in final form, four, complete, printed copies of the final tariff pages with the Commission's docketing division, as set forth in this order. The effective date of the new rates for Rider BTR and Rider RTO shall be no earlier than January 1, 2012.

The Commission continues to encourage electric utilities to provide consumers with options to meet their respective needs. See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Opinion and Order at 33 (August 25, 2010). However, we also continue to have concerns regarding the long-term impacts of PJM capacity pricing and related issues, such as price responsive demand, scarcity pricing, reliability, transmission cost allocation, and ancillary services. Without modifying the agreement of the stipulating parties with respect to challenging Duke's current decision to realign with PJM, the Commission nevertheless will continue to review the capacity markets, as well as other related RTO issues, and the effects of such on Ohio's customers. The Commission will open a new proceeding, if necessary, in order to address our concerns and may direct our Staff to consider all of the options available at that time.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) Duke is an electric light company, as defined in Section 4905.03(A)(3), Revised Code, and a public utility under Section 4905.02, Revised Code.
- (2) On April 28, 2011, Duke filed its application in this case.
- (3) On April 28, 2011, Duke filed a stipulation in this case, signed by Duke, Staff, OCC, and OEG, intending to resolve all issues in this case.
- (4) On May 3, 2011, OPAE filed a motion to strike the stipulation and Duke filed a memorandum contra the motion on May 5, 2011.
- (5) Comments on the application were filed by OPAE and Cincinnati.
- (6) On May 6, 2011, Duke filed a motion to strike Cincinnati's comments and Cincinnati filed a memorandum contra the motion on May 9, 2011. Duke's motion is without merit and should be denied.
- (7) On May 9, 2011, OCC, OMA, FES, OEG, OPAE, Constellation, Exelon, Cincinnati, and IEU were granted intervention.
- (8) The hearing in this matter was held on May 11, 2011.
- (9) At the hearing, the stipulation was submitted, intending to resolve all issues in this case.
- (10) OPAE's motion to strike the stipulation is without merit and should be denied.
- (11) The stipulation meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted.
- (12) Duke should be authorized to create Rider BTR and Rider RTO consistent with this order.

ORDER:

It is, therefore,

ORDERED, That Duke's motion to strike Cincinnati's comments be denied. It is, further,



ORDERED, That OP&E's motion to strike the stipulation be denied. It is, further,

ORDERED, That the stipulation of the parties be adopted and approved. It is, further,

ORDERED, That Duke take all necessary steps to carry out the terms of the stipulation and this order. It is, further,

ORDERED, That Duke be authorized to file in final form four complete copies of the tariff pages consistent with this opinion and order and to cancel and withdraw its superseded tariff pages. Duke shall file one copy in its TRF docket (or may make such filing electronically as directed in Case No. 06-900-AU-WVR) and one copy in these dockets. The remaining two copies shall be designated for distribution to the Rates and Tariffs, Energy and Water Division of the Commission's Utilities Department. It is, further,

ORDERED, That Rider BTR and Rider RTO shall be effective no sooner than January 1, 2012. It is, further,

ORDERED, That Duke shall notify its customers of the changes to the tariffs via bill message or bill insert within 30 days of the effective date of the revised tariffs. A copy of this customer notice shall be submitted to the Commission's Service Monitoring and Enforcement Department, Reliability, and Service Analysis Division at least 10 days prior to its distribution to customers. It is, further,

ORDERED, That nothing in this opinion and order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. 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

  
Todd A. Snitchler, Chairman

  
Paul A. Centolella

  
Steven D. Lesser

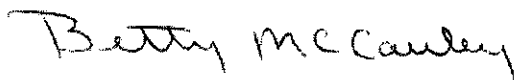
  
Andre T. Porter

  
Cheryl L. Roberto

KLS/CMTP/dah

Entered in the Journal

**MAY 25 2011**



Betty McCauley  
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

DISSENTING OPINION  
OF COMMISSIONER CHERYL L. ROBERTO

The Opinion and Order in this matter adopts a stipulation that was filed approximately four weeks ago, on April 26, 2011; the same day that the Application in this matter was filed. At the time the stipulation was filed, two of the signatories were not parties to the case (OCC and OEG). At least one intervening party (OPAE) had no opportunity to participate in the settlement discussions leading to the stipulation. The matter was set for hearing to begin two weeks after the application was filed on May 11, 2011. By the terms of the stipulation itself, it would expire if this Commission did not adopt it by June 1, 2011.

Given these facts, I cannot find that this settlement process was open or inclusive. Any interested party, not aware or participating in the settlement discussions which occurred before the application was filed would have no meaningful opportunity to prepare or participate in this matter. In light of these facts, I give no weight to the stipulation.

While there may be substantial reasons why this application should be granted, on the basis of the record, in the absence of a stipulation, I am not able to agree that the application should be granted.

A handwritten signature in cursive script, reading "Cheryl L. Roberto", written over a horizontal line.

Cheryl L. Roberto  
Commissioner

Entered in the Journal

**MAY 25 2011**

A handwritten signature in cursive script, reading "Betty McCauley", written over a horizontal line.

Betty McCauley  
Secretary