

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) Case No. 11-2642-EL-RDR
Establishment of Rider RTO and)
Associated Tariff Approval.)

ENTRY ON REHEARING

The Commission finds:

- (1) Duke Energy Ohio, Inc., (Duke) is an electric distribution utility and a public utility as defined in Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission.
- (2) 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. Duke proposed Rider BTR and Rider RTO to supplant Rider TCR at its expiration on December 31, 2011. On April 26, 2011, Duke also filed a stipulation and recommendation (stipulation), along with supporting testimony, in these dockets. The stipulation was signed by Duke, the Commission's Staff, the Ohio Energy Group (OEG), and the Ohio Consumers' Counsel (OCC) (jointly referred to as signatory parties).
- (3) By entry issued May 9, 2011, the motions to intervene, which were filed in accordance with the procedural schedule established in this case by numerous entities, including the OCC, OEG, and Ohio Partners for Affordable Energy (OPAE), were granted.
- (4) By opinion and order issued May 25, 2011, the Commission approved the April 26, 2011, stipulation submitted by the signatory

parties and approved the creation of Rider BTR and Rider RTO to supplant Rider TCR. In approving the stipulation, the Commission denied a motion to strike the stipulation filed by OPAE.

- (5) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in the proceeding by filing an application within 30 days after the entry of the order upon the journal of the Commission.
- (6) On June 21, 2011, OPAE filed an application for rehearing of the Commission's May 25, 2011, order citing two assignments of error.
- (7) On June 29, 2011, Duke filed its memorandum contra OPAE's application for rehearing.
- (8) In its first assignment of error, OPAE asserts that the Commission erred in denying its motion to strike the stipulation because the stipulation violates Rules 4901-1-10 and 4901-1-30, Ohio Administrative Code (O.A.C.). OPAE explains that the stipulation was filed by persons who were not parties to the proceedings because, although 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," OCC and OEG were not parties to these proceedings 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 these proceedings at the time the stipulation was filed.

OPAE does not disagree with the Commission's conclusion that pursuant to Rule 4901-1-30, O.A.C., for purposes of the stipulation, Staff is considered a party. Instead, OPAE argues that the Commission allowed its own processes to be circumvented by allowing the filing of the application and stipulation on the same day. According to OPAE, the filing of a stipulation should not be allowed until after an application is filed and potential intervenors have had an opportunity to intervene. OPAE explains that such a process would prevent intervenors from being foreclosed from participating in settlement discussions.

- (9) In response to OPAE's first assignment of error, Duke explains that, as the Commission recognized, pursuant to Rule 4901-1-30, O.A.C., Staff is considered a party for the purpose of entering into a

stipulation; therefore, there are two parties to the stipulation. Moreover, Duke disputes OPAE's assertion that no settlement discussions should ever occur until after an action is commenced and parties have had an opportunity to intervene. Instead, Duke asserts that OPAE has previously participated in settlement discussions and signed stipulations prior to the filing of an application. Therefore, its concerns must only apply in certain situations where it is not a signatory party.

- (10) In considering OPAE's first assignment of error, the Commission is mindful of the definition of parties contained in Rule 4901-1-10, O.A.C., and affirms its prior interpretation of Rule 4901-1-10, O.A.C., that Staff is a party for purposes of entering into a stipulation. Moreover, as we have previously stated, 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 somehow invalidates the stipulation. Rather, 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 and granted prior to the hearing on the stipulation. The Commission concludes that OPAE has raised nothing new on rehearing that was not previously considered by the Commission in its order; therefore, OPAE's first assignment of error is without merit and should be denied.
- (11) In its second assignment of error, OPAE asserts that the Commission inappropriately applied the criteria it uses to evaluate the reasonableness of a stipulation. Specifically, the Ohio Supreme Court has endorsed the Commission's analysis using the following criteria to resolve issues in a manner economical to ratepayers and public utilities:
 - (a) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
 - (b) Does the settlement, as a package, benefit ratepayers and the public interest?
 - (c) Does the settlement package violate any important regulatory principle or practice?

Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm., 68 Ohio St.3d 559, 561 (1994), citing *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126.

- (12) In support of its second assignment of error, OPAE opines that the stipulation was not the product of serious bargaining among knowledgeable, capable parties representing a wide range of interests, because OPAE believes the stipulation was the product of exclusionary settlement discussions. Moreover, OPAE asserts that the settlement process that occurred in this case is contrary to sound public policy and also raises questions concerning the procedural due process rights of interested stakeholders. In support of its position, OPAE argues that its exclusion from settlement discussions raises issues regarding whether the stipulation is the product of exclusionary settlement meetings, which the Ohio Supreme Court cautions against in *Time Warner AxS v. Pub Util Comm.*, 75 Ohio St.3d 229 (1996) (*Time Warner*). Specifically, OPAE questions our conclusion in the May 25, 2011, order that *Time Warner* did not create a requirement that all parties participate in all settlement meetings, which OPAE opines is a meaningless conclusion given that there were no parties to the case when settlement was reached. Instead, OPAE avers that all interested persons should be given the opportunity to intervene and participate in settlement discussions.
- (13) In response, Duke explains that *Time Warner* did not create a requirement that all parties, or, in the present cases, all potential parties, participate in all settlement discussions. Instead, Duke asserts that OPAE is asking this Commission to mandate that all intervening parties be made aware that settlement negotiations are taking place, even if each and every party does not attend each and every settlement meeting.
- (14) Furthermore, in its second assignment of error, OPAE disagrees with the Commission's conclusion that all customer classes were represented in settlement discussions. OPAE asserts that it is not a residential group, like OCC, but instead advocates for affordable energy policies for low- and moderate-income Ohioans and 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, some of which have commercial accounts with Duke. Therefore, according to OPAE, no other party can adequately represent its interests. OPAE also argues that other groups were also potentially excluded from settlement discussions whose interests were all known because of their 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*). In sum, OPAE believes the Commission erred in finding that the settlement process involved serious bargaining by knowledgeable, capable parties, and that the parties to the stipulation represented a wide array of interests and customer classes.

- (15) Conversely, Duke argues that all customer classes were represented at settlement discussions, disputing OPAE's contention that the customers it represents are substantially dissimilar from those customers represented by OCC. Duke explains that OPAE and OCC represent substantially overlapping classes of customers, and that, moreover, those customer classes need not be identical to have their interests represented by the participation of the other.
- (16) OPAE also argues, in its second assignment of error, that the Commission erred in finding that, as a package, the stipulation benefits ratepayers. Specifically, OPAE explains that, it is not certain what expenses Duke will incur in its transition from the Midwest Independent System Operator (Midwest ISO) to PJM Interconnection, LLC (PJM); therefore, the Commission has no quantification of the value of the stipulation to ratepayers because the costs are unknown. Instead, OPAE opines that the stipulation fails to provide consumers protection from future events that are central to the issues in these cases and does not protect customers from the consequences of Duke's unilateral business decision designed to benefit ratepayers.
- (17) Duke disputes OPAE's contention that the fact that costs are currently unknown indicates that the stipulation will have no value for ratepayers given that, as part of the stipulation, Duke agreed not to seek recovery of all of the ultimate amounts.
- (18) Finally, in its second assignment of error, OPAE asserts that the stipulation violates Commission precedent because a prudence review has not taken place, as the Commission stated would occur in the guidance the Commission offered in the *Duke MRO Case*. Moreover, even if the Commission conducted the prudence review it suggested in the MRO, OPAE opines that it is premature to conduct such a review, as costs are still unknown.

- (19) In response, Duke explains that any statements made in the *Duke MRO Case* regarding the filings of an application to establish new transmission riders was only intended to serve as guidance for any further filings. Therefore, Duke asserts that the Commission did not make any binding holdings in the *Duke MRO Case* regarding Duke's transmission riders.
- (20) In considering OPAE's second assignment of error, the Commission is aware 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). As discussed extensively in the May 23, 2011, opinion and order, the Commission does not believe that any customer class was excluded from the discussions leading up to the stipulation submitted in these cases (Order at 11-12). The Commission does not believe that the stipulation at issue in these cases resulted from exclusionary settlement meetings as discussed extensively in the May 25, 2011, opinion and order. Moreover, OPAE has raised nothing new on rehearing that was not previously considered by the Commission in its order.

In considering OPAE's contention that the stipulation does not benefit ratepayers because all of the benefits have not yet been quantified, we disagree. Although the exact costs of Duke's transition from the Midwest ISO to PJM are not known at this time, the stipulation does provide that Duke will not seek recovery of certain Midwest ISO exit fees, certain PJM integration fees, and the internal cost of the realignment from the Midwest ISO to PJM. Duke also commits to providing a credit to customers for the first \$121 million of regional transmission expansion planning costs charged to Duke by PJM. While it is true that certain expenses Duke will incur in its transition from the Midwest ISO to PJM have not yet been quantified, once those costs are known and Duke requests recovery of such costs, they will be subject to review and consideration by the Commission in subsequent proceedings wherein due process will be afforded in accordance with the statute. Furthermore, OPAE does not deny that there are benefits that accrue to customers as a result of the stipulation; rather, OPAE argues that the Commission should establish, in this case, certain consumer protections for events that may or may not occur in the future. Finally, OPAE does not describe any actual aspect of the

stipulation that violates an important regulatory practice or principle. Although the Commission mentioned, in the *Duke MRO Case*, that a prudence review may be necessary, our suggestion is not an established regulatory principle or practice and our suggestion was not a directive. We agree that it would be premature for the Commission to opine and establish parameters, at this time, on facts there are not before us for consideration in these cases. Therefore, the Commission concludes that OPAE's second assignment of error is without merit and should be denied.


It is, therefore,


ORDERED, That OPAE's application for rehearing be denied. It is, further,

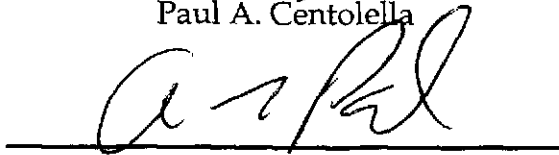
ORDERED, That, a copy of this entry on rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Paul A. Centolella


Steven D. Lesser

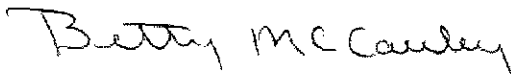

Andre T. Porter


Cheryl L. Roberto

KLS/CMTP/dah

Entered in the Journal

JUL 15 2011


Betty McCauley
Secretary