

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Administration of the)
Significantly Excessive Earnings Test) Case No. 13-804-EL-UNC
Under Section 4928.143(F), Revised Code,)
and Rule 4901:1-35-10, Ohio Administrative)
Code.)

OPINION AND ORDER

The Commission, 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 and Elizabeth H. Watts, 139 East Forth Street, 1303-Main, Cincinnati, Ohio 45202, on behalf of Duke Energy Ohio, Inc.

Mike DeWine, Ohio Attorney General, Thomas W. McNamee and Devin Parram, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of Staff of the Commission.

Boehm, Kurtz & Lowry, by David F. Boehm, Michael L. Kurtz, and Jody M. Kyler, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group.

OPINION:

I. Background

Pursuant to the language of Section 4928.14, Revised Code, electric utilities are required to provide consumers with a standard service offer, consisting of either a market-rate offer or an electric security plan (ESP). Pursuant to the directives of Section 4928.143(F), Revised Code, the Commission is required to evaluate the earnings of each electric utility's approved ESP to determine whether the plan produces significantly excessive earnings for the electric utility. On June 30, 2010, the Commission issued a finding and order in *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC, which established policy and significantly excessive earnings test (SEET) filing directives for the electric utilities.

On April 15, 2013, Duke Energy Ohio, Inc. (Duke or company) filed an application for the administration of the SEET for 2012, as required by Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code (O.A.C.) (Duke Ex. 1). That same day Duke filed the supporting testimony of Peggy A. Laub (Duke Exs. 2, 2a).

By entry issued May 1, 2013, the attorney examiner, *inter alia*, scheduled the hearing in this matter for June 11, 2013. On June 6, 2013, a stipulation and recommendation (Stipulation) entered into by Duke and Staff was filed in this proceeding (Jt. Ex. 1).

On May 3, 2013, the Ohio Energy Group (OEG) filed a motion to intervene in this matter. No one filed a memorandum contra OEG's motion to intervene. At the June 11, 2013, hearing, the attorney examiner granted the motion to intervene filed by OEG.

At the June 11, 2013, hearing, the Stipulation was introduced and Duke presented the testimony of witness William D. Wathen, Jr., who adopted the prefiled testimony of company employee Peggy A. Laub, in support of the Stipulation. OEG attested at the hearing that it did not oppose the Stipulation. Staff also submitted the testimony of Staff witness Joseph P. Buckley (Staff Ex. 1).

II. Application and Comments

In its application, Duke explains that, in *In the Matter of the Application of Duke Energy Ohio, Inc. for an Electric Security Plan*, Case No. 11-3549-EL-SSO, et al. (11-3549), the Commission approved a stipulation, which provides a mechanism for how the Commission will administer the SEET with regard to Duke. Specifically, Duke asserts that the stipulation approved in 11-3549 provides that, should Duke's actual annual return on ending common equity for each review year, as adjusted, not exceed 15 percent, Duke's return on common equity will be deemed to not be significantly in excess of the return on common equity that was earned during the same period by publicly traded companies facing comparable business and financial risks. (Duke Ex. 1 at 1-3.)

Duke submitted testimony along with its application indicating that Duke's return earned on average electric common equity for the year ended December 31, 2012, is (2.76) percent based on a calculated average electric common equity of \$2,193,642,807 and an adjusted electric net income of \$(60,571,934), including non-SSO sales and ESP deferrals. (Duke Ex. 2A at Att. PAL-1.) Duke represents that the company did not have significantly excessive earnings in 2012. (Duke Ex. 1 at 4-6; Duke Ex. 2 at 5, 12-14, Duke Ex. 2A at PAL-1).

III. Stipulation

A Stipulation signed by Duke and Staff was submitted, on the record, at the hearing held on June 1, 2013 (Jt. Ex. 1). The Stipulation was intended by the signatory parties to

resolve all outstanding issues in this proceeding. The Stipulation provides that Duke has calculated its earned return on average common equity for the year ended December 31, 2012, to be (2.76) percent. The parties agree that, consistent with the ESP approved in 11-3549, because this return is substantially lower than the 15 percent threshold, significantly excessive earnings did not occur with respect to the company's ESP in 2012. (Jt. Ex. 1 at 2.)

IV. Consideration of the Stipulation

Rule 4901-1-30, Ohio Administrative Code (O.A.C.), authorizes parties to Commission proceedings to enter into stipulations. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. See *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves almost 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. 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, 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 31, 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 Supreme Court of Ohio 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, 629 N.E.2d 423 (1994), citing *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992). Additionally, the Court stated that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission. *Consumers' Counsel* at 126.

Company witness Wathen testified that the Stipulation is a product of serious bargaining among capable, knowledgeable parties (Tr. at 11). Upon review of the terms of the Stipulation, based on our three-prong standard of review, we find that the first criterion, that the process involved serious bargaining by knowledgeable, capable parties, is met.

With regard to the second criterion, Mr. Wathen explained that the Stipulation benefits the public interest (Tr. at 11-12). Upon review of the Stipulation, we find that, as a package, it satisfies the second criterion as it benefits ratepayers by avoiding the cost of litigation.

Company witness Wathen also testified that the Stipulation does not violate any important regulatory principle or practice (Tr. at 12). 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, we find that the Stipulation entered into by the parties is reasonable and should be adopted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) Duke is a public utility as defined in Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission.
- (2) On April 15, 2013, Duke filed an application for the administration of the SEET, as required by Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, O.A.C.
- (3) The evidentiary hearing was held on June 11, 2013.
- (4) At the hearing, the Stipulation was submitted, intending to resolve all issues in this case. No one opposed the Stipulation.
- (5) The Stipulation meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted.

ORDER:

It is, therefore,

ORDERED, That the Stipulation filed in this proceeding be approved and adopted.
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 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 each party of record.

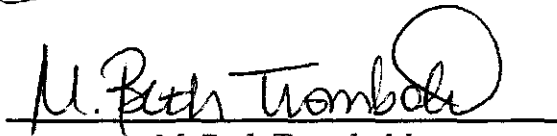
THE PUBLIC UTILITIES COMMISSION OF OHIO




Todd A. Snitchler, Chairman



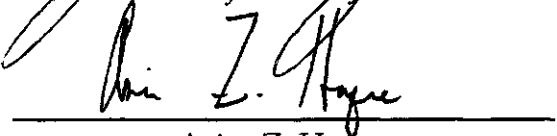
Steven D. Lesser



M. Beth Trombold



Lynn Slaby



Asim Z. Haque

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Entered in the Journal

AUG 21 2013



Barcy F. McNeal
Secretary