

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates.)))	Case No. 21-887-EL-AIR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.)))	Case No. 21-888-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.)))	Case No. 21-889-EL-AAM

**DUKE ENERGY OHIO, INC.’S MEMORANDUM CONTRA
APPLICATION FOR REHEARING OF THE OFFICE OF THE
OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

The Public Utilities Commission of Ohio (Commission) issued an Opinion and Order (Order) in the above-captioned proceeding on December 14, 2022, approving the electric distribution rates to be charged by Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company). The Office of the Ohio Consumers’ Counsel (OCC) seeks rehearing of that decision, apparently due to some confusion on OCC’s part about how rates are set. The Company is, like everyone else, concerned to see “soaring energy prices, inflation and unemployment . . . [, t]he stock market . . . crashing . . . and a recession . . . looming;”¹ however, rates are not set based on these concerns. Rather, rates are set based on preset factors: costs incurred in the provision of electric distribution service, revenues received in that endeavor, assets invested in and used for that service, and the return being earned on that investment.²

¹ Application for Rehearing by the Office of the Ohio Consumers’ Counsel, p. 1 (Jan. 13, 2023).

² R.C. 4909.15.

The Corrected Stipulation and Recommendation filed on September 19, 2022 (Stipulation), adopted by the Commission in this case is reasonable and appropriate, and meets the Commission’s standard three-pronged test. OCC’s application for rehearing should be denied.

II. LAW AND ARGUMENT

A. **The Stipulation Is the Product of Serious Bargaining Among Capable, Knowledgeable Parties and Therefore Meets the First Criterion.**

The Commission, when presented with a proposed settlement agreement, invariably tests that settlement against three criteria, as has been endorsed by the Ohio Supreme Court.³ The first criterion is for the Commission to consider whether the agreement resulted from serious bargaining among capable, knowledgeable parties. The Stipulation in these proceedings unquestionably did result from such bargaining.

OCC claims that there could be no serious bargaining because the parties had “unequal bargaining power” and Duke Energy Ohio leveraged its power to its own advantage. OCC proposes that the utility, in “PUCO settlements,” is treated as indispensable and that such treatment is an obstacle to serious bargaining.⁴ However, OCC points to no Commission precedent in which a proposed resolution of a case has been found not to be the result of serious bargaining, just because the utility was included. Indeed, following OCC’s rationale to its logical conclusion, the Commission should never approve a stipulation that includes the utility. Not only does this outcome not comport with the Court’s endorsement of the three-pronged test but it is patently absurd.

OCC also attempts to demonstrate the Company’s outsized power by quoting a separate opinion written by a former commissioner, written about an entirely distinct issue. Ms. Roberto,

³ See, e.g., *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559 (1994).

⁴ Memorandum in Support of Application for Rehearing by Office of the Ohio Consumers’ Counsel (OCC Application), p. 4 (Jan. 13, 2023).

writing in the context of the first electric security plan (ESP) proceedings for the FirstEnergy utilities, discussed the fact that the utility in such cases has the ultimate power because the law allows it to withdraw its application if it does not like the result. She specifically differentiated the situation in an ESP proceeding from others:

[B]ecause of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission. . . . In light of the Commission's fundamental lack of authority in the context of an ESP application to serve as the binding arbiter of what is reasonable, a party's willingness to agree with an electric distribution utility application can not be afforded the same weight due as when an agreement arises within the context of other regulatory frameworks.⁵

OCC simply ignores Ms. Roberto's crucial distinction and attempts to paint all litigated Commission cases with the same brush. This argument must fail.

OCC next complains that the Commission itself should have "equaliz[ed] the power among parties" apparently because, without that assistance from the Commission, the Company's "unequal bargaining power unfairly allowed [it] to present settlement terms to OCC on a take it or leave it basis."⁶ What OCC fails to explain is how a settlement that is so far removed from the original application in the case could possibly have been something that the Company simply presented on a take-it-or-leave-it basis. It is undeniable that the Company negotiated away from its original position.

OCC also wastes a great deal of ink on the concept that the Stipulation had to "reflect the broad interests of all consumers."⁷ The first criterion approved by the Court says nothing about this topic; it only looks to see whether bargaining did or did not occur and whether all parties were fairly represented by counsel. This issue, as part of the first criterion, is made up out of whole

⁵ *In the Matter of the Application of Ohio Edison Company, et al.*, Case No. 08-935-EL-SSO, *et al.*, Second Opinion and Order, Concurring and Dissenting Opinion of Cheryl Roberto, p. 2 (Mar. 25, 2009).

⁶ OCC Application, pp. 4-5.

⁷ *Id.*, pp. 5-7.

cloth by OCC so that it can have what amounts to veto power over stipulations.⁸ Nevertheless, the Commission will note that OCC wants the Company to moderate rate increases⁹ and, indeed, the Company did exactly that by agreeing to a rate increase that is far lower than what it had requested. The Commission will also note that the Stipulation does serve the broad interests of all consumers in various ways, regardless of OCC's meritless arguments concerning the percentage of the rate increase to be borne by various categories of customers and the supposedly "parochial" interests of several of the intervening parties.

Finally, Duke Energy Ohio strongly disagrees with OCC's accusation that the Company "dangles money" or "provides benefits" in exchange for a party agreeing to a settlement proposal.¹⁰ The very nature of negotiation is to offer one thing in exchange for another; it is a back-and-forth process that, if successful, results in parties jointly agreeing to an overall outcome. OCC also participates in such negotiation, as was admitted in OCC's testimony.¹¹ OCC's accusations are unsupported in the record and were proven false by its own witness at hearing. As noted by the Commission's Order, OCC witness Williams admitted at hearing that : 1) he did not communicate with any parties as to their reasoning for joining the Stipulation; 2) Duke did not offer monetary payments to either Staff or any commercial or industrial customers; 3) in certain

⁸ In fact, the Commission has routinely upheld stipulations opposed by OCC, recognizing that no single party holds a veto right with respect to the first prong of the three-part test for examining stipulations. *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 13-1571-GA-ALT, Opinion and Order (Feb. 19, 2014) at 10. *See also In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of an Alternative Form of Regulation to Extend and Increase Its Infrastructure Replacement Program*, Case No. 16-2422-GA-ALT, Opinion and Order, ¶ 70 (Jan. 31, 2018) ("To permit a party to drive the scope of the issues that must be revised in the Stipulation, as OCC proposes, would be akin to a single party veto of the stipulation. The Commission has consistently determined that no single party, including OCC, is required to agree to a stipulation, in order to meet the first prong of the three-prong test."); *Dominion Retail, Inc. v. The Dayton Power and Light Co.*, Case No. 03-2405-EL-CSS, et al., Opinion and Order (Feb. 2, 2005) at 18 ("The Commission will not require OCC's approval of stipulations."); *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 04-571-GA-AIR, et al., Opinion and Order (Apr. 13, 2005) at 9 ("There is no requirement that any particular parties execute stipulations in order for the first prong of the test for stipulations to be met.").

⁹ *Id.*, p. 5.

¹⁰ *Id.*, pp. 7-8.

¹¹ Opinion and Order, ¶ 102 (Dec. 14, 2022)

circumstances where Duke's Application included funding for a given party, particularly PWC, the funding previously existed in base rates approved by the Commission in other proceedings and was included in the Company's Application before the Stipulation was finalized; 4) the Stipulation does not provide funding to CUB-Ohio; 5) there are no provisions where Duke agreed to give funding to OP&E; and 6) the Cincinnati weatherization funding comes from the franchise fee that Duke is obligated to pay.¹² Finally, and most significantly, OCC's own "disingenuous" testimony reveals that OCC as the party that demanded significant shareholder dollars be provided by the Company in these proceedings.¹³

OCC's first assignment of error should be denied.

B. The Stipulation Does Not Violate Ohio Law.

Contrary to OCC's second assignment of error, the Stipulation does not violate R.C. 4905.33 or paragraphs (A) or (L) of R.C. 4928.02. First, although R.C. 4905.33 is a requirement in the normal use of that term, the various paragraphs of R.C. 4928.02 are not. The latter are statements of policy. The state policy is to ensure the availability of nondiscriminatory service and to protect at-risk populations. And that is a meritorious state policy. However, it is not a requirement that a utility must, at all times, protect at-risk populations and avoid discrimination of any nature. Hence, it cannot be said that the Stipulation "violates" R.C. 4928.02.

Ohio law requires utilities to provide service to all customers in exchange for the same charge, under substantially the same circumstances and conditions.¹⁴ Here, the City of Cincinnati intervened in these proceedings and as part of settlement, the City has committed to offer specific services for low-income customers within its borders that would be funded out of the franchise fee

¹² Opinion and Order p. 44 (Dec. 14, 2022).

¹³ *Id.*

¹⁴ R.C. 4905.33(A).

that Duke Energy Ohio already pays. OCC thinks that the Company should provide those same services, without the funding, throughout its territory and that to do otherwise is illegally discriminatory. OCC is missing the point. The City of Cincinnati is the party providing these low-income services and in exchange for the Company agreeing to pay a fixed franchise fee, the City has committed to use a portion of that fee to fund such services.

The Ohio Supreme Court has ruled definitively on the reading of this statute, pointing out that, “[i]f the utility services rendered to customers are different or if they are rendered under different circumstances or conditions, differences in the prices charged and collected are not proscribed by R.C. 4905.33.”¹⁵ Requiring the Company to offer the same services in different locations, where the funding opportunity exists in one and not in the other, is not the rectification of discrimination. Rather, it would create discrimination in reverse, by forcing Cincinnati to use franchise-fee revenue to fund what other communities can get for free.

It is also beyond dispute that the Company need not offer identical commitments to parties and non-parties. OCC criticizes the Company for making commitments only to Cincinnati regarding bill-payment assistance, streetlights, smart city technology, service to water treatment facilities, and asset relocations. But no other local governments intervened. How could the Company, without intervention, know that other areas need those same improvements? How can OCC know? And how can OCC argue that the circumstances in other localities are the same as those in Cincinnati, so as to meet the standard expressed by the Court in *Weiss*?

OCC’s second assignment of error should be denied.

¹⁵ *Weiss, D.B.A. Center West Realty Company v. Pub. Util.Comm.*, 90 Ohio St.3d 15, 16 (2000).

C. The Procedural Schedule Allowed All Parties Reasonable Time for Case Preparation and Ample Rights of Discovery.

OCC points to a recent Ohio Supreme Court decision to bolster its assertion that the Commission did not allow sufficient time for OCC to issue discovery requests and prepare its case. In that decision, the Court remanded the underlying proceeding back to the Commission with the instruction, among other things, that it must rule on the merits of discovery motions, thereby balancing the statutory right to discovery against the statutory deadline on Commission action. Critically, however, in the underlying Commission proceeding, the intervenors had not had the opportunity to obtain responses to any discovery questions at all.¹⁶

In contrast, OCC issued ten sets of discovery prior to the filing of the Stipulation, spanning the period from October 14, 2021, to August 2, 2022. Those ten sets included 223 interrogatories and 71 requests for the production of documents. After the filing of the Stipulation, it issued three more sets of discovery, comprising 27 more interrogatories, 29 more requests for the production of documents, and five requests for admissions and noticed depositions of the Company's witnesses.¹⁷ OCC was provided ample time for discovery.

The Commission's procedural schedule was entirely reasonable. OCC's third assignment of error should be denied.

III. CONCLUSION

For the reasons set forth above, Duke Energy Ohio respectfully requests that the Commission deny the OCC's Application for Rehearing.

¹⁶ *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*, 166 Ohio St.3d 519, 2021-Ohio-3630, ¶¶ 15, 17, 42.

¹⁷ *See Amended Notice to Take Depositions by the Office of the Ohio Consumers' Counsel* (Sept. 20, 2022).

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Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum Contra Application For Rehearing of the Office of Ohio Consumers' Counsel electronically filed by Mrs. Tammy M. Meyer on behalf of Duke Energy Ohio Inc. and D'Ascenzo, Rocco and Kingery, Jeanne and Akhbari, Elyse Hanson and Vaysman, Larisa and Brama, Elizabeth and Verhalen, Kodi J.