

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

SECOND ENTRY ON REHEARING

Entered in the Journal on March 20, 2024

I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by the Ohio Consumers' Counsel.

II. PROCEDURAL BACKGROUND

{¶ 2} Duke Energy Ohio, Inc. (Duke or the Company) is an electric light company as defined by R.C. 4905.03 and a public utility as defined by R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} The fixation of rates for public utilities in the state of Ohio is governed by R.C. Chapter 4909. R.C. 4909.17, 4909.18, 4909.19, and 4909.43 enumerate the statutory requirements for an application to increase a public utility's rates. The Commission adopted Ohio Adm.Code 4901-7-01 and its appendix (Standard Filing Requirements), pursuant to R.C. 4901.13, 4909.04(C), and 4909.18. The Standard Filing Requirements specify the format

for filing all information required in an application for an increase in rates and define the information that the Commission requires, pursuant to R.C. 4909.18(E).

{¶ 4} On September 1, 2021, Duke filed a notice of intent to file an application for an increase in rates, pursuant to R.C. 4909.43(B) and in compliance with Ohio Adm.Code 4901-7-01, Appendix A, Chapter I of the Commission's Standard Filing Requirements. Concurrently, Duke also filed a motion to set a test period and date certain and for a waiver of certain filing requirements.

{¶ 5} On October 1, 2021, Duke filed its application (Application) to increase its rates pursuant to R.C. 4909.18. Duke filed direct testimony in support of its Application on October 15, 2021.

{¶ 6} By Entry issued on October 20, 2021, the Commission granted a motion filed by Duke on September 1, 2021, for a waiver of certain Standard Filing Requirements. The Commission also approved Duke's proposed date certain of June 30, 2021, and established a test year of the 12 months ending March 31, 2022.

{¶ 7} By Entry dated January 26, 2022, the Commission accepted the Application for filing as of October 1, 2021, and directed Duke to publish notice of the Application pursuant to R.C. 4909.19.

{¶ 8} Pursuant to R.C. 4909.19, Staff conducted an investigation of the facts, exhibits, and matters relating to the application. Staff filed a written report of its investigation (Staff Report) on May 19, 2022.

{¶ 9} The following entities were granted intervention in these proceedings: Ohio Energy Group (OEG); Ohio Consumers' Counsel (OCC); Ohio Manufacturers' Association Energy Group (OMAEG); The Kroger Co. (Kroger); City of Cincinnati (Cincinnati); Interstate Gas Supply, Inc. (IGS); Retail Energy Supply Association (RESA); Ohio Partners for Affordable Energy (OPAE); Walmart Inc. (Walmart); ChargePoint, Inc. (ChargePoint);

Nationwide Energy Partners, LLC (NEP); Citizens' Utility Board of Ohio (CUB-Ohio); One Energy Enterprises LLC (One Energy); and People Working Cooperatively, Inc. (PWC).

{¶ 10} Objections to the Staff Report were filed by various parties on June 21, 2022.

{¶ 11} A local public hearing was held at Middletown City Hall Council Chambers in Middletown, Ohio on July 18, 2022; Butler Tech in Liberty Township Ohio on July 20, 2022; and Cincinnati City Hall in Cincinnati, Ohio on July 26, 2022. Numerous public comments were also filed, most of which express opposition to Duke's request to increase its rates.

{¶ 12} On September 19, 2022, a joint stipulation and recommendation (Stipulation) was filed by Staff, Duke, OP&E, OEG, Cincinnati, PWC, RESA, Walmart, IGS, One Energy, NEP, and CUB-Ohio (collectively, Signatory Parties). OMAEG, Kroger, and ChargePoint signed the Stipulation as non-opposing parties (collectively, Non-Opposing Parties). On the same day, Duke filed an updated version of the Stipulation to fix a typographical error omitting the party heading for Cincinnati's signature. On September 26, 2022, Duke filed a corrected version of Attachment 4 of the Stipulation.

{¶ 13} The evidentiary hearing commenced on October 4, 2022, and concluded on October 11, 2022.

{¶ 14} On December 14, 2022, the Commission issued an Opinion and Order approving the Stipulation.

{¶ 15} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

{¶ 16} On January 13, 2023, OCC filed an application for rehearing of the December 14, 2022 Opinion and Order. On January 23, 2023, Duke filed a memorandum contra OCC's application for rehearing.

{¶ 17} On February 8, 2023, the Commission issued an Entry on Rehearing granting OCC's application for rehearing for the limited purpose of further consideration of matters specified within the application for rehearing.

III. DISCUSSION

A. Assignment of Error No. 1

{¶ 18} In its first assignment of error, OCC asserts that the Commission erred by unreasonably approving the Stipulation, arguing it was not the result of serious bargaining and does not represent the broad interests of residential consumers. OCC largely reiterates arguments it already made on this topic in brief prior to issuance of the Opinion and Order. According to OCC, Duke used its superior bargaining power to ignore OCC's positions and chose to bargain with parties who claimed to have residential customer interests at heart but who actually possess narrower interests than OCC's broad residential customer interests in Ohio. OCC points to a concurring and dissenting opinion from a former commissioner who stated that, in the context of an electric security plan application, the utility possesses a strong bargaining position because it can withdraw a Commission-modified and approved plan. *In re the Application of Ohio Edison Co.*, Case No. 08-935-ELSSO, et al., Concurring and Dissenting Opinion of Cheryl Roberto (Mar. 25, 2009) at 2. Here, OCC argues that there are virtually no settlements presented to the Commission that do not include the utility, which allows the utility to argue it is an indispensable party to negotiations when bargaining with other parties during the settlement process. OCC asserts that the Opinion and Order fails to address Duke's unequal bargaining power in settlement negotiations, which undermines its finding that serious bargaining occurred. (OCC App. for Rehearing at 3-5.)

{¶ 19} In response to the Commission’s reasoning that OCC cannot unreasonably withhold its signature to a stipulation to veto a stipulation, OCC argues that the number of settling parties does not show serious bargaining if the Stipulation fails to reflect the broad interests of all consumers. OCC contends that the Commission should consider a diversity of interests among the Signatory and Non-Opposing Parties in this case. OCC highlights that non-residential settling parties like Walmart and OEG benefit from Stipulation provisions that call for non-residential customers to pay a smaller percentage allocation of the agreed-to \$23.1 million rate increase as compared to residential customers. OCC argues that NEP, ChargePoint, and OneEnergy have little interest in what residential consumers pay. Further, OCC argues that parties who purport to be representatives of residential consumers, such as OPAE, CUB Ohio, PWC, Staff, and Cincinnati, have narrower interests than OCC’s mandate of representing the residential customer class as a whole. According to OCC, even though these parties have limited residential consumer interests, they all refused OCC’s proposals, which “* * * is not fair, and it is not serious bargaining.” OCC submits that a settlement that serves narrow interests costs Duke less money and, the more settling parties Duke has, the more the Stipulation appears to serve the broad interests of all consumers, when, in OCC’s perspective, it does not. (OCC App. for Rehearing at 5-7.)

{¶ 20} Regarding the Commission stating that OCC’s argument related to Duke “dangling money” for parties’ settlement signatures is meaningless and disingenuous, OCC asserts that a stipulation does not have to state any specific monetary payment in order for there to be a benefit to a settling party. OCC mentions that non-residential settling parties and non-opposing parties receive favorable allocations under the settlement. OCC points out that the continuance of funding for weatherization for PWC is a financial benefit because, if not included in the Stipulation, such absence would be a financial loss to PWC. Concerning Cincinnati, OCC believes Duke’s commitments to Cincinnati are also benefits, though only benefits for Cincinnati’s residents. (OCC App. for Rehearing at 7-9.)

{¶ 21} In response to OCC’s argument that settlements before the Commission treat the utility as indispensable to such agreements, which OCC views as an obstacle to serious

bargaining, Duke asserts that OCC fails to provide any Commission precedent showing that a settlement was not the result of serious bargaining since the utility was included. Further, Duke believes that the logical conclusion of this rationale results in the Commission never approving a stipulation that includes a utility. Duke also points out that OCC's reliance on former Commissioner Cheryl Roberto's dissent in a prior Commission case concerning an electric security plan (ESP) and a utility's outsized power in such a process fails to acknowledge that Commissioner Roberto's comments were in the context of an ESP application, which is inapposite to this case. (Duke Memo Contra at 2-3.) In response to OCC's argument that Duke's unequal bargaining power unfairly allows Duke to present settlement terms on a take it or leave it basis, Duke contends that it is undeniable that it negotiated far away from its original position to such an extent that OCC's argument is senseless. Further, Duke notes that OCC's assertion that the Stipulation should reflect the broad interests of all consumers is faulty because the first criterion upon which the Commission relies in weighing the reasonableness of settlements before it does not include OCC's standard, which in effect would provide OCC with veto power over a stipulation if OCC has not signed the stipulation. Regarding OCC's claim that Duke dangles money or provides benefits in exchange for a party to join a settlement, Duke vehemently denies such an accusation and notes that offering one thing in exchange for another is the very nature of negotiation. Further, Duke provides many other reasons why it believes OCC's accusation is proven false by the record. Accordingly, Duke argues that OCC's first assignment of error should be denied. (Duke Memo Contra at 2-5.)

{¶ 22} The Commission finds that OCC's first assignment of error is meritless and, therefore, should be denied. Most of OCC's arguments supporting its first assignment of error were already addressed in the Opinion and Order. Opinion and Order at ¶¶ 100-104. OCC argues that nearly all settlements filed before the Commission include the utility, making the utility an indispensable party with unequal bargaining power. First, as Duke notes, OCC fails to present any Commission precedent establishing that a settlement is not the product of serious bargaining if the utility is included in the settlement. Typically,

utilities are the entities who file many of the cases before the Commission, usually in the form of an application requesting some type of Commission approval, so it is not surprising that the utility would likely be included on most, if not all, settlements that affect that specific application. However, nothing precludes intervenors from presenting a stipulation for the Commission's consideration. OCC points to a concurring and dissenting opinion in a prior Commission case, arguing that the utility possesses a strong bargaining position because it can withdraw a Commission-modified and approved plan. *In re the Application of Ohio Edison Co.*, Case No. 08-935-EL-SSO, et al., Concurring and Dissenting Opinion of Cheryl Roberto (Mar. 25, 2009) at 2. OCC's reliance on the reasoning from this prior opinion is misplaced. Here, the rate application was filed pursuant to R.C. Chapter 4909, not R.C. Chapter 4928. Thus, the basis upon which that prior dissenting opinion is based – the power to withdraw a Commission-modified plan – is unique to R.C. 4928.143 and, therefore, absent in this case. In addition, in the ESP context, the electric utility's right to withdraw its proposed ESP, if exercised, comes with a cost, which is that the utility gets none of the benefits that it included in the withdrawn proposal. Consequently, the ability to withdraw the proposal is double-edged. It is not obvious that it necessarily provides a negotiation advantage to the utility. It very well might be more accurately characterized as a stop-loss mechanism, and, in any event, it is a provision that the Legislature included in the ESP statute.

{¶ 23} We also find meritless OCC's argument that the number of settling parties does not show serious bargaining if the Stipulation fails to reflect the broad interests of all consumers. OCC again attempts to distinguish itself from the other parties who signed the Stipulation as Signatory or Non-Opposing Parties in the hopes of showing that these parties had limited residential consumer interests, thus demonstrating that the Stipulation serves only non-diverse, narrow interests. Again, we fully addressed this argument in the Opinion and Order. Opinion and Order at ¶ 101. We noted that, at times, the Commission has looked at the diversity of interests in proceedings where a large number of parties were able to achieve a settlement agreement, reflecting a broad coalition of competing interests, as one

indicator that serious bargaining occurred. Opinion and Order at ¶ 101. We also emphasized that no single party is afforded veto power under the first part of the three-part test, which we believed OCC was attempting to do. Opinion and Order at ¶ 101. Ultimately, despite OCC's arguments on rehearing otherwise, we see no reason to alter our finding that serious bargaining occurred, in part, because, "* * * the vast array of stakeholders who signed the Stipulation represent a cross-section of customer classes, including advocates for residential customers, with varying competing interests." Opinion and Order at ¶ 101.

{¶ 24} Finally, we also find unavailing OCC's argument that Duke enticed a coalition of parties to sign the Stipulation by offering specific benefits. In the Opinion and Order, we specifically acknowledged that the settling parties receive benefits under the Stipulation, "While many signatory parties receive benefits under the Stipulation, we will not conclude that these benefits are the sole motivation of any party in supporting the Stipulation." Opinion and Order at ¶ 102. What OCC complains of is typically how settlements work, "we expect the parties to a stipulation will bargain in support of their own interests in deciding whether to support a stipulation. We further believe that parties are best positioned to determine their own best interests and whether any potential benefits outweigh any potential costs." Opinion and Order at ¶ 102. Furthermore, we reiterate the reasoning we provided on this issue in the Opinion and Order. Opinion and Order ¶ 102. In conclusion, while OCC believes Duke used unequal bargaining power to entice parties with narrow interests (i.e., not statewide consumer interests) with monetary benefits to join a Stipulation, we found above that OCC's arguments are unfounded and meritless; therefore, OCC's first assignment of error should be denied.

B. Assignment of Error No. 2

{¶ 25} In its second assignment of error, OCC asserts that the Commission erred by unlawfully approving a settlement that discriminates against consumers outside the city of Cincinnati in violation of R.C. 4928.02(A) and R.C. 4905.33 and fails to protect at-risk populations in violation of R.C. 4928.02(L). OCC notes that the Stipulation provides

\$350,000 in annual funding for weatherization, energy efficiency, and bill-payment assistance programs for qualifying low-income residents in Cincinnati, and then OCC focuses on the Commission's explanation as to the reasonableness of this arrangement that this funding comes from the franchise fee Duke is obligated to pay any city within its territory. OCC contends that the order fails to protect at-risk populations outside of Cincinnati since bill-payment assistance is not promised to them. OCC asserts that this reasoning is "beside the point" and does not justify Duke's failure to provide similar assistance to non-Cincinnati residents. OCC also argues that it is discriminatory to provide commitments to Cincinnati, such as a streetlight improvement project, establishing Smart City technology, and other projects, that it does not promise to provide to other local governments in its service territory. Additionally, OCC notes that the Commission stated that the three-part test it considers when weighing a stipulation pertains only to parties and does not obligate Duke to negotiate with non-parties to a proceeding. According to OCC, Duke is obligated to provide nondiscriminatory service to all consumers within its service territory regardless of whether a locality intervenes in a case or not. (OCC App. for Rehearing at 9-11.)

{¶ 26} In response, Duke first notes that R.C. 4928.02 provides statements of meritorious state policy, meaning it is not a requirement that a utility, at all times, protect at-risk populations and avoid discrimination of any nature, meaning it is incorrect to say, as OCC does, that a stipulation can "violate" R.C. 4928.02. According to Duke, under R.C. 4905.33(A) and as further articulated by the Ohio Supreme Court in *Weiss, d.b.a. Center West Realty Co. v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 16, 734 N.E.2d 775 (2000), utilities must provide service to all customers in exchange for the same charge under substantially the same circumstances and conditions. Duke asserts that Cincinnati intervened in this proceeding and, as part of the settlement, committed to offer specific services for low-income customers within its borders that will be funded by the franchise fee Duke already pays. Duke notes that OCC believes Duke should provide those services, without funding, throughout its territory and that to do so otherwise is illegally discriminatory; however,

Duke argues that such an arrangement would actually be discriminatory to Cincinnati since it would force Cincinnati to use franchise-fee revenue to fund what other localities would get for free. Furthermore, Duke argues that it is beyond dispute that Duke does not need to offer identical commitments to parties and non-parties. Without other local governments intervening, Duke rhetorically asks how it or OCC could know whether those other localities need the same agreed-to improvements. Consequently, considering the above, Duke requests that OCC's second assignment of error be denied. (Duke App. for Rehearing at 5-6.)

{¶ 27} The Commission finds OCC's second assignment of error unavailing and, therefore, should be denied for the same reasons as already articulated in the Opinion and Order. Opinion and Order at ¶¶ 146-47, 173. Further, OCC believes it is "beside the point" that but for the Stipulation the portions of the franchise fee that would be used for bill payment assistance and for weatherization in Cincinnati could have been used for other purposes. Instead, OCC believes that promising to provide such funding for these specific services is discriminatory against consumers and localities outside of Cincinnati and within Duke's service territory. OCC argues that Duke must provide nondiscriminatory services to all customers and localities regardless of whether they intervened in this proceeding or not. While as a general tenet, OCC's statement holds true that Duke should provide nondiscriminatory services in its territory regardless of intervention (in the context of R.C. 4905.33(A)), it ignores the reality that the franchise fee revenue belongs to Cincinnati. Cincinnati intervened in this proceeding, and the provisions related specifically to Cincinnati in the Stipulation, such as the streetlight replacement project, smart city projects, and other programs, resulted from settlement discussions between Cincinnati and Duke in this proceeding. Further, Ohio Adm.Code 4901-1-30, the Commission rule allowing stipulations in Commission cases, contemplates that such agreements be between "parties" to the case. Ohio Adm.Code 4901-1-30. It is significant that Cincinnati intervened in this proceeding and other localities did not; as Duke noted, it is not possible to evaluate whether the cost-benefit of the arrangement Cincinnati negotiated would be of comparable value to

other communities. Again, despite OCC's attempts to characterize portions of the Stipulation related to Cincinnati, such as the use of the franchise fee for bill-payment assistance and weatherization program, as illegally discriminatory, after weighing the evidence, we have already stated and still maintain that "*** the Commission does not view this program as discriminatory[.]" Opinion and Order at ¶ 173.

C. Assignment of Error No. 3

{¶ 28} In its third assignment of error, OCC asserts that the Commission erred by unlawfully upholding a procedural schedule that limited OCC's case preparation and restricted OCC's rights of discovery in violation of R.C. 4903.082 and Ohio Supreme Court precedent. Under this assignment of error, OCC primarily reiterates the arguments it provided in its initial brief regarding this issue (OCC Initial Br. at 42-46). OCC argues that the attorney examiners erred by setting a procedural schedule that was prejudicial to residential consumers and OCC's case preparation. OCC claims that the schedule set by the attorney examiners was unfair and, consequently, the Stipulation should be rejected. OCC notes that the Stipulation was filed with the Commission on September 19, 2022, and that a prehearing conference was held remotely on September 20, 2022. OCC claims that, despite its objections, the attorney examiners set an unfair procedural schedule in which testimony in support of the Stipulation was due September 22, 2022; testimony in opposition was due September 29, 2022; and the hearing was scheduled for October 4, 2022.

{¶ 29} OCC claims that the procedural schedule severely impaired OCC's discovery rights with respect to the Stipulation filed on September 19, 2022. OCC states that the September 20, 2022 Entry required discovery responses within five calendar days and that OCC's ability to conduct sufficient discovery was still limited. OCC notes that settlement negotiations between Duke, Staff, and other parties did not begin until after the Staff Report was filed and initial discovery ended. OCC claims that Duke's statement in its memorandum contra that OCC had "over a year" since Duke filed the Application to ask any questions is untrue. OCC states that the Stipulation's final language was not circulated

to all parties until the end of the settlement negotiations. OCC argues that the resulting Stipulation gave rise to the need for new and additional discovery. Also, according to OCC, the Commission's reliance on the 275-day statutory timeframe under R.C. 4909.42 when agreeing with the attorney examiners' procedural schedule should be disregarded considering the Ohio Supreme Court's reasoning in *In re Application of Suvon, L.L.C.*, 166 Ohio St.3d 519, 2021-Ohio-3630, 188 N.E.3d 140.

{¶ 30} In its memorandum contra, Duke notes that, in *In re Suvon*, the Court remanded the proceeding back to the Commission such that the Commission must rule on the merits of discovery motions, which then would balance the statutory right to discovery against the statutory deadline on Commission action. Duke emphasizes that, in that proceeding, the intervenors had not had the opportunity to obtain responses to any discovery questions. Here, however, Duke asserts that OCC was provided ample time for discovery. According to Duke, OCC issued ten sets of discovery prior to the filing of the Stipulation, from October 14, 2021, to August 2, 2022. After the Stipulation was filed, OCC issued three more sets of discovery, consisting of 27 more interrogatories, 29 more requests for production of documents, and 5 requests for admissions and noticed depositions of Duke witnesses. Therefore, Duke believes that the Commission's procedural schedule was reasonable, and OCC's third assignment of error should be denied. (Duke Memo Contra at 7.)

{¶ 31} The Commission finds that OCC's third assignment of error should be denied for largely the same reasons articulated in the Opinion and Order. Opinion and Order at ¶ 28. Attorney examiners have broad discretion in regulating the hearing process under Ohio Adm. Code 4901-1-27. As noted in the Opinion and Order, procedural schedules vary, likely based on a number of factors, including, but not limited to, statutory requirements; schedules of the parties, witnesses, Staff, and the attorney examiners; and the availability of Commission resources. Additionally, OCC points to the Ohio Supreme Court's decision in *Suvon* to contradict part of our reasoning in the Opinion and Order rejecting OCC's arguments, where we noted that the Commission must keep in mind the

275-day statutory timeframe under R.C. 4909.42 when progressing the case's schedule. However, nothing in *Suvon* undermines our obligation to bear in mind the mandatory deadlines set forth by the General Assembly in R.C. 4909.42. *Suvon* is also distinguishable from the situation at hand in that there were no pending discovery motions before the Commission at the time the attorney examiners issued the procedural schedule, and there were no pending discovery motions at the time the Commission issued its Opinion and Order.¹ Moreover, Duke represents that OCC issued ten sets of discovery from October 14, 2021, to August 2, 2022, and that, after the Stipulation was filed, OCC issued three more sets of discovery, consisting of 27 more interrogatories, 29 more requests for production of documents, and 5 requests for admissions, as well as noticed depositions of Duke witnesses. Clearly, as stated in the Opinion and Order, OCC had ample time to conduct discovery and prepare for the hearing and has not shown that the procedural schedule was unduly prejudicial or unreasonable under the circumstances of these proceedings.

IV. ORDER

{¶ 32} It is, therefore,

{¶ 33} ORDERED, That the application for rehearing filed by OCC should be denied. It is, further,

¹ The Commission notes that two motions for protective order filed by Duke on October 1 and 15, 2021 were still pending at the time the attorney examiner issued the procedural schedule and when the Opinion and Order was issued; however, these motions requested confidential treatment of specific documents for trade secret purposes to prevent public disclosure. Despite OCC contesting a portion of the October 15, 2021 motion for protective order, the dispute centered on the merits of preventing public disclosure. The dispute was not related to the exchange of documents between parties during discovery.

{¶ 34} ORDERED, That a copy of this Second Entry on Rehearing be served upon all parties of record.

COMMISSIONERS:

Approving:

Jenifer French, Chair
Daniel R. Conway
Lawrence K. Friedeman
Dennis P. Deters
John D. Williams

MJS/dmh

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Case No(s). 21-0887-EL-AIR, 21-0888-EL-ATA, 21-0889-EL-AAM

Summary: Entry on Rehearing denying the application for rehearing filed by the Ohio Consumers' Counsel. electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio.