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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan.	:	Case No. 08-920-EL-SSO
In the Matter of the Application of Duke Energy Ohio for Approval to Amend Accounting Methods.	:	Case No. 08-921-EL-AAM
In the Matter of the Application of Duke Energy Ohio for Approval of a Certificate of Public Convenience and Necessity to Establish an Unavoidable Capacity Charge(s).	:	Case No. 08-922-EL-UNC
In the Matter of the Application of Duke Energy Ohio for Approval to Amend its Tariff.	:	Case No. 08-923-EL-ATA

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INITIAL BRIEF
OF
THE OHIO ENVIRONMENTAL COUNCIL

Barth E. Royer (Counsel of Record)
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, Ohio 43215-3927
(614) 228-0704 – Telephone
(614) 228-0201 – Fax
BarthRoyer@aol.com – Email

Nolan Moser
Air & Energy Program Manager
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
(614) 487-7506 – Telephone
(614) 487-7510 – Fax
nmoser@theOEC.org – Email

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Trent A. Dougherty
Staff Attorney
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
(614) 487-7506 – Telephone
(614) 487-7510 – Fax
trent@theOEC.org – Email

Attorneys for
The Ohio Environmental Council

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INITIAL BRIEF
OF
THE OHIO ENVIRONMENTAL COUNCIL

I. INTRODUCTION

This case is before the Commission for consideration of a Joint Stipulation and Recommendation ("Stipulation"), which, if adopted by the Commission, would resolve all issues raised by the above-styled applications of Duke Energy Ohio ("DE-Ohio") for approval of an Amended Substitute Senate Bill No. 221 ("SB 221") electric security plan ("ESP") and certain related measures. Although the Stipulation, which was docketed October 27, 2008, was signed by the Commission staff and a majority of the parties to these proceedings, two intervenors, the Office of the Ohio Consumers' Counsel ("OCC") and Industrial Energy Users-Ohio ("IEU-

Ohio"), are contesting two separate elements of the comprehensive settlement embodied in the Stipulation. OCC, although a signatory to the Stipulation, expressly reserved the right to litigate the provision of the Stipulation regarding the terms under which residential governmental aggregation customers can return to DE-Ohio's standard service offer ("SSO") service during the period of the ESP. *See* Stipulation, 32, n. 11. IEU-Ohio, which neither supports nor opposes the balance of the Stipulation (*see* IEU-Ohio Ex. 1, at 4), takes issue with Paragraph 13.b, which sets out the terms and conditions under which mercantile customers can seek exemption from the rate mechanism designed to recover the cost of energy efficiency and peak demand reduction programs implemented by DE-Ohio pursuant to the requirements of Sections 4928.66(A)(1)(a) and (b), Revised Code.

The hearing on the Stipulation was held on November 10, 2008 at the offices of the Commission. The Ohio Environmental Council ("OEC"),[1] a signatory to the Stipulation, hereby submits its initial post-hearing brief in accordance with the schedule established by the presiding attorney examiners at the conclusion of the hearing. *See* Tr. 175. OEC's initial brief responds to the issues raised by IEU-Ohio witness Murray (*see* IEU-Ohio Ex. 1, *passim*) with respect to Paragraph 13.b of the Stipulation. For those reasons set forth herein, OEC respectfully submits that IEU-Ohio's position with respect to these issues is without merit, and urges the Commission to approve the Stipulation as filed.

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[1] As explained in its motion to intervene, OEC is a non-profit, charitable organization comprised of a network of over 100 affiliated group members, whose mission is to secure a healthier environment for all Ohioans. Over its 40-year history, OEC, relying on scientific principles, has been a leading advocate for fresh air, clean water, and sustainable land use before the legislature and administrative agencies, as well as in the courts. In keeping with its mission, OEC was an active participant in the effort that led to the inclusion of energy efficiency mandates in SB 221, and was also an active participant in the negotiations that led to the Stipulation now before the Commission.

II. STATEMENT OF THE ISSUE

In addition to the pricing of generation service, SB 221 addressed a broad range of other important matters, including energy efficiency and the reduction of peak demand. To promote these objectives, SB 221 created mandatory annual energy savings and peak demand reduction benchmarks, which, if not met, subject the state's electric distribution utilities ("EDUs") to financial penalties in the form of compliance payments. The relevant statute, Section 4928.66, Revised Code, requires the EDUs to implement programs designed to achieve these benchmarks and provides for annual PUCO review to determine compliance.

The statute further provides that EDUs may implement tariffed rate mechanisms designed to recover the cost of their energy efficiency and demand response programs. However, division (A)(2)(c) of Section 4928.66, Revised Code, provides that such mechanisms may exempt mercantile customers that commit the capabilities of their own self-directed energy efficiency and demand reduction projects and measures for integration into an EDU's programs, if the Commission determines that the exemption "reasonably encourages such customers to commit those capabilities to those programs." Although the statute is less than a model of clarity, "integration" in this context appears to mean that the EDU can combine the energy savings and demand reductions resulting from the mercantile customer's self-directed program with the results of its own programs to achieve compliance with the statutory benchmarks.

Paragraph 13.b of the Stipulation sets out the terms and conditions governing exemption from Rider DR SAW, the mechanism by which DE-Ohio will recover the costs associated with its own energy efficiency and peak demand reduction programs.[2] Paragraph 13.b provides that the exemption will be available to mercantile customers that have a minimum monthly demand

[2] Rider DR SAW is explained in detail in other sections of Paragraph 13 of the Stipulation.

of 3 MW at a single site or aggregated at multiple sites within DEO-Ohio's service territory. To qualify for the exemption, the customer must file a joint application with DE-Ohio before the Commission, and must demonstrate that it has undertaken or will undertake self-directed energy efficiency and/or demand reduction programs that have produced or will produce annual percentage energy savings and/or peak demand reductions that are equal to or greater than the applicable annual percentage statutory energy savings and/or peak demand reduction benchmarks to which DE-Ohio is subject. As a part of the application, the customer must, *inter alia*, support the claimed level of savings and/or reductions through independent measurement and verification.

IEU-Ohio objects to the stipulated 3 MW eligibility threshold for exemption from Rider DR SAW, claiming that this requirement violates the statute and is contrary to the public interest. According to IEU-Ohio witness Murray, Section 4928.66(A)(2)(c), Revised Code, mandates that the opportunity to seek exemption from the EDU's cost-recovery mechanism be made available to all mercantile customers.[3] Thus, Mr. Murray argues that the 3 MW limitation is both unlawful and inconsistent with the underlying legislative intent. *See* IEU-Ohio Ex. 1, at 5-8. In addition, Mr. Murray contends that the requirement that, to qualify for exemption, the applicant mercantile customer must demonstrate annual energy savings and/or demand reductions equal to or greater than the statutory benchmarks to which DE-Ohio is subject is inappropriate, and that the Commission should be free to determine eligibility for exemption on a case-by-case basis. *See*

[3] Section 4928.01(A)(19), Revised Code, defines a "mercantile customer" as a commercial or industrial customer consuming more that 700,000 kWh annually, or is part of a national account involving multiple facilities in one or more states. Thus, the 3 MW limitation means that exemption would not be available to customers that do not exhibit this level of minimum monthly demand, notwithstanding that their annual usage brings them within the definition of a "mercantile customer." *See* IEU-Ohio Ex. 1, at 6-7.

IEU-Ohio Ex. 1, at 9-12. Although not expressly stated in his filed testimony, Mr. Murray would apparently extend this concept to permitting the Commission to authorize partial exemptions from the rider. *See* Tr. 110.

OEC adamantly disagrees with IEU-Ohio witness Murray's interpretation of the statute for reasons set forth herein. OEC also disagrees with Mr. Murray's argument that Paragraph 13.b of the Stipulation is contrary to the public interest. As explained in detail *infra*, this argument totally ignores the impact on other ratepayers, DE-Ohio, and the Commission itself of allowing all mercantile customers to pursue relief from DEO-Ohio's cost-recovery mechanism without regard to whether the exemption will produce a meaningful, cost-effective contribution to DE-Ohio's efforts to achieve the applicable statutory energy savings and peak demand reduction benchmarks. Indeed, it is Mr. Murray's recommendation – not Paragraph 13.b of the Stipulation – that is inconsistent with the underlying legislative scheme.

III. ARGUMENT

A. CONSISTENT WITH LONG-STANDING PRECEDENT, THE COMMISSION SHOULD APPLY ITS FAMILIAR THREE-PRONGED TEST FOR EVALUATING SETTLEMENTS IN CONSIDERING THE STIPULATION NOW BEFORE IT.

Rule 4901-1-30, Ohio Administrative Code ("OAC"), authorizes parties to Commission proceedings to enter into stipulations.[4] Although such stipulations are not binding upon the Commission, it is well-settled that the terms of these agreements are to be accorded substantial weight, particularly, where, as here, the stipulation is supported by a majority of the parties to the proceeding, including Commission's staff. *See Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123, (1992), at 125, citing *Akron v. Pub. Util. Comm.*, 55 Ohio St. 2d 155 (1978). In

[4] Pursuant to Rule 4901-1-10, OAC, the Commission staff is considered a party for purposes of entering into stipulations.

evaluating stipulations, the Commission has routinely applied the following three-pronged test first enunciated in *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26,1985) and endorsed by the Ohio Supreme Court on several occasions. *See, e.g., Industrial Energy Consumers v. Pub. Util. Comm.*, 68 Ohio St. 3d 559 (1994), *citing, with approval, Consumers' Counsel*, supra, at 126.

(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?

As discussed below, the settlement embodied in the Stipulation now before the Commission clearly satisfies each of these criteria. Further, the Stipulation is supported by the record in this proceeding.

B. THE SETTLEMENT EMBODIED IN THE STIPULATION IS THE PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES.

The first of the three criteria utilized by the Commission in evaluating stipulations – Is the settlement the product of serious bargaining among capable, knowledgeable parties? – is typically is not a source of controversy, and that is the case here. In their respective testimonies, DE-Ohio witness Smith and staff witness Turkenton both described the lengthy, open negotiation process that led to the Stipulation (*see* DE-Ohio Ex. 18, at 3-4; Staff Ex. 1, at 2), and the participants in that process and their counsel are well known to the Commission by virtue of their participation in numerous Commission proceedings over a period of many years. Indeed, IEU-Ohio, which was actively involved throughout the negotiations (*see* IEU-Ohio Ex. 1, at 4-5), does not dispute that the settlement embodied in the Stipulation satisfies the first prong of the

three-part test. *See* Tr. 123. However, notwithstanding that there is no issue with respect to whether this criterion has been met, OEC believes that a brief discussion of the underlying rationale for this test will provide an important backdrop for the arguments that follow.

Stipulations are the product of bargained-for compromises by parties with competing interests, and it is the very essence of settlements that no participant in the negotiations gets everything it wants. Thus, the breadth of the range of interests represented by the signatory parties to a stipulation should be a significant factor in the Commission's assessment of the settlement package and the weight it should be accorded. The wider the range of interests represented by the parties endorsing a stipulation, the more confidence the Commission can have that the negotiations have produced a balanced result.

In this case, the signatory parties represent an extraordinarily broad range of stakeholder interests, including the interests of all DE-Ohio customer classes, a number of competitive retail providers, the city of Cincinnati, and various environmental advocacy organizations. Indeed, the interests of DE-Ohio's mercantile customers were prominently represented in the negotiations, not only by IEU-Ohio, but by the Ohio Energy Group, the Ohio Manufacturer's Association, the Commercial Group, and the Kroger Co., all of which are directly affected by Paragraph 13.b of the Stipulation, and all of which, except IEU-Ohio, are signatories to the Stipulation. In so stating, OEC in no way intends to suggest that IEU-Ohio's disagreement with its fellow mercantile customer representatives means that its position with respect to the exemption from the cost-recovery mechanism is not entitled to careful consideration. Rather, OEC merely wishes to point out that this is not a situation in which the parties on one side of an issue cut a deal among themselves without regard for competing viewpoints. Thus, the Commission should

be quite confident in finding that Paragraph 13.b of the Stipulation was, indeed, the product of serious negotiations and, in fact, represents a hard-bargained, balanced compromise.

C. THE SETTLEMENT, AS A PACKAGE, BENEFITS RATEPAYERS AND THE PUBLIC INTEREST.

1. The evidence supports a finding that the settlement embodied in the stipulation, as a package, benefits DE-Ohio customers.

DE-Ohio witness Smith and staff witness Turkenton each provided a long litany of the benefits resulting from the Stipulation (*see* DE-Ohio Ex. 18, at 5-12; Staff Ex. 1, at 3-5), and there can be no doubt that the Stipulation represents a much better deal for DE-Ohio customers than the ESP proposed in the DE-Ohio's application in this case. Although IEU-Ohio would obviously have preferred a different version of Paragraph 13.b, it is important that the Commission bear in mind that the test is whether the settlement, as a package, benefits ratepayers and the public interest. Plainly, this standard does not mean that, to approve a stipulation, the Commission must find that all customers are better off under all provisions of a proposed settlement than they would have been under some other outcome. Rather, the Commission must evaluate the settlement package as a whole, and should not second-guess the signatory parties' collective judgment with respect to a challenged provision of a stipulation in the absence of a showing that the provision is contrary to the public interest, violates an important regulatory principle, or is contrary to law. IEU-Ohio has made no such showing in this case.

2. IEU-Ohio witness Murray's opinion that Paragraph 13.b of the Stipulation does not benefit the public interest is inextricably tied to his erroneous interpretation of Section 4928.66, Revised Code.

Notwithstanding that the presiding attorney examiners denied motions to strike significant portions of Mr. Murray's testimony on the ground that the challenged passages were purely legal conclusions (*see* Tr. 99-104),[5] there is no question that the bulk of his prefiled testimony is, in fact, legal argument as to how the statute should be interpreted. This is particularly apparent with respect to his interpretation of the legislative intent underlying Section 4928.66(A)(2)(c), Revised Code, which Mr. Murray cites as the basis for his opinion that Paragraph 13.b of the Stipulation is contrary to the public interest. *See* IEU-Ohio Ex. 1, at 7.

Section 4928.66(A)(2)(c), Revised Code, provides, in pertinent part, as follows:

> Any mechanism designed to recover the cost of energy efficiency and peak demand reduction programs under divisions (A)(1)(a) and (b) of this section may exempt mercantile customers that commit their demand-response or other customer-sited capabilities, whether existing or new, for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs, if the commission determines that that exemption reasonably encourages such customers to commit those capabilities to those programs.

Mr. Murray opines that this provision represents a legislative determination that it is in the public interest that all mercantile customers have the opportunity to seek exemption from the mechanism by which EDUs recover the costs of their energy efficiency and demand reduction programs and that such requests for exemption should be decided by the Commission on a case-by-case basis. *See* IEU-Ohio Ex. 1, at 7. Because Section 13.b of the Stipulation limits the availability of the exemption from Rider DR SAW to mercantile customers "that have a minimum monthly demand of 3 MW at a single site or aggregated multiple sites with DE-Ohio's certified territory," Mr. Murray concludes that this provision runs afoul of the legislature's intent. *Id.* Although OEC will address other aspects of Mr. Murray's interpretation of Section 4928.66,

[5] Mr. Murray is not an attorney. IEU-Ohio Ex. 1, at 4.

Revised Code, in greater detail *infra*, it should be obvious that Mr. Murray's interpretation of division (A)(2)(c) of the statute suffers from several fatal flaws.

First, if the legislature intended that exemption from the EDU cost-recovery mechanism had to be made available to all mercantile customers, the statute would have provided that the mechanism "shall" exempt mercantile customers that meet the remainder of the stated conditions instead of stating that the mechanism "may" exempt mercantile customers that meet those conditions. This principle of statutory construction is so elementary that even non-lawyer witness Murray recognized the significance of the distinction between the mandatory "shall" and the permissive "may." *See* Tr. 120. Because there is no mandatory requirement that the mechanism designed to recover the costs of an EDU's energy efficiency and demand reduction programs provide for any exemption, it necessarily follows that limiting the availability of the exemption by including an eligibility threshold is legally permissible.

Second, Mr. Murray's interpretation is inconsistent with the underlying statutory scheme. Divisions (A)(1)(a) and (b) of Section 4928.66, Revised Code, require EDUs to implement programs to achieve the annual energy savings and peak demand reduction benchmarks set forth therein. There is nothing in Section 4928.66, Revised Code, or any other statute that remotely suggests that EDUs are <u>required</u> to integrate the energy efficiency and demand reduction capabilities associated with a mercantile customer's self-directed energy efficiency and demand reduction projects and measures into their own programs. The onus to meet the statutory benchmarks is on the EDU. If the EDU can satisfy those benchmarks through its own programs, there is no reason the EDU should be compelled to offer relief from its cost-recovery mechanism – to the detriment of other ratepayers – as an inducement to encourage mercantile customers to commit their capabilities for integration into the EDU's program without regard to whether

integration of the customer capability provides a meaningful contribution to the EDU's ability to meet the applicable benchmarks. In other words, the primary purpose of the exemption is to assist the EDU in achieving benchmark compliance, not to reward mercantile customers for any energy efficiency or demand response measure they might undertake regardless of the level of savings or reduction the measure might produce. If that were the underlying intent, the legislature would have certainly found a less convoluted way to express it.

Finally, Mr. Murray's observation that the "the Ohio General Assembly is responsible for making public interest determinations" (IEU-Ohio Ex. 1, at 5) has no bearing on this issue. Although SB 221, like any other legislation, reflects the Ohio General Assembly's judgment as to what constitutes appropriate public policy, it is this Commission that must determine if the settlement, as a package, benefits the public interest. OEC certainly does not dispute that, as a general proposition, mercantile customer energy conservation and demand reduction measures serve the public interest. However, there is more to the "public interest" determination than that.

Although Mr. Murray did not know the number of additional mercantile customers that would be eligible if the exemption were available to all mercantile customers as opposed to only those with minimum monthly demands of at least 3 MW (*see* Tr. 122), the Commission can safely assume that this figured heavily in the collective judgment of the signatory parties that there should be some limitation on the availability of the exemption. Why else would a limitation have been included? It must be remembered that exempting mercantile customers from Rider DR SAW imposes additional costs on other DE-Ohio customers. The public interest is not served by relieving a mercantile customer from a tariffed rate element without regard to whether a meaningful benefit will be achieved. Indeed, elsewhere in his testimony, Mr. Murray argues that there must be a "value proposition" for the customer to commit its self-directed

energy savings and demand reduction capabilities for integration into an EDU's own program. *See* IEU-Ohio Ex. 1, at 15. Paragraph 13.b of the Stipulation merely recognizes that this "value proposition" is a two-way street.

D. . THE SETTLEMENT PACKAGE DOES NOT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE OR PRACTICE.

1. The stipulated requirement that, to be eligible for exemption from Rider DR SAW, an applicant mercantile customer must demonstrate to the Commission that its self-directed energy efficiency or demand reduction program will produce a specified level of energy savings or demand reduction does not violate Section 4928.66(A)(2)(c), Revised Code.

As noted above, Paragraph 13.b of the Stipulation provides that, to qualify for exemption from Rider DR SAW, the applicant mercantile customer must demonstrate to the Commission that it has undertaken or will undertake self-directed energy efficiency and/or demand reduction programs that have produced or will produce annual percentage energy savings and/or peak demand reductions that are equal to or greater than the applicable annual percentage statutory energy savings and/or peak demand reduction benchmarks to which DE-Ohio is subject. IEU-Ohio witness Murray claims that this standard "implies that any customer's energy efficient improvement that is less than the electric distribution company's portfolio obligation, in a given year, has no value at all." IEU-Ohio Ex. 1, at 10-11. Mr. Murray then states that this eligibility criterion "could serve to discourage mercantile customer efforts' towards energy efficiency," and observes that, "if an electric distribution company is hungry for energy efficiency improvements, it may be a reasonable judgment that half a loaf is better than none at all." IEU-Ohio Ex. 1, at 11. Thus, Mr. Murray concludes that this is a matter which should be addressed by the Commission on a case-by-case basis. *Id.* OEC respectfully submits that this argument will not stand up to even cursory scrutiny.

As Mr. Murray acknowledged, the prudent mercantile customer will undertake energy efficiency and demand reduction measures that are cost-effective in their own right, without need for additional incentives from the host EDU. *See* Tr. 131-132. However, in instances where the payback period for an investment in an energy efficiency or demand reduction project will not satisfy the mercantile customer's internal rate of return calculus for capital investment, the additional financial incentive provided under an EDU energy efficiency or demand reduction program may induce the customer to proceed with the investment and thereby contribute to EDU achieving compliance with the Section 4928.66(A)(1)(a) and (b), Revised Code, benchmarks. *See* Tr. 132-134. Moreover, because the onus is on the EDU to meet the statutory benchmarks through its own programs, it is in the EDU's interest to develop cost-effective energy efficiency and demand reduction programs that are advantageous to mercantile customers.[6] In addition, as Mr. Murray also acknowledged, an EDU can enter into a special arrangement with a mercantile customer that would include an incentive to the customer to participate in an EDU program specifically tailored to its needs. *See* Tr. 134. Clearly, all these approaches encourage, rather than discourage, "mercantile customers' efforts toward energy efficiency."

This brings us to the last arrow in the EDU's quiver – exemption from the cost-recovery mechanism – which the EDU can fire if it is still "hungry for energy efficiency improvements," to use Mr. Murray's language. However, as in the case of the stipulated 3 MW threshold for eligibility for the exemption, it is clearly appropriate to limit the exemption to instances in which integration of the energy savings and/or demand reduction capability resulting from a mercantile customer's self-directed programs will produce a meaningful contribution to DE-Ohio's ability

[6] Indeed, Paragraph 13.g of the Stipulation recognizes this very concept by providing for the establishment of a "Manufacturing Collaborative" funded by DE-Ohio to develop cost-effective energy efficiency programs targeted to manufacturers.

to achieve benchmark compliance. In this connection, it is important to note that DE-Ohio, the party at risk for failure to satisfy the applicable benchmarks, endorses the Paragraph 13.b test for exemption from Rider DR SAW. Because the primary purpose of the exemption is to assist the EDU in achieving benchmark compliance, the fact DEO-Ohio is on board with the stipulated test should go far in convincing the Commission that this test is reasonable and appropriate.

2. IEU-Ohio witness Murray's proposal that the Commission determine eligibility for exemption from Rider DR SAW on a case-by-case basis is inconsistent with the Section 4928.66(A)(2)(c), Revised Code, and is otherwise unworkable.

As previously indicated, IEU-Ohio witness Murray advocates that the Commission should determine whether, and to what extent, a mercantile customer should be exempted from Rider DR SAW on a case-by-case basis. *See* IEU-Ohio Ex. 1, at 11-12. OEC objects to this recommendation on several grounds.

First, not only is there no provision in the statute for partial exemption from the rider, but Mr. Murray's recommendation is inconsistent with the underlying legislative scheme. The Commission must bear in mind that Section 4928.66(A)(2)(c), Revised Code, speaks in terms of the cost-recovery mechanism exempting mercantile customers – "Any mechanism . . . may exempt mercantile customers" – which clearly indicates that the EDU can, with Commission approval, establish conditions for exemption from its cost-recovery mechanism. Under the plain language of the statute, the Commission's role in ruling upon an individual mercantile customer application for exemption is to determine if granting an exemption "reasonably encourages" the applicant customer to commit the energy savings and demand reduction attributes of its own self-directed measures to the EDU's program, not to invent terms for exemption on the fly in an

attempt to accommodate the desire of a particular mercantile customer to obtain full or partial relief from the cost-recovery mechanism.

OEC invites the Commission's attention to the cross-examination of Mr. Murray for evidence that his suggested case-by-case approach is simply unworkable. Asked if changing out one light bulb for a more energy efficient model would qualify a mercantile customer for exemption from Rider DR SAW, Mr. Murray stated that he believed that "those types of applications would be dismissed pretty rapidly by the Commission." Tr. 129. However, in the absence of a bright-line test like that proposed in Paragraph 13.b of the Stipulation, the Commission would be required to entertain and decide any application seeking exemption. Although this is obviously an extreme example, Mr. Murray was unable to say where the line should be drawn, contending only that this was a determination that the Commission should make on a case-by-case basis based on its judgment as to whether the exemption was "reasonable." *See* Tr. 129-130. When pressed, Mr. Murray stated that, if the Commission were to be besieged with 10,000 applications for exemption based on changing out a light bulb it could change its rules to address the problem. Tr. 131. This response makes OEC's point. Plainly, it makes more sense to head off this problem before it occurs by including a reasonable eligibility standard of the type proposed in Paragraph 13.b of the Stipulation rather than forcing the Commission to change the rules of the game to deal with the problem after it occurs.

To illustrate the basis for his disagreement with a test based on the annual percentage savings benchmark to which DE-Ohio itself would be subject, Mr. Murray provided an example in which the EDU was subject to an five percent energy savings benchmark in a given year, and a mercantile customer was willing to commit for integration into the EDU's programs the energy-savings capability of a project that was anticipated to produce an energy savings equal to

four percent of its own baseline. *See* IEU-Ohio Ex. 1, at 10. Mr. Murray opined that, if the EDU found itself unable to achieve the applicable statutory benchmark through its own programs, it might welcome integration of the customer's project because "half a loaf is better than none at all." *See* IEU-Ohio Ex. 1, at 10-11.

Although Mr. Murray acknowledged that the five percent benchmark he used in his example exceeded the actual annual savings benchmark applicable in any year of the ESP (IEU-Ohio Ex. 1, at 10),[7] the use of this hypothetical five percent benchmark produces a very misleading picture. Under Section 4928.66(A)(1)(a), Revised Code, the energy savings benchmarks for 2009, 2010, and 2011, the three years covered by the DE-Ohio ESP, are three-tenths of one percent, five-tenths of one percent, and eight-tenths of one percent, respectively. Thus, while the four percent annual savings he posits in attempting to show that stipulated eligibility test is short-sighted, would, in the case of a large-volume mercantile customer, represent a substantial number of kWh, something less than the three-tenths of the one percent savings requirement that would actually apply in 2009 under the Paragraph 13.b criteria would be a mere crumb, not the half loaf to which Mr. Murray refers. As the signatories to the Stipulation have recognized, it makes no sense to relieve a customer from Rider DR SAW based on a demonstrated energy savings of something between zero and three-tenths of one percent of the customer's historical baseline, yet that is precisely where Mr. Murray's partial exemption argument takes us. Moreover, because a four percent savings exceeds all the annual savings benchmarks prescribed in Section 4928.66(A)(1)(a), Revised Code, Mr. Murray's hypothetical

[7] Indeed, the five percent Mr. Murray used in his example far exceeds all the annual savings benchmarks established in Section 4928.66(A)(1)(a), Revised Code, not just those applicable in to the next three years.

customer would, in fact, always be eligible to apply for exemption from Rider DR SAW under the terms of Paragraph 13.b of the Stipulation.

To summarize, the statutory scheme requires EDU's to implement energy efficiency and demand reduction programs to achieve the applicable mandatory annual energy savings and peak demand reduction benchmarks. In OEC's view, exemption from the EDU cost-recovery mechanism is an extraordinary provision, and should be available only in unique circumstances. For the Commission to find otherwise could result in costs being impose on ratepayers without providing any corresponding societal benefit and could open the Commission processes to an onslaught of applications that could overwhelm the Commission's resources. The bright-line eligibility standard proposed in Paragraph 13.b of the Stipulation is, on its face, quite modest, but will provide at least a modicum of protection for all stakeholders. Further, the stipulated standard is consistent with the legislative intent underlying Section 4928.66, Revised Code, which is to provide relief from the cost-recovery mechanism only in those instances where this incentive is necessary to produce a meaningful contribution to DE-Ohio's ability to achieve the applicable energy savings and demand reduction benchmarks.

E. THE STIPULATION IS SUPPORTED BY THE RECORD IN THIS PROCEEDING.

At hearing, counsel for IEU-Ohio objected to the admission of the Stipulation into evidence, contending that there was no record support for the terms and conditions set forth in Paragraph 13.b. *See* Tr. 89. Although the presiding attorney examiners admitted the Stipulation over this objection (*see* Tr. 96) – and properly so – OEC expects that we will again hear from IEU-Ohio on this subject on brief based on IEU-Ohio witness Murray's comment that his is the only opinion regarding Paragraph 13.b that "the Commission has to rely upon." Tr. 118-119.

OEC will not attempt to anticipate IEU-Ohio's arguments at this juncture, but would offer the following observations.

DE-Ohio, to its credit, initiated settlement discussions shortly after its ESP application was filed. *See* DE-Ohio Ex. 18, at 4. As negotiations continued, the due dates for testimony and the hearing date were pushed back on several occasions at the request of various parties in order to permit settlement discussions to continue. With a negotiated resolution in sight, the parties deemed hammering out the terms of a stipulation to be a more productive use of their time and resources than preparing testimony in support of their initial positions that might ultimately prove unnecessary. Once a settlement agreement acceptable to almost all of the participating parties was reached, there was no longer any reason for the signatory parties to file testimony identifying and supporting their original positions on the elements of the ESP as initially proposed in DE-Ohio' application, including, of course, their positions with respect to requirements for exemption from the mechanism designed to recover the costs of DE-Ohio's energy efficiency and demand reduction programs. As a result, the Commission cannot look to the pre-filed testimony of staff and intervenor witnesses for corroboration that the Stipulation, including Paragraph 13.b, represents a hard-bargained compromise involving a balancing of competing positions, and must rely on the post-stipulation testimony of DE-Ohio witness Smith (DE-Ohio Ex. 18, at 4) and staff witness Turkenton (Staff Ex. 1, at 2) for assurance that this was, in fact, the case. However, due to the confidential nature of settlement discussions, these witnesses could not reveal the original positions of the parties with respect to the exemption issue, nor could they disclose the particulars of the debate regarding this issue.

Although Mr. Smith and Ms. Turkenton presented testimony supporting the Stipulation, neither witness specifically addressed the Paragraph 13.b exemption requirements. During his

cross-examination of Mr. Smith and Ms. Turkenton, counsel for IEU-Ohio took pains to establish that both witnesses were aware that IEU-Ohio objected to this provision at the time they prepared their testimony. *See* Tr. 50-51, 94. However, OEC is not sure what IEU-Ohio intends to make of this in view of the fact that, under the final procedural schedule, the testimony of Mr. Smith and Ms. Turkenton was filed in advance of the testimony of IEU-Ohio witness Murray, which was the first time IEU-Ohio's position was publicly articulated. Thus, to address IEU-Ohio's objection in their prefiled testimony, Mr. Smith and Ms. Turkenton would have had to guess at what Mr. Murray might ultimately have to say. It is true that these witnesses did attempt to anticipate the arguments that OCC witness Gonzales would make with respect to the terms under which residential governmental aggregation customers should be allowed to return to DE-Ohio's SSO service, and addressed that issue in their respective prefiled testimonies. However, based on OCC's express reservation in the Stipulation of the right to litigate this issue, these witnesses had publicly available information to go on in preparing their testimony with respect to the OCC issue.

For obvious tactical reasons, counsel for IEU-Ohio studiously avoided asking either Mr. Smith or Ms. Turkenton any questions on cross-examination that would provide them with the opportunity to explain the rationale for the requirements for exemption from Rider DR SAW set forth in Paragraph 13.b of the Stipulation. Moreover, because IEU-Ohio witness Murray's prefiled testimony opposing the Stipulation is, as discussed above, comprised almost entirely of legal argument, it is not clear how non-lawyers Smith and Turkenton could be expected to respond to these arguments, even if, contrary to fact, they knew what Mr. Murray was going to say before they prepared their testimony. In any event, any claim that Paragraph 13.b of the stipulation is not supported by the record should be given the same short shrift it was accorded

by the presiding attorney examiners in admitting the Stipulation into evidence over IEU-Ohio's objection.

IV. CONCLUSION

For those reasons stated above, the Commission should adopt the Stipulation and should authorize DE-Ohio to implement the ESP as proposed therein.

Respectfully submitted,

Barth E. Royer (Counsel of Record)
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, Ohio 43215-3927
(614) 228-0704 – Telephone
(614) 228-0201 – Fax
BarthRoyer@aol.com – Email

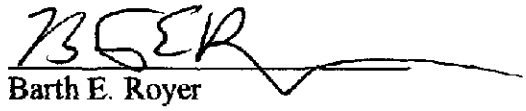
Nolan Moser
Air & Energy Program Manager
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
(614) 487-7506 – Telephone
(614) 487-7510 – Fax
nmoser@theOEC.org – Email

Trent A. Dougherty
Staff Attorney
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
(614) 487-7506 – Telephone
(614) 487-7510 – Fax
trent@theOEC.org – Email

Attorneys for
The Ohio Environmental Council

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following parties by electronic mail that 17th day of November 2008.



Barth E. Royer

Paul A. Colbert
Rocco O. D'Ascenzo
Elizabeth H. Watts
Duke Energy Ohio, Inc.
155 East Broad Street, 21st Floor
Columbus, Ohio 43215

Janine Migden-Ostrander
Ann M. Hotz
Michael E. Idzkowski
Jacqueline Lake Roberts
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202

Thomas J. O'Brien
Sally W. Bloomfieid
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

Grace C. Wung
McDermott, Will & Emery, LLP
600 Thirteenth Street NW
Washington, DC 20005

Thomas McNamee
William Wright
Attorney General's Office
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, OH 43215

Dave Rinebolt
Colleen Mooney
Ohio Partners for Affordable Energy
231 West Lima Street, P.O. 1793
Findlay, OH 45839-1793

Samuel C. Randazzo
Joseph M. Clark
Lisa G. McAlister
McNees, Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215

John Bentine
Mark Yurick
Chester, Wilcox & Saxbe LLP
65 E. State Street, Suite 1000
Columbus, OH 43215-4213

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour And Pease LLP
52 East Gay St.
P. O. Box 1008
Columbus, OH 43216-1008

Cynthia A. Fonner
Senior Counsel
Constellation Energy Group, Inc.
550 W. Washington Street, Suite 300
Chicago, IL 60661

Noel M. Morgan
215 East Ninth Street, Suite 500
Cincinnati, OH 45202

Bobby Singh, Esq.
Integrys Energy Services, Inc.
300 West Wilson Bridge Road, Suite 350
Worthington, OH 43085

Douglas E. Hart, Esq.
Greater Cincinnati Health Council
441 Vine Street, Suite 4192
Cincinnati, OH 45202

Robert P. Malloy, Esq.
The Village of Terrace Park
Wood & Lamping, LLP
600 Vine Street, Suite 2500
Cincinnati, OH 45202

Langdon D. Bell
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927

Terrance O'Donnell
Bricker & Eckler, LLP
100 South Third Street
Columbus, OH 43215-4236

Larry Gearhardt
Ohio Farm Bureau Federation
280 North High Street
P.O. Box 182383
Columbus, OH 43218-2383

Mary W. Christensen
Christensen, Christensen, Donchatz,
Kettlewell & Owens, Inc.
100 East Campus View Blvd., Suite 360
Columbus, OH 43235-4679

Craig G. Goodman
National Energy Marketers Association
3333 K. Street, NW, Suite 110
Washington, DC 20007

Henry W. Eckhart
50 West Broad Street, Suite 2117
Columbus, OH 43215

Douglas M. Mancino
McDermott Will & Emery, LLP
2049 Century Park East, Suite 3800
Los Angeles, CA 90067-3218