BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for Recovery of Program Costs, Lost Distribution Revenue and Performance Incentives Related to its Energy Efficiency and Demand Response Programs.	))))))	Case No.14-457-EL-RDR Case No.15-534-EL-RDR

REPLY BRIEF OF DUKE ENERGY OHIO, INC.

I. INTRODUCTION AND PROCEDURAL HISTORY

Duke Energy Ohio Inc., (Duke Energy or Company) and the Staff of the Public Utilities Commission of Ohio (Staff) submitted a Stipulation and Recommendation (Stipulation) in this proceeding that resolves complex issues that have impacted multiple cases. The Stipulation represents a reasonable, fair and clearly set forth resolution that brings closure to these issues and allows the Company to proceed forward with proposing a new portfolio of energy efficiency and peak demand reduction programs with clear understanding of the parameters within which it may seek cost recovery, while at the same time providing substantial benefits for customers. For all of the reasons set forth below, the Public Utilities Commission of Ohio (Commission) should adopt and approve the Stipulation that was submitted.

II. LEGAL STANDARD

By addressing the appropriate issues in their respective brief, all of the intervening parties have explicitly agreed that "the true test for legality [of the Stipulation]...is the three-part

stipulation test established by [the] Commission and upheld by the Supreme Court of Ohio."[1] And under that test, the Stipulation must be approved where: (i) it is the product of serious bargaining among capable, knowledgeable parties; (ii) as a package, the settlement benefits ratepayers and the public interest; and (iii) the settlement does not violate any important regulatory principle or practice.[2] Indeed, the Commission has recently affirmed that it repeatedly has found value in the parties' resolution of pending matters through a stipulation package, as an efficient and cost-effective means of bringing issues before the Commission while also, often times, avoiding the considerable time and expense associated with the litigation of a fully contested case.[3] As demonstrated herein, the Stipulation satisfies this controlling three-part test and therefore must be approved.

A. The Stipulation is the Result of Serious Bargaining Among Capable, Knowledgeable Parties.

No party to these proceedings disputes that fact that the Stipulation is the result of serious bargaining among capable, knowledgeable parties. Instead, the parties complain that the Stipulation failed to include diverse interest groups. But as the Commission recently affirmed, "[t]he three-prong tested utilized by the Commission and recognized by the Ohio Supreme Court does not incorporate [a] diversity of interest component... ."[4] Further, "[t]he Commission has repeatedly determined that [it] will not require any single party...to agree to a stipulation, in order to meet the first prong of the three-prong test."[5] Indeed, "it is the *quality* of the parties that

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[1] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide a Standard Service Offer Pursuant to R.C.4928.143 in the Form of an Electric Security Plan*, Case No.14-1297-EL-SSO, *et al.*, Opinion and Order (March 31, 2016), Concurring Opinion of Commissioner Haque, at p.2.
[2] *Id.*, Opinion and Order, at p.39 (March 31, 2016).
[3] *Id.*, at p.79.
[4] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order, at p.52 (March 31, 2016).
[5] *Id.*

is determinative, not quantity."[6] Ohio Manufacturers' Association (OMA),Ohio Consumers' Counsel (OCC), Ohio Energy Group (OEG)[7], Ohio Partners for Affordable Energy (OPAE) and The Kroger Company (Kroger) all cite the *Time Warner* case to argue that certain parties were excluded and therefore the Stipulation is not the product of serious bargaining. However, the Supreme Court in that case, after recognizing that the Commission's decision approved only a partial stipulation including less than all the parties, refused to create a requirement that all parties participate in all settlement meetings. [8] And as both the Court and Commission have found, the important consideration is whether any particular customer class was intentionally excluded from negotiations. Here, no party was intentionally excluded from settlement negotiations. Indeed, all parties were invited to settlement meetings, with Staff repeatedly seeking input from them.[9] The Stipulation was submitted to all parties prior to its filing in the docket, and the procedural schedule was delayed at the *joint request* of all the parties in order to allow additional time to discuss settlement.[10] The fact that some chose not to join the Stipulation after considering the content is not the determinative fact. All parties were given an *opportunity to join* the discussion.

In this instance, the facts demonstrate that the Staff and the Company met to discuss a possible settlement and proceeded to create a logical framework in which to do so. Thereafter, the Staff provided an opportunity for all other parties to participate in the settlement. Kroger wrongly contends that parties were given three days to react. But the evidence confirms otherwise. Parties were afforded six days to respond to Staff's overtures, yet none did. Rather, it

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[6] *Id.*, Concurring Opinion of Commissioner Haque, at p.2 (emphasis in original).
[7] It should be noted that OEG was not an intervening party in Case No.14-457-EL-RDR.
[8] *Time Warner AxS v. Pub. Util. Comms'n*, 75 Ohio St.3d 229, 233 (1996).
[9] OMA Exhibit 21; Transcript, at p.249-250.
[10] Joint Motion for Extension of Time, to Clarify Scope of Hearing on Stipulation, Request for Expedited Treatment and Memorandum in Support, (January 29, 2016).

was only after the Stipulation was place of record that any party even acknowledged its receipt.[11] Thereafter there was still time to amend or otherwise change the existing settlement had the parties chosen to do so. But they did not. Now however, the parties ignore the settlement discussions in which they participated and instead maintain here that the settlement was not sufficiently inclusive.

Likewise, OCC argues that it was excluded and that Duke and the PUCO Staff were "unwilling to compromise with intervenors regarding the settlement overall."[12] OCC even asserts incorrectly that the draft Stipulation was presented as a *fait accompli.*[13] However, the evidence does not support OCC's claims. Staff witness Patrick Donlon testified that the dollar value that was referred to in an email to all of the parties inviting further discussion would be "hard to move off," but in Mr. Donlon's estimation, "everything was open."[14] Mr. Donlon further clarified that "hard to move off that number is not non-negotiable."[15] In fact, the email that was entered by OCC demonstrates clearly that the parties were consulted and invited to participate in discussions about the Stipulation if they wished to do so.[16]

OCC was one of the parties agreeing to an extension of the procedural schedule to allow more time for discussion. And OCC cannot now argue that it was excluded; it simply did not accept the terms of the Stipulation. Moreover, OCC cites to an earlier Commission proceeding that wherein the Commission was concerned with the existence of "side agreements."[17] There is no parallel here with the case cited by OCC as the Commission was explicitly concerned with the

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[11] OCC Exhibit 1.
[12] Brief of OCC, at p.6.
[13] Brief of Ohio Partners for Affordable Energy, at p.3.
[14] Transcript, at p.312.
[15] Transcript, at p.310.
[16] OCC Exhibit 1.
[17] Brief of OCC, at p.6, *citing In the Matter of the Application of The Cincinnati Gas & Electric Company To Modify Its Non-Residential Generation Rates*, Case No.03-93-EL-ATA, *et al.*, Opinion and Order (October 24, 2007).

existence of agreements outside of the stipulation that could have impacted the stipulation. No such agreements exist in relation to this proceeding. Moreover, this argument is based on a misunderstanding of the requirement. The three-pronged test adopted by the Commission does not require that all parties agree to a stipulation, but rather that all parties *have an opportunity* to participate in discussions. In this case, the facts establish that all parties were given such an opportunity.[18] The Commission has recently reiterated its policy that no one class of customers may effectively "veto" a stipulation. The Commission stated that it would not require any signatory party, including OCC, to agree to a stipulation in order to meet the first prong of the three-prong test.[19] The Commission may weigh the evidence, giving it substantial weight, as is required, and after careful consideration, it should approve the Stipulation.

B. As a Package, the Stipulation Benefits Ratepayers and the Public Interest.

As the Commission has affirmed, "the second part of the test specifically requires that [it] evaluate the stipulation as a package."[20] This particular package offers significant advantages to customers in the form of claims and rights that are now foregone, litigation avoided, and dollars saved for customers. At hearing, considerable time was expended on exploring the various views of the witnesses with respect to developments in earlier cases.[21] The fact that such inquiry was necessary serves to highlight the fact that the debate about how Duke Energy Ohio quantifies and collects shared savings has been at issue through a number of different proceedings over a period of several years, at least.

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[18] OCC Exhibit 1.
[19] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide a Standard Service Offer Pursuant to R.C.4928.143 in the Form of an Electric Security Plan*, Case No.14-1297-EL-SSO, *et al.*, Opinion and Order (March 31, 2016) at p.43.
[20] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order, at p.77 (March 31, 2016).
[21] Transcript pps.25-32, 35, 83-95, *passim.*

Mr. Duff testified that the Company first provided an explanation of its shared savings mechanism in the case where the existing mechanism was first approved.[22] In the application and supporting testimony, the Company provided an explanation of how it would calculate shared savings.[23] The case was ultimately resolved by a stipulation wherein the parties set forth four modifications to the Company's proposed mechanism.[24] None of these modifications changed the counting of banked energy savings to calculate the shared savings incentive.

Thereafter, the cost recovery mechanism including the approved shared savings mechanism was approved to continue through 2015.[25] During these years, Duke Energy Ohio provided comprehensive energy efficiency and peak demand reduction services pursuant to the approval of the mechanism that had been approved. In filing to recover costs in this proceeding, it became clear that some parties had a difference of opinion with respect to the calculation of shared savings. The history of these matters was not always clear. And Staff witness Donlon testified that one of the reasons Staff supported the Stipulation was because the Company was not permitted to amend its portfolio due to changes in the law.[26]

In resolving the question of the ability to use banked savings in the determination of shared savings in these two proceedings, and with respect to all foreseeable future proceedings, the Company and Staff have settled these matters. Hereafter, the Company can plan its portfolio of energy efficiency and peak demand reduction programs and a cost recovery mechanism wherein the Company and all interested parties will have a clear understanding of all the

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[22] Transcript pps.84-92, Testimony of Timothy J. Duff in Case No.11-4393-EL-POR, OMA Exhibit 13.
[23] *In the Matter of the Application of Duke Energy Ohio, Inc., for an Energy Efficiency Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in its Existing Portfolio*, Case No.11-4393-EL-POR, Application, (July 20, 2011), and Testimony of Timothy J. Duff, (include in the Application at p.7).
[24] Id., Stipulation, (November 18, 2011).
[25] *In the Matter of Duke Energy Ohio Market Assessment and Action Plan for Electric DSM Programs*, Case No.13-431-EL-POR, Opinion and Order, (December 4, 2013).
[26] Transcript, at pps.260, 322.

parameters. This resolution alone provides significant value to the "package" that is represented in the Stipulation. However, it is only one of the many concessions of value included.

The facts at hearing established that the Company would recover $19.75 million for shared savings covering a period of four years.[27] Duke Energy Ohio witness Timothy J. Duff explained that the Company's relinquishment of its claim of $55 million for shared savings over those years is a significant concession.[28] Some of the parties argue that this concession is either non-existent or illusory; however the Company has agreed to relinquish a claim to nearly $35 million dollars with just this one provision alone.[29] While the parties may have evaluated the offer differently, had they chosen to engage in discussions, nonetheless, the concession is significant for Duke Energy Ohio and was of value to the Staff. Mr. Donlon testified that Staff viewed the reduction of litigation risk to be of value.[30]

Counsel for OMA cross-examined Duke Energy Ohio witness Duff extensively on the history of stipulations and orders establishing the Company's existing portfolio and cost recovery mechanism.[31] Likewise, OEG continues in this case to argue the use of banked savings to calculate the shared savings mechanism.[32] It was apparent from these arguments that the issue that is now being resolved has existed since approximately 2013. OEG's entire argument regarding whether the Stipulation is beneficial, rests upon a re-argument of these very issues.[33] This highlights the value the Company and Staff found in finally settling these questions.

One additional value included in the Company's concessions is the agreement to forego receiving any shared savings for 2016. The parties correctly questioned Duke Energy Ohio's

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[27] Duke Energy Ohio Exhibit 2, Supplemental Direct Testimony of Timothy J. Duff, at p.3.
[28] Transcript, at p.61.
[29] Initial Brief of The Kroger Company, at p.8.
[30] Direct Testimony of Patrick Donlon, at p.5.
[31] *Passim*
[32] OEG's Brief is only filed in Case No.15-534-EL-RDR, since it was not an intervenor in Case No.14-457-EL-RDR. Brief of the Ohio Energy Group, at p.6-7.
[33] *Id.*, at p.5.

witness about the pending case at the Commission related to the potential cost recovery mechanism for 2016.[34] The Commission will still need to rule with respect to that proceeding, but the Company has already agreed to forego shared savings for that year. The OMA, OPAE, OCC, OEG and Kroger all argued in that proceeding that the Company should not be entitled to any shared savings in 2016, so the resolution of these two cases also benefits these parties in respect of the positions they took in another proceeding.[35]

The Company also agreed to forego its request to recover shared savings in 2016, the last remaining year to include recovery for work accomplished within the existing approved energy efficiency portfolio. The cost recovery mechanism is still pending a decision by the Commission for 2016, but in any case, shared savings will not be recovered for that year. And the Company agreed to additional concessions as described in the Stipulation. For the calendar years beginning in 2017, the Company will not seek to recover a shared savings mechanism in any portfolio plan year after 2014 in which banked savings have been used to meet the annual benchmark requirements.[36] However, if a change in law occurs, the Company and Staff agreed that the Company would be permitted to seek a shared savings incentive consistent with such change in law, regulation or order.[37] Additionally, the Company agreed to retire 150,000 megawatt hours of banked energy savings. And finally, Mr. Duff explained that the Stipulation resolves OPAE's desire for a cap on shared savings because the amount of shared savings agreed to in the Stipulation "provides finality on the maximum amount that could be awarded."[38]

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[34] Transcript, at p.52-53.
[35] *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Continue Cost Recovery Mechanism for Energy Efficiency Programs Through 2016*, Case No.14-1580-EL-RDR, Comments of Ohio Energy Group, Comments of the Office of the Ohio Consumers' Counsel, Initial Comments of the Kroger Company, Comments of Ohio Partners for Affordable Energy, Initial Comments of the Ohio Manufacturers' Association (December 5, 2014)
[36] Joint Exhibit 1, at p.6.
[37] Joint Exhibit 1, at p.7.
[38] Transcript, at p.153.

Kroger argues that paragraph 3(c) of the Stipulation is of no value.[39] However, that paragraph establishes that the energy efficiency programs provided by the Company throughout the term of the existing portfolio will continue to be evaluated under the existing Evaluation, Measurement & Verification paradigm. Without this provision, one could argue that the quality of the portfolio has been eroded. Thus, the inclusion of this provision establishes a continuing rigorous review of the programs by the Commission and does indeed represent significant value.

It is indisputable that the Company agreed to forego significant value to resolve its claims. Staff further testified that it evaluated the Company's offer and determined that it was a reasonable outcome in light of the fact that the matter was still pending on rehearing.[40] Staff witness Patrick Donlon explained the benefits provided through the stipulated resolution of this case. Mr. Donlon acknowledged the benefits to customers provided by the relinquishment of the Company's claim to shared savings, the benefits to customers resulting from the Company's requirement to comply with energy mandates on an annual basis, and the certainty established by the resolution of these matters.[41] Moreover, Mr. Donlon explained that the Stipulation provides finality and certainty for both the Company and the Commission on the issue of shared savings in this docket, in the related 2015 energy efficiency case, and in future cases.[42] Had the other interested parties continued to work through additional settlement discussion, they may have extracted even greater concessions. They chose not to do so, but that choice does not change the value presented by the existing Stipulation.[43]

The Stipulation as a package provides meaningful and valuable benefits to customers in that it avoids ongoing litigation related to multiple cases and provides certainty for both

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[39] Initial Brief of The Kroger Company at p.10.
[40] Transcript at pps.260, 318, 320, 322.
[41] Staff Exhibit 1, Prepared Testimony of Patrick Donlon, at p.5.
[42] Transcript at p.319-323.
[43] Transcript at p.310.

customers and the Company in regard to shared savings. For these reasons the Commission should adopt and approve the Stipulation.

C. The Stipulation Does Not Violate any Important Regulatory Principle or Practice.

As noted above, the third prong of the Commission's legal inquiry relates to whether or not the Stipulation violates any important regulatory principle or practice. No party cited a law or regulation that the Stipulation purportedly violated, and therefore no party has established that the Stipulation fails to meet this final part of the test. As noted above, the Commission has expressed favor with respect to resolution of pending matters through a stipulation package. The Commission has been presented with just such a package in this case. Indeed, the proposed Stipulation resolved issues and contentions that have persisted in several cases and which may now be resolved fairly and reasonably and in the best interests of Duke Energy Ohio customers.

Kroger inexplicably argues that the Stipulation violates the Commission's Finding and Order in this case. But that is precisely why a rehearing procedure exists. Kroger likewise attempts to suggest that the Stipulation is inconsistent with pending proceedings that have not yet been decided by the Commission.[44] This illogical argument defies response.

OCC incorrectly asserts that the Commission Staff cannot be a party to a stipulation under Rule 4901-1-30, O.A.C. because it has not been a party in the case. The Commission's Rule 4901-1-10, O.A.C. explicitly provides that Staff may be a party for purposes of entering into Stipulations. Although OCC is correct that Staff submitted comments in only one of the two above-captioned cases, nonetheless, Staff was engaged in an audit that is addressed in the Stipulation. Thus OCC is simply incorrect that Staff had not "participated" and therefore was

[44] Initial Brief of The Kroger Company, at p.12.

not a party for purposes of entering into a stipulation. Notably, other than an intentional misreading of the Commission's rules, OCC cites no law to support its contentions.

If the Commission views the Stipulation as a whole to be favorable to consumers, it may approve the Stipulation. The Stipulation submitted to the Commission in this proceeding is reasonable and should be adopted.

D. The Commission Should Approve the Stipulation Unconditionally.

OCC argues that the Commission should approve the Stipulation in this case, subject to a refund during the pendency of any appeal. This is a request that OCC has attempted and failed at repeatedly. Most recently, the Ohio Supreme Court reiterated its well-established holding that the law does not allow refunds in appeals from commission orders. As the Court recognized, "any refund order would be contrary to our precedent declining to engage in retroactive ratemaking."[45] The Court affirmed its holding by recognizing that "These precedents remain good law and still apply to these facts, thus prohibiting the granting of a refund."[46] Thus, there is no legal support for OCC's request despite its persistence in making the request.

III. Conclusion

For the reasons set forth above, Duke Energy Ohio respectfully requests that the Commission adopt and approve the Stipulation that was submitted for its consideration in this proceeding.

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[45] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853; *see also, e.g., Green Cove Resort I Owner's Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774, 814 N.E.2d 829 ("Neither the commission nor this court can order a refund of previously approved rates, however based on the doctrine set forth in *Keco*...")

[46] *Application of Columbus Southern Power Company, et al., and Office of the Ohio Consumers' Counsel, et al., v. Public Utilities Commission, et al.*, 128 Ohio St.3d 512, 516, 2011-Ohio-1788, ¶15, 947 N.E.2d 655, 660.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal delivery, or electronic mail on this 13th day of May, 2016, to the following parties.

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Summary: Brief Reply Brief of Duke Energy Ohio, Inc. electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B. and Watts, Elizabeth H.