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 Nos. 14-457-EL-RDR 15-534-EL-RDR

REPLY BRIEF OF THE KROGER COMPANY

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I. Introduction

In a recent ruling, the Public Utilities Commission of Ohio (PUCO) held that Duke Energy Ohio, Inc. (Duke) could not recover shared savings incentive payments through the use of energy efficiency savings achieved during prior years (e.g., banked savings).[1] In its decision, the PUCO noted that Duke's use of banked savings to achieve shared savings payments undermines the purpose of the shared savings incentive to motivate and reward utilities for achieving energy efficiency savings annually.[2]

Nonetheless, Duke and Staff of the PUCO (Staff) filed a Stipulation and Recommendation (Stipulation), authorizing Duke, among other things, to recover $19.75 million from customers in shared savings incentive payments for its 2013 and 2014 energy efficiency programs,[3] despite the fact that Duke failed to achieve the annual benchmarks during those years absent the use of banked savings.[4] The proposed Stipulation directly violates the PUCO's 2013 Rider Order and fails to satisfy the criteria established by the Commission in evaluating the reasonableness of a stipulation. The Stipulation contains several provisions that result in unjust, unreasonable, and unlawful customer payments to Duke, while undermining the intent of the shared savings mechanism to incent utility companies to engage in long-term energy efficiency programs that could reduce costs to customers.[5] The terms of the Stipulation merely reward Duke for doing a poor job of managing its energy efficiency and demand response programs.[6]

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[1] *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, Finding and Order at 5 (May 20, 2015), reh'g pending (2013 Rider Order).

[2] Id. at 5.

[3] Joint Ex. 1 at 6 (Stipulation).

[4] Tr. Vol. I at 141.

[5] OMA Ex. 1 at 4-5 (Seryak Direct).

[6] OPAE Ex. 3 at 11 (Rinebolt Direct).

For the reasons discussed herein and as set forth in the initial brief filed by Kroger on April 28, 2016, Kroger respectfully requests that the PUCO reject the proposed Stipulation and re-affirm its holding in the 2013 Rider Order case.

II. Discussion

A. The Stipulation fails to satisfy the three-prong test established by the Commission to review the reasonableness of a settlement package.

In evaluating the reasonableness of a proposed settlement, the PUCO examines the following criteria:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?

2. Does the settlement, as a package, benefit ratepayers and the public interest?

3. Does the settlement package violate any important regulatory principle or practice?[7]

As the applicant to this proceeding, Duke bears the burden of proof to demonstrate that the Stipulation meets the aforementioned criteria.[8] Duke has failed to meet this burden. The proposed settlement is not the product of serious bargaining, does not benefit ratepayers or the public interest, and violates several important regulatory principles and practices. As such, it should be rejected.

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[7] See, e.g., *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order at 39 (March 31, 2016) (AEP PPA Order).

[8] See, e.g., *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 11-346-EL-SSO, Entry on Rehearing at 8 (February 23, 2012) (stating “the Signatory Parties have not met their burden of demonstrating that the Stipulation, as a package, benefits ratepayers and the public interest as required by the second prong of our three-part test for the consideration of stipulations.”

B. Duke fails to meet its burden and demonstrate that the Stipulation is the product of serious bargaining among capable, knowledgeable parties.

In its brief, Duke declines to even address whether the Stipulation is the result of serious bargaining among capable knowledgeable parties. Rather, Duke states only that the parties to the Stipulation "are undeniably capable and knowledgeable."[9] Duke devotes the rest of its analysis to an argument that the PUCO does not incorporate a diversity of interest component in its three-prong test, citing to a recent PUCO decision involving AEP Ohio.[10] Duke fails to mention that the PUCO also stated: "However, no particular customer class may be intentionally excluded from negotiations."[11] Additionally, in the same PUCO order, the PUCO also relied on the fact that "contrary to OCC/APJN's position, the signatory parties represent a wide variety of diverse interests."[12] Counter to Duke's claim that diversity is not considered, its co-signatory party, Staff, recognized the diversity of interest component of the first prong in its brief.[13]

Moreover, in reaching its decision in the AEP Ohio PPA case, the PUCO noted that *all* of the parties were invited to attend multiple meetings to discuss settlement proposals and were offered an opportunity to negotiate terms.[14] This is distinguishable from the record evidence in the current case in which the two Signatory Parties (Duke and Staff) were involved in a total of only four negotiation meetings and intervening parties were not invited to participate in those meetings.[15] Further, intervening parties were not offered an opportunity to negotiate specific

[9] Duke Br. at 4.

[10] Id.

[11] AEP PPA Order at 53.

[12] AEP PPA Order at 52.

[13] Staff Br. at 8.

[14] AEP PPA Order at 52.

[15] OMA Ex. 15; Tr. Vol I at 104 and 267 and 296.

terms of the Stipulation.[16] In fact, the only meeting in which the intervening parties were invited to participate in discussions related to the Stipulation occurred on January 27, 2016, 21 days after the Stipulation was executed and filed.[17]

Duke's assertions that the Stipulation was "identified as a draft proposed agreement," "solicited further discussion," and provided an "appropriate period of time" for parties to respond are false.[18] On December 30, 2015, Staff and Duke circulated a copy of the negotiated agreement to intervening parties, with the concluding sentence:

> Please review the attached proposed settlement draft and let me know by noon on Wednesday, January 6, 2016 whether your client has an interest in being a signatory party.[19]

Although the language of the correspondence refers to the attached settlement as a draft, the Stipulation did not change from the time it was distributed to the intervening parties on December 30, 2015 to the time it was filed with the PUCO on January 6, 2016.[20] Additionally, Duke witness Duff testified that by the time he even participated in settlement meetings between Staff and Duke on December 29 and 30,[21] the $19.75 million provision "had already been determined."[22] Additionally, the email does not solicit further discussion, but rather asks the parties if they would like to become a signatory party. Finally, the email was circulated on December 30th and requested a response by January 6th, providing intervening parties only three business days to respond, during which time all of the intervenors were engaged in a substantial

[16] Tr. Vol. I at 62.

[17] Id. at 305-306.

[18] Duke Br. at 2-3.

[19] OMA Ex. 21.

[20] Tr. Vol. I at 116-117.

[21] Id. at 102 and 117-118.

hearing before the PUCO.[23] This is hardly an appropriate period of time for responding to a Stipulation that includes a provision that will cost customers $19.75 million.

Although the PUCO has consistently held that it will not require a single party to agree to a stipulation in order to meet the serious bargaining prong of the three-part test,[24] it is notable that *no* intervening parties in this proceeding agreed to the Stipulation, including no intervening parties that represent consumer interests. Regardless of whether the PUCO considers diversity of interests as a component of the three-part stipulation test or considers it outside the three-part test, the signatures of only the applicant and Staff coupled with the intentional exclusion of several customer classes by failing to invite intervening parties to the settlement discussions between the two Signatory Parties fails to satisfy the serious bargaining prong of the three-part settlement test and the "*Time Warner* footnote."[25]

Duke failed to meet its burden to demonstrate that the proposed Stipulation is the product of serious bargaining among capable, knowledgeable parties, and certainly did not show that the Stipulation is a product of bargaining among parties with diverse or a variety of interests. No intervening parties were involved in drafting the Stipulation,[26] negotiating the terms of the Stipulation,[27] or participating in settlement discussions.[28] The record is void of any evidence demonstrating the Stipulation involved serious bargaining between parties as required by the first prong of the three-part test.

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[22] Tr. Vol. I at 22.

[23] Id. at 119.

[24] Id. at 4.

[25] See *Time Warner Axs v. PUCO* (1996), 75 Ohio St. 3d 229, 234, n.2. (The Supreme Court of Ohio noted a "grave concern" with partial stipulations that arise from settlement talks from which an entire customer class is intentionally excluded.)

[26] Tr. Vol. I at 62.

[27] Id.

[28] Id. at 104

C. Duke's claims that the Stipulation benefits ratepayers and is in the public interest are over-exaggerated.

The Stipulation also fails to satisfy the second prong of the three-part settlement test given the terms of the Stipulation will not benefit customers and are not in the public interest. Duke claims the proposed Stipulation provides three broad benefits to ratepayers, including: (1) concessions provided by Duke through the terms of the Stipulation;[29] (2) finality and certainty regarding the issue of shared savings;[30] and (3) avoidance of ongoing litigation.[31]

First, Duke's purported concessions are over-exaggerated. Duke's claim that it could be entitled to as much as $55 million in a shared savings incentive for 2013, 2014, 2015, and 2016 combined is inaccurate.[32] The PUCO's 2013 Rider Order, which both witness Duff and Donlon acknowledged is valid,[33] prohibited the use of banked savings to claim a shared savings incentive and determined that Duke could not collect shared savings for 2013.[34] Pursuant to that order, Duke cannot collect shared savings for 2014 either as Duke failed to meet the energy efficiency annual benchmarks for 2014 absent the use of banked savings.[35] Further, Duke cannot collect shared savings in 2016 as the shared savings mechanism expired at the end of 2015.[36] Therefore, the $55 million in potential shared savings incentive costs to ratepayers does not accurately reflect the actual potential costs to customers and Duke's characterization of the $19.75 million provision as a concession is misleading. Under the Commission's current 2013 Rider Order,

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[29] Duke Br. at 5.

[30] Id. at 5-6.

[31] Id. at 6.

[32] Stipulation at 6.

[33] Tr. Vol. I at 65 and 264.

[34] 2013 Rider Order at 5.

[35] Tr. Vol. I at 141.

[36] Id. at 60-61.

customers will pay $0 in shared savings for the 2013 and 2014 calendar years. Thus, the provision does not mitigate any cost risk for customers and provides no benefit.

Second, the Signatory Parties' claim that the Stipulation benefits customers by providing finality with respect to the issue of shared savings in the 2013 Recovery Case (Case No. 14-457-EL-RDR), 2014 Recovery Case (Case No. 15-534-EL-RDR), and future cases, is inaccurate.[37] This assertion ignores provision (3)(a) embedded in the Stipulation, which provides an exception permitting Duke to seek a shared savings mechanism in any year after 2014 in which banked savings have been used to meet the annual benchmark standards consistent with a change in law, regulation, or order regarding shared savings.[38] As such, a decision or order in one of the pending PUCO cases could invoke this exception,[39] thereby invalidating Duke's claims that the Stipulation provides finality and certainty to the issue of shared savings. The exception provides a clear loophole in the purported benefit to ratepayers that it will forego filing for recovery of a shared savings mechanism in any year after 2014 in which banked savings were used to meet the annual mandated benchmarks.

Third, Duke's claim that the Stipulation will benefit customers by avoiding litigation is inflated. Duke not only overstated the recovery amounts it could receive as a result of litigation, but also overstated the potential risk of litigation in attempt to provide value to customers through its purported concessions in the Stipulation. As previously discussed, the exception in provision (3)(a) of the Stipulation permits Duke to file for a shared savings mechanism pursuant to a change in law, regulation, or order, which could certainly result in some form of litigation. Further, the risk of litigation always exists, regardless of whether a case is resolved through a

[37] Duke Br. at 5-6; Staff Br. at 10,12.

[38] Stipulation at 6-7.

[39] Tr. Vol. II at 367-368.

Stipulation or Commission order.[40] Additionally, all parties and Staff agree in their opposition to "Duke's use of banked savings to achieve the maximum level of shared savings allowed."[41]

Thus, Duke has failed to demonstrate that the Stipulation benefits ratepayers or is in the public interest as required by the second prong of the three-part settlement test.

D. Duke fails to show that Stipulation does not violate any important regulatory principle or practice.

Duke also fails to meet its burden and show that the Stipulation does not violate any important regulatory principles or practices as required by the final prong of the settlement test. Rather, in its brief, Duke attempts to shift the burden to the intervening parties, stating that "[n]o party has cited a particular law or regulation that can be said to be in violation, and therefore no party has established that the Stipulation is in violation."[42] Not only is the shift in the burden of proof unlawful under PUCO precedent regarding application proceedings, but it is also incorrect. The proposed Stipulation violates several regulatory principles, PUCO orders, and PUCO regulatory audit and accounting practices.

As previously stated, none of the intervening parties in this proceeding were invited to participate in settlement discussions,[43] amounting to an intentional exclusion of the these parties from settlement negotiations in clear violation of the Supreme Court precedent established in *Time Warner Axs. v. PUCO* and partial settlement standards established by the Court.[44]

Additionally, the $19.75 million provision in the proposed Stipulation violates the previous PUCO order in the 2013 Rider Order case, in which the PUCO held that "Duke's use of

[40] Tr. Vol. I at 166-168.

[41] Staff Br. at 10; also see Staff Br. at 5, Kroger Br. at 7-8, OCC Br. at 11, OEG Br. at 5-6, OMA Br. at 9, and OPAE Br. at 5.

[42] Duke Br. at 6.

[43] OMA Ex. 15; Tr. Vol I at 104 and 267 and 296.

[44] See *Time Warner Axs v. PUCO*, 75 Ohio St.3d 229, 234, n.2 (1996).

banked savings to claim an incentive is improper."[45] As acknowledged by Duke witness Duff and Staff witness Donlon, this order is valid until overturned by the Supreme Court or the PUCO issues a new order.[46] The Stipulation permits Duke to receive $19.75 million from ratepayers in shared savings incentives for the 2013 and 2014 calendar years[47] even though, per the 2013 Rider Order, Duke is entitled to $0 during those years. This is clearly inconsistent with PUCO precedent.

Further, the Stipulation is inconsistent with a current PUCO pending proceeding regarding Duke's 2016 shared savings extension request (Case No. 14-1580-EL-RDR), in which Duke requests to continue its cost recovery mechanism for energy efficiency programs through 2016.[48] However, the Stipulation states that Duke will forego collection of shared savings incentives for 2015 and 2016.[49] Therefore, the terms of the Stipulation are inconsistent with a pending request before the PUCO, but Duke intentionally chose to not include that case in the Stipulation as a case that the Stipulation resolved. Moreover, Duke could use the decision issued in the pending request (or in any other pending case) to invoke the exception contained provision (3)(a) of the Stipulation.[50]

The terms of the Stipulation also violate PUCO regulatory audit and accounting practices. Although Duke witness Duff testified that the 2013 audit is "still open" and Duke has not yet received findings from Staff regarding the audit,[51] Staff witness Donlon testified that the 2013 audit has been completed and Staff is accepting Duke's as-filed 2013 cost recovery rates,

[45] 2013 Rider Order at 5.

[46] Tr. Vol. I at 65 and 264.

[47] Joint Ex. 1 at 6 (Stipulation).

[48] OMA Ex. 5 at 1 (Attorney Examiner Entry in Case No. 14-1580-EL-RDR).

[49] Joint Ex. 1 at 6 (Stipulation).

[50] Tr. Vol. II at 367-368.

[51] Tr. Vol. I at 81-82.

regardless of whether the application included errors in the costs or expenses associated with the filing.[52] This plainly deviates from common and acceptable PUCO regulatory audit and accounting practices for annual and quarterly true-ups of utility company costs and expenses. Not only does this violate PUCO regulatory practices, but it also removes an important protection for customers embedded in the PUCO rules and regulatory process. By accepting Duke's 2013 as-filed application, the Stipulation requires customers to pay for accounting expenses and imprudent expenses incurred by Duke, with no recourse for recovery, particularly if those costs are a result of a coding or accounting error where an expense was merely charged to an incorrect account.

Duke argues in its brief that both witness Duff and witness Donlon testified that the Stipulation does not violate any principle or practice.[53] A mere conclusory statement does not satisfy its burden to demonstrate, through the evidence, that no important regulatory principles or practices are violated by the Stipulation. On the contrary, the evidence clearly shows that the Stipulation violates several important regulatory principles and practices, as well as PUCO order and Supreme Court precedent.

III. Conclusion

The proposed Stipulation fails to satisfy the requirements established by the Commission for evaluating the reasonableness of a stipulation. Moreover, Duke has failed to meet its burden to demonstrate that these requirements have been met per the record evidence. Duke's reliance on its claim that the Stipulation "as a whole [is] favorable to consumers,"[54] must fail based on the evidence in this proceeding. As previously discussed, the Stipulation is not the product of

[52] Id. at 284-286.

[53] Duke Br. at 6.

[54] Id.

serious bargaining, does not benefit ratepayers, is not in the public interest, and violates several regulatory principle, practices and PUCO precedent. Kroger respectfully requests that the PUCO reject the proposed Stipulation and reaffirm its order issued in Case No. 14-457.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on May 13, 2016.

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