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 for 2013.	)))))))	Case No. 14-457-EL-RDR
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 for 2014.	)))))))	Case No. 15-534-EL-RDR

APPLICATION FOR REHEARING OF
THE OHIO MANUFACTURERS' ASSOCIATION

Pursuant to Section 4903.10, Revised Code (R.C.), and Rule 4901-1-35, Ohio Administrative Code (O.A.C.), the Ohio Manufacturers' Association (OMA) hereby respectfully requests rehearing of the Public Utilities Commission of Ohio's (Commission) October 26, 2016 Second Entry on Rehearing (EOR) issued in the 2013 Recovery Case (Case No. 14-457-EL-RDR)[1] and Opinion and Order (Order) issued in the 2014 Recovery Case (Case No. 15-534-EL-RDR)[2] regarding Duke Energy Ohio, Inc.'s (Duke) request for recovery of program costs, lost distribution revenue, and performance incentives related to its energy efficiency and demand response programs for 2013 and 2014. OMA contends that the EOR and Order are unlawful and unreasonable in the following respects:

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[1] 2013 Recovery Case, Second Entry on Rehearing (October 26, 2016).

[2] 2014 Recovery Case, Opinion and Order (October 26, 2016).

1. The Commission erred in reversing its previous decision prohibiting the use of energy efficiency savings achieved during prior years (i.e., banked savings) to obtain incentives through the shared savings mechanism in years when Duke did not independently achieve energy efficiency mandates.

2. The Commission erred in approving Duke's application for recovery of program costs, lost distribution revenue, and performance incentives related to its energy efficiency and demand response programs for 2014.

3. The Commission erred in determining that the Stipulation was a product of serious bargaining among capable, knowledgeable parties.

4. The Commission erred in finding that the Stipulation benefits ratepayers and is in the public interest in violation of Ohio law.

5. The Commission erred in finding that the Stipulation does not violate any important regulatory principles or practices in violation of Ohio law.

For these reasons, and as further explained in the Memorandum in Support attached hereto, OMA respectfully requests that the Commission grant its Application for Rehearing.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On October 26, 2016, in a complete reversal of its previous decision, the Commission approved a stipulation filed between Duke and staff of the Public Utilities Commission of Ohio (Staff), which permits Duke to recover from ratepayers $19.75 million in shared savings incentive payments for the 2013 and 2014 calendar years (Stipulation).[3] Additionally, the Commission approved Duke's application for recovery of program costs, lost distribution revenue and performance incentives for the 2014 calendar year and overturned a prior decision,

[3] 2013 Recovery Case, Second Entry on Rehearing at 17; 2014 Recovery Case, Opinion and Order at 17.

now allowing Duke to recover shared savings incentive payments from ratepayers in years when it did not independently achieve energy efficiency mandates.[4]

The Commission's authorization for Duke to use energy efficiency savings achieved during prior years (i.e., banked savings) to maximize its incentives earned through the shared savings mechanism undermines the purpose of the shared savings incentive mechanism to motivate and reward electric distribution utilities for exceeding energy efficiency standards in a given year.[5] Moreover, additional provisions in the Stipulation result in unjust, unreasonable, and unlawful customer payments by ratepayers and directly ignore the Commission's directive to conduct an audit and flow through any necessary true-ups through the rider rate.[6] Although the Commission has recently explained that a "stipulation cannot circumvent the authority of the Commission,"[7] that is precisely what the Commission has done in these proceedings. By overturning a decision rendered 18 months ago for the sake of approving a settlement between only two parties, the Commission has completely reversed course on an issue of significant importance to ratepayers that has public policy implications. This is both unreasonable and unlawful.

II. PROCEDURAL HISTORY

On March 28, 2014, as revised April 17, 2014, Duke filed an application for recovery of program costs, lost distribution revenue, and shared savings incentives related to its energy

[4] Id.

[5] 2013 Recovery Case, Finding and Order at 5 (May 20, 2015) (May 20, 2015 Order).

[6] Joint Ex. 1 at 7 (Stipulation).

[7] *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 52 (March 31, 2016).

efficiency (EE) and demand response programs for 2013 (2013 Recovery Case).[8] The Commission issued an order modifying and approving Duke's application for recovery on May 20, 2015 (May 20, 2015 Order). The Commission expressly stated in its May 20, 2015 Order that Duke's use of banked savings to achieve a shared savings incentive was improper.[9] Both Duke and Ohio Partners for Affordable Energy (OPAE) subsequently filed motions for rehearing of the Commission's May 20, 2015 Order.

Prior to the Commission reaching a decision regarding Duke and OPAE's applications for rehearing, Duke filed another application for recovery of program costs, lost distribution revenue, and shared savings incentives related to its EE programs for 2014 (2014 Recovery Case) on March 30, 2015.[10] In that application, Duke again sought to receive a shared savings incentive based on its use of banked savings.[11]

On January 6, 2016, Duke and Staff filed a Stipulation, which they allege represents a resolution of all of the issues in the 2013 Recovery Case and the shared savings mechanism issue in the 2014 Recovery Case.[12] OMA actively participated in both the 2013 and 2014 Recovery Cases, as well as the evidentiary hearing involving the Stipulation that was filed in both cases.

On October 26, 2016, the Commission issued decisions in both the 2013 Recovery Case and the 2014 Recovery Case, approving the Stipulation, granting Duke's application for recovery of program costs, lost distribution revenue, and performance incentives for 2014, and granting

[8] *In the Matter of the Application of Duke Energy Ohio, Inc., for the 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, Application (March 28, 2014).

[9] 14-457 Order at 5.

[10] *In the Matter of the Application of Duke Energy Ohio, Inc., for the Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to its Energy Efficiency and Demand Response Programs,* Case No. 15-534-EL-RDR , Application (March 30, 2015).

[11] Id.

[12] Joint Ex. 1 at 2 (Stipulation).

Duke's motion for rehearing on the issue of using banked savings to achieve a shared savings incentive in the 2013 Recovery Case.[13]

III. ARGUMENT

A. The Commission erred in reversing its previous decision prohibiting the use of energy efficiency savings achieved during prior years (i.e., banked savings) to obtain incentives through the shared savings mechanism in years when Duke did not independently achieve energy efficiency mandates.

Pursuant to the Commission's October 26, 2016 EOR, Duke is now authorized to collect a shared savings incentive from customers for 2013 and 2014 programs when it failed to even meet the annual statutory benchmarks for energy efficiency absent the use of banked savings during each year.[14] Based on this decision, it appears that when a settlement has been filed, the Commission can disregard established precedent in order to approve terms and provisions within that settlement, no matter how unlawful. This outcome is unjust and unreasonable and establishes a dangerous precedent.

In its May 20, 2015 Order, the Commission stated the following:

> As to Duke's use of banked savings, the PUCO agrees with OMA and finds the Company may only use the banked savings to reach its mandated benchmark. Therefore, the PUCO finds Duke's use of banked savings to claim an incentive is improper.[15]

The Commission further stated:

> [T]he tiered incentive structure is designed to motivate and reward the utility for exceeding energy efficiency standards on an annual basis. As the mandated benchmark rises every year, Duke must continue to find ways to encourage energy efficiency. If it has a large bank of

[13] See, e.g., 2013 Recovery Case, Second Entry on Rehearing at 15-16 (October 26, 2016); 2014 Recovery Case, Opinion and Order at 16-17 (October 26, 2016).

[14] Tr. Vol. I at 141.

[15] 2013 Recovery Case, Opinion and Order at 5 (May 20, 2015).

> accrued savings to rely on, the motivation to push energy efficiency programs in following years diminishes. Thus, in order for the structure to continue to serve as a true incentive for Duke to exceed the benchmarks, the Commission finds the banked saving cannot be used to determine the annual shared savings achievement level.[16]

The language in its May 20, 2015 Order clearly demonstrated that it was just and reasonable to disallow the use of banked savings for obtaining shared savings incentive payments as allowing shared savings under such circumstances contradicts the original purpose and intent of shared savings to motivate and reward utilities for exceeding the energy efficiency standards each year.

Similarly, in a recent decision involving FirstEnergy's application to provide a standard service offer pursuant to an electric security plan (ESP), the Commission disallowed FirstEnergy's recovery of shared savings for energy savings resulting from their Customer Action Program, in which FirstEnergy merely measured the results of efficiency measures that customers took on their own.[17] The Commission noted that, as a policy, they have *never* allowed shared savings for programs that involve "no action by the Companies to achieve the energy savings."[18]

Thus, the Commission has endorsed and continues to endorse the belief that electric distribution utilities should not be permitted to obtain a shared savings incentive for their inaction, including not exceeding the minimum required in any given year. Despite this clear and unambiguous language, Duke seeks to circumvent the Commission's policy and use the

[16] Id.

[17] *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. 4928.143in the Form of an Electric Security Plan,* Case No. 14-1297-EL-SS), Fifth Entry on Rehearing at 147 (October 12, 2016).

[18] Id. (emphasis added).

Stipulation not only as a means to rectify its choice not to amend its energy efficiency portfolio plan by the deadline established in Senate Bill 310,[19] but also to force a reversal of the Commission's May 20, 2015 Order for the sake of settlement in this proceeding.

As will be discussed in more detail below, the Commission has adopted the following criteria to evaluate whether a stipulation is reasonable and warrants acceptance:

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?[20]

Regardless of the agreement by signatory parties with respect to a particular settlement, the Commission is obligated to ensure that a filed stipulation meets these established criteria. Although Stipulations are viewed as "an efficient and cost-effective means of bringing issues before the Commission,"[21] a Stipulation is merely a recommendation[22] and is not binding. As the Ohio Supreme Court has stated, the Commission still "must determine what is just and reasonable from the evidence presented at the hearing."[23] Here, the provision in the Stipulation

[19] Tr. Vol. I at 261.

[20] See, e.g., *In the Matter of the Application of the 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).

[21] See, e.g., *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 77-78 (March 31, 2016); *In re FirstEnergy*, Case No. 12-1230-EL-SSO, Opinion and Order at 42 (July 18, 2012); *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 11-5568-EL-POR, et al., Opinion and Order at 17 (March 21, 2012).

[22] *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379 (1978).

[23] Id.

between Duke and Staff allowing the use of banked savings to achieve a shared savings incentive is unreasonable and fails to satisfy the stipulation test.

Therefore, the Commission erred in granting Duke's motion for rehearing in the 2013 Recovery Case, which effectively reverses its prior order disallowing the use of banked savings to achieve a shared savings incentive. This decision establishes new and dangerous precedent that contradicts the underlying purpose of the shared savings incentive mechanism to encourage and reward utility companies for running effective energy efficiency programs that produce savings.[24]

B. The Commission erred in approving Duke's application for recovery of program costs, lost distribution revenue, and performance incentives related to its energy efficiency and demand response programs for 2014.

In addition to unreasonably reversing its prior decision in the 2013 Recovery Case, the Commission also erred in approving Duke's application for recovery of program costs, lost distribution revenue, and performance incentives related to its energy efficiency and demand response programs in the 2014 Recovery Case. The Commission approved Duke's application subject to the Stipulation, which permits Duke to recover $19.75 million in shared savings from ratepayers for the 2013 and 2014 calendar years. Given it is undisputed that Duke failed to meet its mandated energy efficiency benchmarks in 2013 and 2014 without the use of banked savings,[25] the Commission's decision to approve Duke's application unreasonably authorizes Duke to use banked savings to achieve shared savings incentive payments. Therefore, the Commission erred in approving Duke's application for 2014 for all of the reasons previously discussed above.

[24] OMA Ex. 1 at 2 (Seryak Direct).

[25] Tr. Vol. I at 141.

C. The Commission erred in determining that the Stipulation was a product of serious bargaining among capable, knowledgeable parties.

In determining that the Stipulation meets the first prong of the three-part settlement test, the Commission states that the Stipulation was the result of serious bargaining, did not exclude intervening parties, and included signatory parties that represent diverse interests.[26] Each of these findings are erroneous based on the record evidence in this proceeding.

First, no serious bargaining occurred in developing the Stipulation signed by Staff and Duke. It is critical that in order for parties to engage in serious bargaining and negotiation, there is transparency in the process. As the record demonstrates, there was no transparency in the negotiations to this Stipulation. The signatory parties to the Stipulation were involved in a total of only four meetings.[27] Intervening parties were not even informed of the existence of two of those four meetings until Duke supplemented its initial discovery responses after the deposition of Mr. Timothy Duff on March 1, 2016.[28] This was well after the meetings initially occurred on October 2, December 28, December 29, and December 30, 2015.[29] Additionally, after Staff and Duke reached an agreement on the Stipulation at their December 30, 2015 meeting, they circulated a copy of the negotiated final agreement to intervening parties, stating:

> 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.[30]

Intervening parties were not asked to participate in negotiating the terms of the Stipulation or to provide feedback regarding the already negotiated terms of the Stipulation.[31] Rather, they were

[26] 2013 Recovery Case, Second Entry on Rehearing at 11; 2014 Recovery Case, Opinion and Order at 11.

[27] OMA Ex. 14.

[28] Id.

[29] Tr. Vol. I at 259.

[30] OMA Ex. 21.

merely given the Stipulation and instructed to decide whether or not to sign within three business days.[32] Notably, the terms of the Stipulation did not change from the time the agreement was circulated to the intervening parties on December 30, 2015 to the time it was filed with the Commission on January 6, 2016,[33] providing further indication that the settlement was already final when circulated to the intervening parties.

Additionally, when intervening parties were finally invited to discuss the Stipulation, it was 21 days *after* the Stipulation was filed with the Commission. At this meeting, intervening parties were informed that the provision providing Duke with $19.75 million in shared savings for its 2013 and 2014 energy efficiency programs would be "hard to move off," thereby eliminating any discussion among intervenors about a critical provision within the Stipulation that would cost customers $19.75 million.[34] Further, Duke witness Duff testified that by the time he participated in settlement meetings between Staff and Duke on December 29 and 30, 2015,[35] the $19.75 million provision for the 2013 and 2014 shared savings incentive "had already been determined."[36] When asked why intervening parties were not invited to participate in negotiation discussions prior to reaching a settlement, no rationale was forthcoming.[37] This sequence of events hardly demonstrates serious bargaining or transparency in the process of developing the Stipulation.

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[31] Tr. Vol. I at 62 and 314.

[32] Tr. Vol. I at 119.

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

[34] Specifically, Staff witness Donlon testified that intervening parties were told in a meeting on January 27, 2016, that "it would be hard to move off that number" (referring to the $19.75 million provision) given there existed a signed Stipulation between Staff and Duke. Tr. Vol. I at 309-310.

[35] Tr. Vol. I at 102 and 117-118.

[36] Tr. Vol. I at 22.

[37] Tr. Vol. I at 255.

Second, the Stipulation also excludes a large number of intervening parties as there are only two signatory parties to the Stipulation – Duke and Staff. The Supreme Court of Ohio has expressed "grave concern" with stipulations that exclude an entire customer class and states that they are "contrary to the Commission's negotiations standard… and partial settlement standard."[38] The Stipulation in this proceeding excludes not only an entire customer class, but *all* classes of customers as no intervening party representing a customer class agreed to sign the Stipulation and no intervening party representing a customer class was invited to participate in negotiations of the filed Stipulation.[39] The record clearly demonstrates that, contrary to the Commission's assertions, intervening parties representing customer interests were "purposely excluded from negotiations."[40]

Finally, the finding that the signatory parties represent diverse interests is in error. The two Signatory parties to the Stipulation are the utility company and Staff. While OMA does not dispute that a single party cannot nullify a stipulation,[41] it is noteworthy that *no* intervening parties in this case agreed to the Stipulation. Further, the Commission failed to identify how the signatory parties to the Stipulation (e.g., Duke and Staff) represent diverse interests in violation of Section 4903.09, Revised Code, which requires the Commission to set forth the reasons for its decisions.[42]

Therefore, the Commission erred in finding that the Stipulation meets the first prong of the three-part settlement test and is the result of serious bargaining among capable knowledgeable parties.

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

[39] Tr. Vol. I at 62 and 314.

[40] 2013 Recovery Case, Second Entry on Rehearing at 11; 2014 Recovery Case, Opinion and Order at 11.

[41] 2013 Recovery Case, Second Entry on Rehearing at 11-12; 2014 Recovery Case, Opinion and Order at 11-12.

[42] See e.g., *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312 (1987); *In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, 147 Ohio St.3d 59 (April 21, 2016).

D. The Commission erred in finding that the Stipulation benefits ratepayers and is in the public interest in violation of Ohio law.

The Commission concluded that the Stipulation represents "significant compromises" that benefit ratepayers and are in the public interest.[43] However, this conclusory statement ignores significant costs to customers embedded in the Stipulation provisions and relies on Duke's inflated assumptions of what it might recover under the shared savings mechanism absent the Stipulation.

Duke asserts that it could be entitled to a shared savings incentive of as much as $55 million in pre-tax dollars for calendar years 2013, 2014, 2015, and 2016 combined.[44] This overstated calculation fails to consider a number of facts. First, it is undisputed that Duke failed to meet its mandated energy efficiency benchmarks in 2013 and 2014 absent the use of banked savings.[45] Pursuant to the Commission's May 20, 2015 Order, which prohibited the use of banked savings to claim a shared savings incentive,[46] Duke could not recover any shared savings for 2013 and 2014. Thus, the true potential cost to customers during the 2013 and 2014 calendar years was $0. Second, Duke attributes $15 million of the purported $55 million in potential costs to 2016, despite the fact that the shared savings mechanism expired at the end of 2015 and Duke had not yet been authorized to extend the shared savings mechanism and collect shared savings in 2016.[47] Therefore, the $19.75 million provision and Duke's agreement to not pursue future

[43] 2013 Recovery Case, Second Entry on Rehearing at 11 and 13; 2014 Recovery Case, Opinion and Order at 11 and 13.

[44] 2013 Recovery Case, Second Entry on Rehearing at 13; 2014 Recovery Case, Opinion and Order at 13; Joint Ex. 1 at 6 (Stipulation).

[45] Tr. Vol. I at 141.

[46] 2013 Recovery Case, Opinion and Order at 5.

[47] *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, Application (September 9, 2014).

shared savings are hardly compromises, as characterized by the Commission.[48] Rather, they are generous benefits to Duke with no equal return to customers.

Similarly, the provisions in the Stipulation related to Staff's acceptance of Duke's 2013 cost recovery filed in the 2013 Recovery Case[49] and the agreement that Duke's energy efficiency programs will remain subject to the Evaluation, Measurement and Verification (EM&V) process[50] also do not represent compromises or concessions on behalf of Duke. With respect to the 2013 cost recovery, Staff witness Donlon testified that the 2013 audit has been completed and Staff is accepting Duke's as-filed 2013 cost recovery rates, regardless of any errors by Duke in costs or expenses associated with the filing.[51] This is hardly a concession to Duke, but rather, is a windfall as Duke will no longer have to forgo collection from customers of any costs that were deemed inappropriate or imprudent under the audit and recommended for disallowance by the auditor (i.e., Staff). Further, Duke's energy efficiency programs are already subject to the Commission's EM&V process and the inclusion of this term provides no additional benefit to customers and no compromise on the part of Duke beyond what is already required in Rule 4901:1-39-05, O.A.C..

Moreover, the terms of the Stipulation directly contradict the intent of the shared savings incentive mechanism. As stated by OMA witness John Seryak, shared savings incentive mechanisms were designed to align the interests of utility companies and customers as it relates to energy efficiency programs.[52] These programs reduce costs for ratepayers and encourage and reward utility companies for running cost-effective programs that produce savings above the

[48] 2013 Recovery Case, Second Entry on Rehearing, at 13; 2014 Recovery Case, Opinion and Order at 13.

[49] Joint Ex. 1 at 7 (Stipulation).

[50] Id.

[51] Donlon Direct at 284-286.

[52] OMA Ex. 1 at 2 (Seryak Direct).

statutory requirement.[53] Staff agrees, noting in reply comments filed in Case No. 14-1580-EL-RDR that:

> The primary purpose of allowing the use of banked savings to meet energy efficiency requirements is to provide recognition that the currently required energy efficiency savings have already been achieved by the Company in a *prior* period. This has no relationship to the purpose of shared savings, which is to incentivize the Company to optimize its implementation of its portfolio plan in the *current* period.[54]

By approving the Stipulation, the Commission is permitting Duke to receive a shared savings incentive of $19.75 million for the 2013 and 2014 calendar years when Duke failed to meet its annual mandated benchmark absent the use of banked savings.[55] This removes from customers any benefits they could receive from the shared savings incentive mechanism (e.g., in the form of energy efficiency and cost savings) and undermines the purpose of the shared savings incentive mechanism.[56]

Additionally, the Commission's finding that the Stipulation is beneficial to ratepayers as it provides certainty ignores regulatory-out provisions embedded in the Stipulation.[57] For example, although Duke agrees not to file for recovery of a shared savings incentive in any year after 2014 in which banked savings were used to meet the annual benchmark, the exception contained in provision (3)(a) of the Stipulation renders this provision meaningless as it allows Duke to seek a shared savings incentive "consistent with [any] change in law, regulation, or

[53] Id.

[54] OCC Ex. 2 at 6 (Reply Comments of Staff in PUCO Case No. 14-1580-EL-RDR).

[55] Tr. Vol. I at 141.

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

[57] 2013 Recovery Case, Second Entry on Rehearing at 13; 2014 Recovery Case, Opinion and Order at 13.

order."[58] This provides no resolution of issues or certainty to ratepayers given a subsequent Commission order would nullify the entire provision and purported concession by Duke to forego shared savings.

The Commission's determination that the Stipulation provides a benefit of reducing the risk of litigation due to the finality of the issue of banked savings is also erroneous.[59] Regardless of whether a case is resolved through a Stipulation or through a Commission order, there is always a risk of additional litigation either via litigation of the Stipulation or the appeals process.[60] Further the regulatory-out exception embedded in provision (3)(a) of the Stipulation permits Duke to file for a shared savings mechanism consistent with a new regulation or order, providing no real finality and doing nothing to mitigate the risk of additional litigation.[61] The Commission's decision to completely reverse its prior decision on the issue of banked savings and shared savings has resulted in additional litigation given the fact that parties believed the issue had been resolved by the Commission in its previous May 20, 2015 Order and Staff through prior comments.[62]

E. The Commission erred in finding that the Stipulation does not violate any important regulatory principles or practices in violation of Ohio law.

The Stipulation also fails to meet the third prong of the settlement test as it violates several regulatory principles, Commission orders, and Commission regulatory audit and accounting practices. As previously discussed at length, none of the intervening parties representing customers support the Stipulation or were invited to participate in settlement

[58] Joint Ex. 1 at 7 (Stipulation).

[59] 2013 Recovery Case, Second Entry on Rehearing at 13; 2014 Recovery Case, Opinion and Order at 13.

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

[61] Joint Ex. 1 at 6-7 (Stipulation).

[62] OCC Ex. 2 at 6 (Reply Comments of Staff in PUCO Case No. 14-1580-EL-RDR) (Staff stated that "The Company should be allowed to use accrued banked savings to earn shared savings in a future year.")

discussions.[63] This intentional exclusion of customer classes from settlement negotiations violates Supreme Court precedent established in *Time Warner Axs v. PUCO.*[64] The Commission failed to address this point in its decisions in violation of Ohio law.

Additionally, provisions in the Stipulation related to shared savings are inconsistent with the Commission's May 20, 2015 Order and pending Commission proceedings. The Commission held in its prior order that "Duke's use of banked savings to claim an incentive is improper."[65] Given that Duke failed to achieve its annual mandated energy efficiency benchmark in both 2013 and 2014 absent the use of banked savings,[66] the $19.75 million provision in the Stipulation violates the Commission's previous May 20, 2015 Order. As testified to by both Staff witness Donlon and Duke witness Duff, a Commission order is binding until it is modified by the Commission or overruled by the Supreme Court.[67] The Commission's statement that the stipulation approved in the previous recovery case, Case No. 11-4393-EL-RDR, lacked clarity is unsupported by the record.[68] Nowhere in that stipulation was the term "banked" utilized or discussed,[69] nor did the subsequent order in that case explicitly discuss banked savings.[70] In fact, Duke's own witness Duff submitted testimony in that case supporting the stipulation: "The incentive mechanism does not apply until the Company has exceeded its target for annual compliance with the Commission's regulation for energy efficiency."[71] The language in the May

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

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

[65] 2013 Recovery Case, Opinion and Order, at 5.

[66] Tr. Vol. I at 141.

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

[68] 2013 Recovery Case, Second Entry on Rehearing at 15; 2014 Recovery Case, Opinion and Order at 15.

[69] Tr. Vol. I at 196.

[70] Id. at 87.

[71] OMA Ex. 13 at 2 (Duff Direct in 11-4393-EL-RDR).

20, 2015 Order is clear and the language in the stipulations relied upon by Duke for its purported misinterpretation does not include any "vagueness."[72]

Additionally, provision (3)(a) in the Stipulation, which states that Duke will forego collection of shared savings incentives for 2015 and 2016,[73] is inconsistent with Duke's current pending request to continue its cost recovery mechanism for energy efficiency programs through 2016 (Case No. 14-1580-EL-RDR). Thus, the terms of the Stipulation do not align with current Commission orders and pending proceedings.

Finally, the Stipulation also includes a provision that disregards important Commission audit and accounting principles and practices. Staff witness Donlon explained during his testimony that agreement to the Stipulation resulted in Staff's acceptance of Duke's as-filed application in the 2013 Recovery Case, independent of the results of the 2013 audit of Duke's costs included in the rider rate.[74] The audit process has long served as a protection for customers from paying for imprudent costs and expenses inadvertently allocated to the incorrect account or imprudently incurred by the regulated utilities. The audit process permits Staff to work with the utility to remove the imprudent cost from the rider rate or recommend a disallowance of the expense to the Commission. In this proceeding and according to the terms of the Stipulation, Staff has accepted Duke's as-filed cost recovery application for 2013, including any unreasonably or imprudently incurred costs included in the rider rate.[75] This provision is unreasonable and unjust as it removes important customer protections afforded through the audit process and violates important regulatory principles related to common Commission practice.

[72] Tr. Vol. II at 346.

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

[74] Tr. Vol. I at 283.

[75] Tr. Vol. I at 285-286.

The Commission failed to address this Stipulation provision in its decisions in contravention to Section 4903.09, Revised Code.

Therefore, the Commission erred in finding that the Stipulation does not violate any important regulatory principles or practices.[76]

IV. CONCLUSION

As demonstrated by the record and as discussed herein, in OMA's initial brief,[77] and in OMA's reply brief,[78] the Stipulation fails to satisfy the Commission's three-part test for evaluating the reasonableness of a stipulation. The Stipulation is not the product of serious bargaining, does not benefit ratepayers, is not in the public interest, and violates several important regulatory principles and practices. As such, the Commission erred not only in approving the Stipulation, but also in authorizing the use of banked savings to recover a shared savings incentive, which directly reversed its previous order in the 2013 Recovery Case. OMA respectfully requests that the Commission grant its application for rehearing of the issues set forth above. Specifically, OMA requests that the Commission reconsider its decision to approve the Stipulation filed between Duke and Staff and its decision to allow Duke to use previous banked savings to achieve a shared savings incentive in both the 2013 and the 2014 Recovery Cases.

[76] 2013 Recovery Case, Second Entry on Rehearing at 15; 2014 Recovery Case, Opinion and Order at 15.

[77] 2013 Recovery Case, Initial Brief of OMA (April 28, 2016); 2014 Recovery Case, Initial Brief of OMA (April 28, 2016)

[78] 2013 Recovery Case, Reply Brief of OMA (May 13, 2016); 2014 Recovery Case, Reply Brief of OMA (May 13, 2016).

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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 November 23, 2016.

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Summary: Application Application for Rehearing of The OMA electronically filed by Ms. Cheryl A Smith on behalf of The Ohio Manufacturers' Association