THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC. FOR APPROVAL OF ITS 2017-2019 ENERGY EFFICIENCY AND PEAK DEMAND REDUCTION PROGRAM PORTFOLIO PLAN.	CASE NO. 16-576-EL-POR

OPINION AND ORDER

Entered in the Journal on September 27, 2017

I. SUMMARY

{¶ 1} The Commission approves Duke Energy Ohio, Inc.'s Energy Efficiency and Peak Demand Reduction Program Portfolio Plan for 2017 through 2019, as modified by the Amended Stipulation filed in this case, and subject to an annual cap, not to exceed four percent of the Company's 2015 operating revenues, on recovery of program costs and shared savings from customers.

II. APPLICABLE LAW

{¶ 2} The Duke Energy Ohio, Inc. (Duke or the Company), is an electric distribution utility as defined in R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02 and, as such, is subject to the energy efficiency and peak demand reduction (EE/PDR) requirements under R.C. 4928.64 and 4928.66.

{¶ 3} Ohio Adm.Code Chapter 4901:1-39 provides rules for the Commission's review of each electric utility's EE/PDR program portfolio plan (Portfolio Plan) that consists of cost-effective programs to encourage innovation and market access for all customer classes and achieve the statutory benchmarks for peak-demand reduction, and meet or exceed the statutory benchmarks for energy efficiency.

{¶ 4} On May 28, 2014, the General Assembly passed 2014 Sub.S.B. No. 310 (S.B. 310), which became effective on September 12, 2014, and amended provisions in R.C. Chapter 4928 to freeze the EE/PDR mandates at 2014 levels. S.B. 310 also gave each electric utility the option of extending its then-current Portfolio Plan through 2016, or amending its Portfolio Plan to scale back to the frozen standard levels. S.B. 310 also created an Energy Mandates Study Committee to evaluate the EE/PDR statutory mandates. On September 30, 2015, the committee issued a report recommending that the existing frozen mandate levels be continued indefinitely. However, the freeze enacted by S.B. 310 expired without renewal in 2017, and the benchmarks under R.C. 4928.64 and 4928.66 again apply.

III. Procedural History

{¶ 5} Duke's last Portfolio Plan for 2014-2016 was approved by the Commission in *In re Duke Energy Ohio, Inc.*, Case No. 13-431-EL-POR, Opinion & Order (Dec. 4, 2013), with an additional small business energy saver program approved in *In re Duke Energy Ohio, Inc.*, Case No. 14-964-EL-POR, Finding and Order (Sep. 10, 2014), as well as a weatherization pilot for low-income customers approved in *In re Duke Energy Ohio, Inc.*, Case No. 13-662-EL-UNC, Finding and Order (May 15, 2013). Duke elected to continue its 2014-2016 Portfolio Plan unchanged through 2016 under S.B. 310, and therefore was not subject to the freeze.

{¶ 6} Ohio Adm.Code 4901:1-39-04(A) required each electric utility to file an update to their three-year EE/PDR program portfolio plans (POR) by April 15, 2016. On March 16, 2016, Duke filed a request to extend the deadline for filing its 2017-2019 Portfolio Plan until October 15, 2016.[1] In requesting the extension, Duke noted the Energy Mandates Study Committee's September 30, 2015 report, and argued that uncodified Section 7(B) of S.B. 310 prohibited the Commission from taking any action with regard to any portfolio plan prior to January 1, 2017. Duke also asserted that its requested waiver would not impact the Commission's review of Duke's Portfolio Plan for 2017 and beyond.

{¶ 7} Motions to intervene were filed by The Kroger Co. (Kroger), the Ohio Manufacturers' Association (OMA), Ohio Partners for Affordable Energy (OPAE), and

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1 Duke originally docketed its request under Case No. 16-576-EL-WVR as a request for a rule waiver, but the case was subsequently changed to a POR purpose code for administrative convenience.

the Environmental Law & Policy Center (ELPC), as well as comments objecting to Duke's waiver request, on March 23, 28, and 29, 2016, and April 4, 2016, respectively.

{¶ 8} On April 7, 2016, the Commission issued an entry granting the motions for intervention of Kroger, OMA, OPAE, and ELPC, and extending the deadline for the filing of Duke's 2017-2019 Portfolio Plan to June 15, 2016.

{¶ 9} On June 15, 2016, Duke filed its application for approval of its 2017-2019 Portfolio Plan, along with the direct testimony of Company witnesses Trisha A. Haemmerle, Kevin A. Bright, and James E. Ziolkowski.

{¶ 10} Motions to intervene were filed by Industrial Energy Users-Ohio (IEU-Ohio), and the Environmental Defense Fund jointly with the Ohio Environmental Council (EDF/OEC) on June 23, 2016, by the Ohio Consumers' Counsel (OCC) and the Natural Resources Defense Council (NRDC) on June 28 and 29, 2016, respectively, and by IGS Energy, Inc. (IGS Energy) and the Ohio Hospital Association (OHA) on July 11 and 27, 2016, respectively. Objections to the approval of the Company's 2017-2019 Portfolio Plan were filed by IEU-Ohio, OPAE, Kroger, OMA, and IGS Energy on August 15, 2016. On that same date, Duke filed the report of Nexant, Inc. on the Company's DSM Market Potential Study to determine the potential energy and demand savings that could be achieved by EE/PDR programs in Duke's service territory.

{¶ 11} On October 14, 2016, Duke filed an Amended Application for the Company's 2017-2019 Portfolio Plan along with the supplemental testimony of Company witnesses Haemmerle and Bright.

{¶ 12} By entry issued October 26, 2016, the motions to intervene of EDF/OEC, IEU-Ohio, OCC, NRDC, IGS Energy, and OHA were granted, and a hearing was scheduled for November 28, 2016.

{¶ 13} By entry issued on November 14, 2016, the hearing was rescheduled for December 5, 2016, but on November 18, 2016, Staff filed a motion to continue the hearing due to a conflict in hearing dates, and by entry issued November 22, 2016, the hearing was rescheduled for January 9, 2017.

{¶ 14} On December 22, 2016, Duke filed a stipulation and recommendation that was joined by OHA, ELPC, EDF/OEC, NRDC, and IGS Energy. On December 23, 2016, the Ohio Consumers' Counsel and Staff filed a joint motion and request for expedited treatment to continue the hearing and set a new procedural schedule. By entry issued December 27, 2016, the hearing was continued to February 21, 2017. On January 4, 2017, Duke filed the supplemental direct testimony of Timothy J. Duff in support of the stipulation.

{¶ 15} On January 27, 2017, Duke filed an Amended Stipulation (Stipulation) that was joined by OHA, OPAE, ELPC, EDF/OEC, NRDC, IGS Energy, Kroger, and OMA.

{¶ 16} By entry issued February 6, 2017, the hearing was rescheduled to February 27, 2017. Also on that date, Staff filed the direct testimony of Patrick Donlon and OCC filed the direct testimony of Colleen Shutrump.

{¶ 17} The hearing of this matter was conducted on February 27, 2017 with Mr. Duff, Ms. Haemmerle, and Mr. Ziolkowski testifying on behalf of Duke, Ms. Shutrump appearing on behalf of OCC, and Mr. Donlon testifying on behalf of Staff. The testimony of Company witness Bright was admitted by stipulation of the parties without cross-examination (Tr. I at 83-86). The hearing was then adjourned until March 15, 2017 to consider Mr. Duff's rebuttal testimony, which was subsequently filed on March 7, 2017.

{¶ 18} Initial briefs were filed on March 31, 2017, by Duke, Staff, OCC, OPAE, OHA, and jointly by ELPC, NRDC, OEC and EDF (Environmental Intervenors, collectively). Reply briefs were filed on April 7, 2017 by Duke, Staff, OCC, OPAE, OHA, the Environmental Intervenors, and IGS Energy.

IV. OCC MOTION TO STRIKE

{¶ 19} On April 14, 2017, OCC filed a motion to strike portions of Duke's initial brief and OPAE's initial and reply briefs that OCC asserts rely on non-record allegations, opinions, and assertions that were not subject to scrutiny by other parties and are not supported by the facts in evidence or administratively noticed in this proceeding. Memoranda contra OCC's motion to strike were filed by OPAE and Duke on April 27 and 28, 2017, respectively. OCC filed a reply to their memoranda contra on May 4, 2017.

{¶ 20} The Ohio Supreme Court has held that there is neither an absolute right for, nor an absolute prohibition against, the Commission taking administrative notice of facts outside the record of a case. *In re Ohio Edison Co.*, 146 Ohio St.3d 222, 227, 2016-Ohio-3021 at ¶29, (citing *Canton Storage & Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 8, 647 N.E.2d 136 (1995)). Rather, each case must be resolved on its facts, and particularly whether the complaining party had prior knowledge of, and an adequate opportunity to explain and rebut, the facts administratively noticed. In all cases, the complaining party must demonstrate prejudice. *Id.* (citing *Allen v. Pub. Util. Comm.*, 40 Ohio St.3d 184, 186, 532 N.E.2d 1307 (1988)).

{¶ 21} OCC objects to Duke's reference in its initial brief to an Ohio utility rate survey published on the Commission's website in claiming that Duke's electric rates are among the lowest in the state. We will hereby take administrative notice of the survey, and as OCC has not shown that it suffered undue prejudice by the Company's characterization of its rates, we will deny OCC's motion to strike with respect to Duke's reference initial brief.

{¶ 22} With respect to OCC's motion to strike portions of OPAE's briefs, all of the references relate to statements regarding OPAE's participation in settlement negotiations which are not part of the evidentiary record in this case. OCC asserts that OPAE's statements purport to show that OPAE's participation in settlement discussions was comparable to OCC's, from which OPAE concludes that serious bargaining occurred. In response, OPAE asserts that OCC has not cited any precedent on what parties may rely on in their briefs. OPAE notes the assertion of Ms. Shutrump that OCC was denied an opportunity to meaningfully participate in settlement negotiations because OCC was not invited to any settlement discussions between November 3, 2016 and the filing of the original stipulation on December 22, 2016. However, OPAE contends that, although Ms. Shutrump's testimony indicated that Duke and OCC had several conversations in mid-December, she concluded that the Stipulation was not the result of serious bargaining among the parties, thereby failing the first prong of the Commission's test for the reasonableness of stipulations (OCC Ex. 13 at 6-7).

{¶ 23} OPAE cites *In re Duke Energy Ohio, Inc.*, Case No. 15-534-EL-RDR, Opinion and Order (Oct. 26, 2016) at 11, for the proposition that the first part of the reasonableness test is satisfied if no parties were purposely excluded from settlement negotiations. OPAE argues that OCC's own witness introduced the issue of whether OCC was excluded from settlement negotiations, and that OPAE should be allowed to rebut OCC's assertions in its briefs. Further, OPAE asserts that briefs are not evidence of record and that, even if the Commission were to consider some part of OPAE's language as hearsay, there is no reason to strike such language, as the Commission is capable of giving the proper weight to hearsay.

{¶ 24} As discussed above, we will deny OCC's motion to strike with respect to Duke's reference initial brief. However, with respect to the language which OCC wants stricken from OPAE's briefs, we first note that such statements are not in the evidence of record in this proceeding. Further, this Commission has generally discouraged disclosures regarding settlement negotiations, as allowing such language into the record of a proceeding may dampen a party's willingness to participate in future settlement discussions. We will, therefore, grant OCC's motion to strike with respect to such statements included in OPAE's briefs.

V. Summary of the Stipulation

{¶ 25} As noted above, the Stipulation, as amended, is supported by Duke, OHA, OPAE, ELPC, EDF/OEC, NRDC, IGS Energy, Kroger, and OMA.

{¶ 26} The agreement provides that the Company will continue to offer programs consistent with its existing EE/PDR programs during 2017 until the Commission approves Duke's 2017-2019 Portfolio Plan. Further, the signatory parties agree to support the Company's application to defer program costs and lost distribution revenues associated with such continued programs during 2017, and the Company's recovery of such costs, subject to audit. The Stipulation also specifies an incentive structure, ranging from six to 12 percent if Duke exceeds its annual statutory benchmarks for savings achieved, and caps the Company's recovery on annual shared savings at $8 million after-taxes. In addition, net benefits from natural gas savings, water or wastewater improvements, heat rate or energy intensity improvements, nonelectric savings, non-energy benefits, customer savings or demand reductions not included in the Company's approved programs, or any savings that were reflected in a shared savings incentive from a prior year, will not be included in Duke's shared savings during the 2017-2019 Portfolio Plan (Jt. Ex. 2 at 4-6).

{¶ 27} Under the Stipulation, Duke agrees to bid EE/PDR resources into PJM capacity auctions and credit revenues to customers through the Company's EE/PDR Rider. The Company will also make certain changes to its cost-effectiveness analyses to include avoided gas and other fuel costs, consistent with standard national practice. The Stipulation also includes a $50,000 annual commitment to OMA, and various other provisions to promote programs for OMA members and other non-residential customers (Jt. Ex. 2 at 6-7, 10).

{¶ 28} The Stipulation contains a number of provisions relating to the Company's commitments to ELPC, IGS Energy, and Duke's Collaborative regarding a Smart Thermostat Program, which aims to provide incentives for 25,000 customers by the end of the 2017-2019 Portfolio Plan term. Further, Duke will develop a Space Heating Efficiency Program, which seeks to provide retrofits for at least one percent of housing units with primary electric heat (including both single family and multi-family) by the end of 2019. The Stipulation also provides several commitments to OHA that include a $75,000 annual fund and the development of a new Hospital Portfolio Program. Finally, the Stipulation includes a number of provisions relating to Combined Heat & Power project incentives and potential changes (Jt. Ex. 2 at 8-14).

VI. COMMISSION DISCUSSION

{¶ 29} Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight, particularly where the stipulation is unopposed by any party and resolves all issues in the proceeding. *Consumers Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 1992-Ohio-122, 592 N.E.2d 1370, citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978).

{¶ 30} The Commission has established a three-prong test in considering whether a stipulation is reasonable and should be adopted: (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? The Supreme Court of Ohio has endorsed the Commission's use of these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 1994-Ohio-435, 629 N.E.2d 423, citing *Consumers' Counsel* at 126. The Court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission. In determining the reasonableness of a stipulation, the Commission should consider the agreement as a package. *In re Ohio Edison Co., et al.*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (Oct. 12, 2016) at 99-100.

{¶ 31} As noted above, the Stipulation, as amended, is supported by Duke, OHA, OPAE, ELPC, EDF/OEC, NRDC, IGS Energy, Kroger, and OMA. IEU-Ohio intervened in the case, but does not oppose the Stipulation. Staff does not oppose any specific provisions of the Stipulation, but recommends that certain clarifications be made, along with the imposition of a 3.5 percent overall cost cap on Duke's EE/PDR program costs and shared savings to mitigate the risk to the Company's ratepayers. OCC joins Staff's proposed cost cap recommendation, and also requests several other modifications and clarifications, as further discussed below.

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

{¶ 32} The signatory parties state that the Stipulation represents the culmination of a long and detailed settlement process with a diverse group of capable, knowledgeable parties, signing the agreement (Joint Ex. 2). Duke witness Duff testified that the signatory parties to the Stipulation have regularly participated in the Company's past portfolio plan and rate proceedings, as well as cases involving the other Ohio electric distribution utilities. He stated that these parties are very well versed in the law and regulations applicable to Duke's proposed EE/PDR Portfolio Plan, as well as the Company's historical EE/PDR performance, and were represented by experienced, competent counsel. Furthermore, Mr. Duff asserted that the terms of the Stipulation confirm that concessions were made by the signatory parties with the goal of making the Company's Portfolio Plan as robust as possible with programs that will allow the Company to meet its statutory requirements and offer customers meaningful, attractive EE/PDR programs. He concluded that the Stipulation is the product of serious bargaining between capable, knowledgeable parties (Co. Ex. 4 at 9-10).

{¶ 33} OCC witness Shutrump testified that OCC was excluded from settlement discussions and not given an opportunity to meaningfully participate in negotiations (OCC Ex. 13 at 6-7). Upon cross examination, however, she admitted that OCC was invited to at least one meeting (Tr. I at 93-94).

{¶ 34} OCC contends that the Stipulation was not the product of serious bargaining because the residential customer class was excluded from all but one settlement negotiation. OCC claims that Duke improperly negotiated the terms of the settlement with the other parties without inviting OCC. Duke, OHA, and OPAE dispute OCC's claims. OPAE asserts that an attendance record from the November 2, 2016 settlement meeting (Co. Ex. 10), and a December 16, 2016 email of a draft stipulation from the Company to the parties (Co. Ex. 12), as well as a comparison of the original and amended stipulations (Jt. Exs. 1 and 2), provide credible evidence to rebut OCC's contentions. OPAE argues there is no requirement for any set number of face-to-face meetings among all the parties to a case in order to satisfy the first prong of the three-part test for the reasonableness of stipulations.

{¶ 35} Although OCC has claimed that it was excluded from negotiations, Co. Exs. 10 and 12 show that OCC was included in at least one settlement meeting and received a copy of a draft stipulation. While the Commission should closely scrutinize any settlement provisions opposed by Staff and OCC, such opposition does not mean that serious bargaining among the parties did not occur. As noted in the testimony of Duke witness Duff, the signatory parties are knowledgeable and capable intervenors who are represented by competent counsel, and have regularly participated in Commission proceedings, including the Company's past portfolio plan proceedings. In addition, Mr. Duff suggests that the terms of the Stipulation indicate that various parties made concessions to ultimately achieve a final agreement, which demonstrates that the Stipulation is the product of serious bargaining between the knowledgeable, capable parties (Co. Ex. 4 at 10). Furthermore, we note that the low-income residential customer advocates did sign the Stipulation. Accordingly, upon review of the record, the Commission finds that the Stipulation is a product of serious bargaining among capable, knowledgeable parties, and that the first prong of the three-part test for the reasonableness of a stipulation has been met.

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

{¶ 36} Duke witness Duff testified that the Stipulation benefits consumers and the public interest by ensuring that the Company's EE/PDR programs will continue to be available to Duke's customers and will allow them to continue to reap the benefits of participation until Duke's new Portfolio Plan is approved. Mr. Duff asserts that the Stipulation also enhances the Company's proposed program offerings, and supports a fair and reasonable cost recovery mechanism that appropriately incentivizes the Company to exceed its statutory requirements, and achieve as much energy efficiency possible, as quickly as possible, in the most cost effective manner possible. This, he concludes, will keep the overall cost of meeting the benchmarks as low as possible, which ultimately aligns with the intent of the statutory requirements and is in customers' best interests (Co Ex. 4 at 11-12).

{¶ 37} As noted by Mr. Duff, under the Stipulation, the Company has agreed to bid EE/PDR resources into the PJM capacity auctions and return revenues back to customers through Duke's Rider EE-PDR. Further, the Company will only be eligible for incentives in a year in which it did not need to use banked savings to meet its mandated savings level. Additionally, Duke has committed to work with OMA, OHA and others on a number of new programs. The Company has also agreed to an $8.0 million after-tax cap on its eligibility to earn shared savings when Duke exceeds its statutory mandate in a given year. OHA also notes Duke's commitment to develop a new program to help hospitals control their energy costs and allocate more funds to serving the health needs of the public. (Co. Ex. 4 at 3-9, Tr. I at 46-48).

{¶ 38} OPAE, OHA, and the Environmental Intervenors join Duke in arguing that the Stipulation, as a package, will benefit ratepayers and the public interest. Duke characterizes the Stipulation as comprehensive resolution of all significant matters related to the Company's Portfolio Plan for the next three years, including approval of Duke's existing programs with some additions that have the potential to provide significant benefits to customers. Duke states that the Company's proposed Portfolio

Plan will help both participants and non-participants lower their bills by increasing energy efficiency opportunities, and it will help pave the way for future, deeper savings by developing the market for newer technologies such as LED lighting and smart thermostats. (Duke Ex. 1 at 4, Joint Ex. 2 at 8).

Staff's Proposed Cost Cap on Program Costs and Shared Savings

{¶ 39} The primary issue presented in this proceeding is Staff's proposal to cap Duke's recovery of EE/PDR program costs and shared savings at 3.5 percent of the Company's annual operating revenues reported in line 10 on page 300 of Duke's 2015 FERC Form 1, or approximately $33.8 million. Staff witness Donlon testified that such a measure is necessary to mitigate the risk of rising EE/PDR costs to ratepayers. Mr. Donlon contends that these costs have been escalating to the point that EE/PDR rider costs have become one of the highest riders on residential customers' bills, and in reviewing October 2016 rates, he reported that Duke's EE/PDR rider was the third highest rider on the bill for an average customer using 750 kW. He concludes that a cost cap will provide some price assurances to customers and mitigate the risk of increasing costs, while still supporting energy efficiency and allowing the utilities to meet or exceed their statutorily mandated levels (Staff Ex. 1 at 6-8, Tr. I at 159-161).

{¶ 40} OCC joins Staff in arguing that the Stipulation, as a package, will not benefit ratepayers or the public interest unless the settlement includes a cost cap similar to that proposed by Staff. Staff cites Mr. Donlon's testimony that such a cost cap would benefit ratepayers and the public interest because it would require Duke to pick the most effective and efficient means of achieving its benchmarks to avoid unnecessary charges to customers. Further, Mr. Donlon explained that Staff decided to base the cap on Duke's annual operating revenues, as reported on FERC Form 1, because this number is publicly available, expressed in total dollars to directly compare to overall program costs and shared savings, would allow Duke more flexibility in managing its budget than other methods, and would provide transparent comparisons among Ohio utilities since it's a required FERC reported number (Staff Ex. 1 at 5, 9; Tr. I at 170-171).

{¶ 41} Staff argues the cost cap is sufficient to allow Duke to meet or exceed its benchmarks for 2017 through 2019. Staff notes Mr. Donlon's testimony that Duke has always underspent its EE/PDR budget while overachieving its projected energy savings. Based upon this historical analysis, Staff believes that Duke can comply with the proposed cost cap and still comfortably meet and exceed its statutory benchmarks. Staff further argues that the project savings requirements and the projected budgets put forth by Duke are overstated because they fail to include opt-outs and PJM revenues. (Staff Ex. 1 at 8-9, Tr. I at 51-56, 170-171; II at 218-219).

{¶ 42} Duke, OHA, OPAE, and the Environmental Intervenors reject Staff's proposed cost cap as arbitrary, illogical, and misaligned with Ohio public policy and the interests of customers. They argue that cost-effective energy efficiency provides more utility system benefits than the associated program costs so that the establishment of a cost cap would limit customer participation to the detriment of customers. They note the rebuttal testimony of Company witness Duff that customers will retain all of the net benefits associated with the Company's EE/PDR programs after Duke hits the annual $8 million cap on total shared savings included in the Stipulation (Duke Ex. 13 at 7). They argue that forgoing this value to customers for the sake of an overall cap is not in the customers' best interests.

{¶ 43} Duke, OPAE, OHA, and the Environmental Intervenors also argue that the proposed cost cap might force Duke to suspend a program or halt customer participation, thereby jeopardizing the benefits of energy efficiency while possibly increasing the costs and creating a poor experience for customers. Mr. Duff testified that because the cost of energy efficiency has gone up over time, forcing a utility to cease offering programs due to an annual cost cap would likely increase the cost of compliance over the cumulative mandate period. He stated that Duke's average cost per kWh of energy saved during the 2013-2015 period was nearly double that of the proceeding 2010-2012 plan period, and that Staff's proposed $33.8 million cost cap would provide significantly less funding than the $38 million for Duke's projected program costs alone. He noted that Staff's annual cap is just 7.3 percent more than what the Company spent on programs during 2015, a year in which its annual energy savings were 19 percent less than its annual benchmark for 2015 (Co. Ex. 13 at 3-4).

{¶ 44} Mr. Duff also criticized Staff's proposed cap as being illogical and unreasonable, arguing that operating revenues from FERC Form 1 have little relevance to the Company's EE/PDR programs or requirements as they only reflect revenues associated with generation from customers under Duke's standard service offer and exclude switched customers. Mr. Duff proposes that a more relevant number, megawatt hours sold, is also available on the Company's FERC Form 1 and would provide a more appropriate base for a cap. The Company witness also asserts that Staff's proposal creates inequities between Ohio utilities, noting that the cap for Duke is only 90 percent of that approved for Ohio Power Company (AEP) in Case No. 16-574-EL-POR, even after earning its maximum shared savings of $31 million. Mr. Duff suggests that if the Commission adopts a cap, it should be based on program dollars per MWH sales, which he calculates would result in a cap of approximately $52 million, using the same ratio as approved for AEP. Using Staff's methodology, he calculates that Duke's cap should be increased to 5.4 percent to have approximately the same amount of cap per MWH of energy efficiency as approved for AEP (Co Ex. 4-8).

{¶ 45} Staff argues that Mr. Duff's testimony is not credible and should not be given any weight because he misunderstands Staff's proposal. Staff notes Mr. Donlon's testimony that the proposed cap only applies to program costs and shared savings, but excludes lost distribution revenues. Accordingly, Staff asserts that Mr. Duff's claim that the cap would be insufficient to allow Duke to meet its mandates for energy efficiency is without merit (Duke Ex. 13 at 4, Staff Ex. 1 at 4, 9). On reply, Duke contends that Mr. Duff did fully understand Staff's proposal and criticizes Staff's failure to acknowledge that Duke's performance during the 2013-2015 period failed to meet its statutory benchmarks. In its reply, Staff notes that historically, Duke has significantly over-achieved its annual and cumulative energy savings requirements and targets. Duke's annual savings mandate is 203,000 MWh, while its projected target is 236,694 MWh (Co. Ex. 3 at 12, Tr. I at 57-59). As of 2015, Duke was two years ahead on its cumulative energy savings requirement (Tr. I at 26). Staff asserts that these significant over-achievements are proof that Duke has an excessive budget that allows it to overspend on EE/PDR programs, which results in Duke's energy efficiency rider being one of the highest riders on customers' bills (Staff Ex. 1 at 6).

Conclusion

{¶ 46} As noted above, the primary issue presented in this proceeding is whether to adopt Staff's proposal to cap Duke's recovery of EE/PDR program costs and shared savings at 3.5 percent of the Company's annual operating revenues reported in line 10 on page 300 of Duke's 2015 FERC Form 1, or approximately $33.8 million. While both Staff and OCC support this proposal, the Duke, OHA, OPAE, and the Environmental Intervenors oppose such a cap. We note the testimony of Mr. Donlon regarding Duke's increasing EE/PDR rider and the Company's historical record in achieving its statutory mandates in concluding that a cap on EE/PDR program costs and shared savings constitutes a reasonable measure to limit customer exposure to future bill increases (Staff Ex. 1 at 6-8, Tr. I at 26, 57-59 159-161). Mr. Duff suggests that if the Commission adopts a cap using Staff's methodology, Duke's cap should be 5.4 percent. However, we note that an annual cap on EE/PDR program costs and shared savings equal to four percent of the utility's 2015 operating revenues was recently adopted by the Commission for AEP Ohio, Inc. in *In re Ohio Power Co. Energy Efficiency Portfolio Plan,* Case No. 16-574-EL-POR, Opinion and Order (Jan 18, 2017) at 4-5, 8, and for Dayton Power and Light Company in the companion order being issued today in *In re Dayton Power and Light Co. Energy Efficiency Portfolio Plan,* Case No. 16-649-EL-POR, Opinion and Order (Sep. 27, 2017) at 7, 15-16. We believe the same four percent cap should be used in this case to provide an appropriate limitation on the EE/PDR costs to be recovered from Duke's customers.

{¶ 47} Accordingly, the Stipulation will be modified to limit Duke's annual recovery of EE/PDR program costs and shared savings for calendar years 2018 and 2019 to not exceed four percent of the Company's 2015 operating revenues as reported on FERC Form 1. Duke may exceed the cap in calendar year 2017 to recover program costs only. Because we will allow Duke to exceed the cap in 2017, Duke will not be authorized to recover shared savings for 2017 to the extent such recovery would exceed the cap. Moreover Duke should scale back, but not suspend, its EE-PDR programs to avoid materially exceeding its Portfolio Plan budget for 2017 as approved in this case. The Company should not exceed the Portfolio Plan budget for programs for calendar year 2017 without having obtained a waiver from the Commission.

SMART THERMOSTAT AND SPACE HEATING EFFICIENCY PROGRAMS

{¶ 48} OCC also objects to the Stipulation's provisions regarding a new smart thermostat program and an expanded space heating efficiency program (Joint Ex. 2 at 8-11). OCC characterizes the analysis for these programs as too speculative, and contends that all of the required information required under Ohio Adm.Code 4901:1-39-03 and 4901:1-39-04 for these programs was not included in the Company's filings or sufficiently explained in the testimony of Duke witness Haemmerle (Tr. at 71: 11-15). OCC complains that under the Stipulation, CRES providers and other retailers will begin offering thermostat rebates to customers immediately upon approval of the Portfolio Plan and Duke will reimburse them after the fact with customer funds (Joint Ex. 2 at 8). OCC argues that such retroactive rebates are unjust and unreasonable Duke's customers.

{¶ 49} Duke and the Environmental Intervenors refute OCC's contentions with respect to the both programs, while IGS Energy filed a reply brief in support of the smart thermostat program. They note that these programs were added to Duke's Amended Portfolio Plan after negotiations that resulted in the Stipulation, and were not, therefore, included in Duke's market potential study or original Portfolio Plan filings (Co. Ex. 1-3). Duke notes that these programs will be analyzed and subjected to rigorous study to ensure that they are cost effective and will be presented to the Duke Collaborative for its review, so that OCC will have ample opportunity to be heard if OCC believes they might not be cost effective or otherwise imprudent. The Environmental Intervenors cite the

Commission's decisions in *In re FirstEnergy*, Case No 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016) at 15-16, 111, *In re Ohio Power Company*, Case No. 16-574-EL-POR, Opinion and Order (Jan. 18, 2017) at ¶24, and *In re Duke Energy Ohio*, Case No. 13-431-EL-POR, Opinion and Order (Dec. 4, 2013), where the Commission has approved stipulations that included programs with limited details regarding funding amounts and measures for implementation or where the parties agreed to develop additional programs through the collaborative process. With regard to the smart thermostat program, IGS Energy offers a point-for-point summary of the program details and disputes OCC's assertion that retailers or CRES providers will receive a windfall under the program.

Conclusion

{¶ 50} We agree with Duke, IGS Energy, and the Environmental Intervenors that Duke is not prohibited from including the Stipulation's smart thermostat and space heating efficiency program provisions in its 2017-2019 Portfolio Plan because these provisions were not included in Duke's original application or market potential study filings. Rather, the addition of these two provisions must be considered within the context of weighing whether the Stipulation, as a package, benefits ratepayers and the public interest. Moreover, as noted above, OCC will have an opportunity to be heard if further analysis determines that either program is not cost effective or otherwise prudent.

$8 MILLION CAP ON SHARED SAVINGS

{¶ 51} OCC also contends that the Stipulation does not benefit customers or the public interest because the $8 million after-tax ($12.5 million before tax) cap on Duke's shared savings provided under the paragraph 6 of the Stipulation is too high (Jt. Ex. 2 at 5). OCC witness Shutrump testified that at least 19 other states have limited utility profits on energy efficiency programs, and recommended that the cap on Duke's shared savings be reduced to $5.0 million after tax (OCC Ex. 13 at 12-13). OCC notes that under the amended application, Duke projects net benefits to customers of about $48.4 million in 2017, $44.4 million in 2018, and $42.7 million in 2019 (Co. Ex. 7, Attachment JEZ-1). OCC calculates that if Duke's net benefit projections are accurate, customers could pay up to $5.8, $5.3, and $5.1 million after tax in shared savings for 2017, 2018 and 2019, respectively. As the net benefit projection for each plan year is substantially below the Stipulation's $8 million after-tax cap on shared savings, OCC argues that this Stipulation provision may not provide any benefit at all to customers.

{¶ 52} In response, the Company states that the Stipulation's cap on shared savings is appropriate, and consistent relative to the caps on shared savings previously approved by the Commission. Duke notes the testimony of Company witness Duff in calculating that the proposed cap on Duke's shared savings is 40 percent of that approved for AEP Ohio based on the size of its 2015 annual benchmark, while Duke is over 47 percent the size of AEP Ohio. Duke states that it is not proposing that it's shared savings cap be increased to $9.4 million in proportion to AEP Ohio's approved cap, but the Company does believe that it's Stipulated $8 million cap on shared savings is reasonable and in the interest of customers (Co. Ex. 13, TJD attachment 2, Co. Reply Brief at 9).

Conclusion

{¶ 53} We agree with Duke that the $8 million after-tax cap on Duke's shared savings under the Stipulation is reasonable. This cap does provide a benefit to customers because it limits the amount of potential costs to be borne by customers, while still allowing an incentive for the Company to exceed its statutorily mandated EE/PDR targets.

{¶ 54} OCC also argues that the Stipulation fails to benefit ratepayers and the public interest since it allows Duke to charge customers for programs in 2017 that have not yet been approved. As more fully discussed below, we find no merit in this argument as Duke has, in good faith, continued its programs during the pendency of this proceeding to the benefit of its customers and the public. Accordingly we find that the Stipulation, as a package, and modified to include the cap on recovery of EE/PDR program costs and shared savings discussed above, does benefit ratepayers and the public interest.

C. *Does the settlement package violate any important regulatory principle or practice?*

{¶ 55} Duke witness Duff testified that the Stipulation complies with all statutory and regulatory requirements (Co. Ex. 4 at 10-11).

{¶ 56} OPAE cites the testimony of Staff witness Donlon, in suggesting that Section 7(g) of the Stipulation be clarified so as to not conflict with the stipulation approved in Case No. 14-457-EL-RDR, Second Entry on Rehearing (Oct. 26, 2016) at 6-7, which provides that, beginning in 2017, Duke will not file for recovery of shared savings in any year after 2014 in which the Company uses banked savings to achieve its annual benchmark requirements (Staff Ex. 1 at 10-11). Staff, however, is now satisfied with Company witness Duff's testimony at the hearing that section 7(g) of the Stipulation does not conflict with the terms of the stipulation in Case No. 14-457-EL-RDR. Mr. Duff testified that Duke will not file for shared savings or any net benefits in any year in which banked savings have been used (Tr. I at 46-48).

{¶ 57} We agree with Staff that no further clarification is necessary. However, we note the recommendation in Mr. Donlon's testimony that if the Company's pending application to defer EE/PDR program costs and lost distribution revenues in Case No. 17-349-EL-AAM is granted, it be structured to allow for a regulatory deferral over/under recovery true-up accounting. Specifically, if the monthly actual incurred expenses pertinent to the rider are less than the monthly approved revenues, the Company will credit a regulatory liability and charge the appropriate expense accounts, or if monthly actual incurred expenses are more than the monthly approved revenues, the Company will charge a regulatory asset while crediting the appropriate expense accounts (Staff Ex. 1 at 3, 12-13, Tr. I at 147). The Commission finds that any ruling on this recommendation should be deferred until consideration of the application in that docket.

{¶ 58} OCC argues the settlement violates regulatory principles and practices. First, OCC argues that the settlement violates the regulatory principle that rates must be just and reasonable because the settlement would permit Duke to charge unlimited EE/PDR program costs to customers and up to $12.5 million per year in utility profits. In addition, OCC argues the Stipulation violates Ohio Supreme Court precedent against retroactive ratemaking, citing *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E. 2d 465 (1957); *Lucas Cty. Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 686 N.E.2d 501 (1997); and *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788. OCC notes that under the Stipulation, Duke will charge customers for program costs, lost revenues, and shared savings from the beginning of 2017, before its new Portfolio Plan has been approved (Joint Ex. 2 at 4-5).

{¶ 59} On reply, OHA argues that the Stipulation does not constitute retroactive ratemaking, as these provisions do not involve rate-making, but rather provide for the continuation of a Commission-approved rider mechanism which already allows for the deferral and subsequent recovery of EE/PDR costs. OHA contends that each of the cases cited by OCC are distinguishable from this case. OHA asserts that *Keco* addressed whether a customer could seek restitution from a utility for charges that were assessed pursuant to a Commission-approved tariff, not a rider mechanism and approved deferrals like those involved here. *Keco*, 166 Ohio St. at 259, 141 N.E.2d 465. OHA believes that *Lucas County* is also distinguishable because there, the Court specifically found that there was no mechanism which allowed for a rate adjustment and, thus, any refund would necessarily constitute retroactive ratemaking. *Lucas Cty.*, 80 Ohio St.3d at 348, 686 N.E.2d 501. OHA notes Duke's pending application in Case No. 17-349-EL-AAM to defer 2017 EE/PDR program costs, in arguing that as there is a EE-PDR rider mechanism in place, there is no "refund" at issue here. Finally, OHA states that *Columbus Southern* involved a Commission order allowing recovery of twelve months of revenues over a period of nine minutes, which was clearly an attempt to recoup revenues that were lost due to regulatory delay, not deferrals associated with a preexisting rider mechanism. *Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, at ¶¶ 9-10.

{¶ 60} Finally, OHA cites two additional cases, *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 433 N.E. 2d 568 (1982), and *Consumers' Counsel v. Pub. Util. Comm.*, 6 Ohio St.3d 377, 379, 453 N.E.2d 673 (1983), that OHA contends are more applicable here. In *River Gas*, the Court held that the rule from *Keco* does not apply in cases where there is an established recovery mechanism which allows the utility to pass variable costs directly to customers. *River Gas*, 69 Ohio St.2d at 512-514. In *Consumers' Counsel*, the Court held that Commission approval of an accounting modification, such as a deferral, does not constitute ratemaking and, thus, does not violate the rule against retroactive ratemaking. *Consumers' Counsel*, 6 Ohio St.3d at 379.

{¶ 61} As noted above, the Environmental Intervenors also argue that Staff's proposed cost cap is inconsistent with Ohio law and Commission orders that emphasizes the value of energy efficiency savings and high quality programs. They assert that Staff's proposal implies that limiting customer access to energy efficiency, a least-cost resource, would be a desirable outcome. They opine that as energy efficiency delays the need to incur expensive generation, transmission and distribution costs, and provides direct bill savings to participating customers, it drives down the price of wholesale power for all customers. Therefore, the Environmental Intervenors reason that a cap which limits EE/PDR cost recovery may ultimately raise bills overall by depriving customers of savings opportunities.

{¶ 62} In reply, OCC asserts that there is no conflict between past Commission orders approving shared savings mechanisms and the proposed $33.8 million annual cost cap, under which Duke retains an incentive to exceed its annual statutory benchmarks because the more savings it achieves, the higher its profits from shared savings. OCC observes that the Environmental Intervenors cite the Commission's March 31, 2016 Opinion and Order in Case No. 14-1297-EL-SSO, where the Commission noted that cost-effective energy efficiency programs save money for customers. However, OCC points out that in a subsequent entry in the same case, the Commission ordered the utility to lower the cost of its EE/PDR programs and prohibited the utility from charging customers for programs that exceed the statutory benchmark. The Commission concluded that the utility should attempt to exceed the statutory minimum energy savings by efficiently administering the approved programs and achieving energy savings for the least cost, rather than setting the program budget to a stipulated goal. See, *Ohio Edison Co., et. al,* Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016) at 44, 94-95, and Fifth Entry on Rehearing (Oct. 12, 2016) ¶ 325 at 147. OCC concludes that Staff's proposed cost cap in this case is consistent with the Commission's directive to lower the cost of energy efficiency.

{¶ 63} Upon review of the record, the Commission finds that the Stipulation does not violate any important regulatory principle or practice, and that the third prong of the three-part test for the reasonableness of a stipulation has been met. We conclude that Sections 1-3 of the Stipulation, which allow for the deferral and subsequent recovery of EE/PDR costs recovery of program costs, lost revenues, and shared savings from the beginning of 2017 through Duke's EE/PDR rider mechanism does not constitute ratemaking and, thus, does not violate the rule against retroactive ratemaking. *River Gas,* 69 Ohio St.2d at 512-514, and *Consumers' Counsel,* 6 Ohio St.3d at 379. Further, we find imposition of a cap on EE/PDR program costs and shared savings to limit the impact on customers does not to violate the state policies under R.C. 4928.02, the statutory mandates under R.C. 4928.66, or past Commission precedent.

{¶ 64} Accordingly, we find that the Stipulation should be modified to limit Duke's annual recovery of EE/PDR program costs and shared savings to not exceed four percent of the Company's 2015 operating revenues as reported on FERC Form 1. As so modified, we find that the Stipulation passes the three-part test and should be adopted.

{¶ 65} Finally, we note that Staff has identified some inconsistencies and confusion in the reporting and analysis of EE/PDR savings and program expenditures (Tr. I at 49-50, Staff Ex. 3 and 4). To avoid this confusion in future proceedings, the Company is directed to work collaboratively with its Stakeholders and Staff to develop a uniform system of reporting program savings and expenditures on an annual basis, which shall be included as part of the Company's annual status report.

VII. ORDER

{¶ 66} It is, therefore,

{¶ 67} ORDERED, That the Stipulation, as amended, be approved, subject to an annual four percent cost cap for the Company's recovery of EE/PDR program costs and shared savings from customers, as set forth above. It is, further,

{¶ 68} ORDERED, That the Company's Portfolio Plan, as modified by the Stipulation and this Opinion and Order, continue in effect until a subsequent Portfolio Plan has been approved by this Commission. It is, further,

{¶ 69} ORDERED, That OCC's motion to strike be granted in part and denied in part, as set forth above. It is, further,

{¶ 70} ORDERED, That the Company take all other actions consistent with the Stipulation and this Opinion and Order. It is, further,

{¶ 71} ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

RMB/SEC/dah

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Barcy F. McNeal
Secretary