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Via E-file

December 9, 2011

Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43215

In re: Case No. 11-4393-EL-RDR

Dear Sir/Madam:

Please find attached the BRIEF OF THE OHIO ENERGY GROUP e-filed today in the above-referenced matter.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,

David F. Boehm, Esq.
Michael L. Kurtz, Esq.
Jody M. Kyler, Esq.
BOEHM, KURTZ & LOWRY

DFBkew
Encl.
Cc: Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing was served by electronic mail (when available) or ordinary mail, unless otherwise noted, this 9th day of December, 2011 to the following:

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BEFORE THE
PUBLIC UTILITY COMMISSION OF OHIO

In The Matter Of The Application Of Duke Energy Ohio For An Energy Efficiency Cost Recovery Mechanism And For Approval Of Additional Programs For Inclusion In Its Existing Portfolio	:	**Case No. 11-4393-EL-RDR**

BRIEF OF THE OHIO ENERGY GROUP

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December 9, 2011

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BRIEF OF THE OHIO ENERGY GROUP

I. INTRODUCTION

The Ohio Energy Group ("OEG") hereby submits this Brief in support of its recommendations in this proceeding. OEG is a non-profit entity organized to represent the interests of large industrial customers in electric and gas regulatory proceedings before the Public Utilities Commission of Ohio ("PUCO" or "Commission"). OEG's members who are participating in this intervention are: AK Steel Corporation, Air Products and Chemicals, Inc., Ford Motor Company, GE Aviation, and The Procter & Gamble Co. These companies take electric service from Duke Energy Ohio, Inc ("Duke" or "Company"). For the reasons discussed below, the Commission should reject the proposed Stipulation and Recommendation filed November 18, 2011 in this docket ("Stipulation"). At a minimum, the Commission should modify the Stipulation to adopt OEG's recommendations regarding the allocation of the non-residential Rider EE-PDR revenue requirements and the proposed EE/PDR incentive mechanism.

II. ARGUMENT

A. The Commission should reject the proposed Stipulation.

The proposed Stipulation does not satisfy the Commission's three criteria for reasonableness and should be rejected. Although the Commission grants Stipulations substantial weight, such agreements are not binding on the Commission.[1] A Stipulation can be rejected or modified at the Commission's discretion. The Commission determines the reasonableness of a proposed Stipulation using three 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?[2]

As discussed below, the proposed Stipulation does not satisfy these criteria and should be rejected by the Commission.

a. The Stipulation is not the product of serious bargaining among capable, knowledgeable parties.

Although Duke witness Timothy Duff testifies that "the signatory parties represent a broad range of interests,"[3] a brief examination of the signatory parties to the Stipulation in this case quickly demonstrates that Mr. Duff's statement is incorrect. Aside from the Company and Staff, the signatory parties to the Stipulation are three residential/low-income customer representatives (the Office of the Ohio Consumers' Counsel, Ohio Partners for Affordable Energy, and People Working Cooperatively), four environmental interest representatives (Ohio Environmental Council, Environmental Law & Policy

[1] See PUCO Case Nos. 11-3549-EL-SSO et al., Opinion & Order (Nov. 22, 2011) ("Duke ESP Order") at 41 (citing *Consumers' Counsel v. Pub. Util. Comm.* (1992) 64 Ohio St.3d 123,125).
[2] Duke ESP Order at 41.
[3] Duke Ex. 7, Supplemental Direct Testimony of Timothy J. Duff on Behalf of Duke Energy Ohio, Inc., Case No. 11-4393-EL-RDR (Nov. 22, 2011) ("Duff Supplemental Testimony") at 4, lines 21-22.

Center, Natural Resources Defense Council, and Sierra Club), and one competitive retail electric service provider (Vectren Retail LLC).

Though there are a number of parties who have signed the Stipulation, the range of interests represented by the signatory parties is far from "broad." Notably, no non-residential representatives, including commercial or industrial customers, universities, or municipalities, are signatory parties to the Stipulation. And large energy users, such as industrial customers, are the ones most significantly impacted by Duke's proposed kWh cost allocation methodology for non-residential customers. If the Stipulation is approved, the Commission will effectively be approving Duke's proposed kWh cost allocation methodology. A non-residential cost allocation methodology based upon kWh usage would assign a significantly greater proportion of the cost recovery to large industrial manufacturing and commercial customers with high energy usage, irrespective of which rate class realizes the potential benefits purportedly produced by Duke's energy efficiency and peak demand reduction ("EE/PDR") programs.[4] The Commission should not effectively condone such a methodology by approving a Stipulation that was not signed by representatives of large energy users.

When considering the reasonableness of the Stipulation in the Duke Electric Security Plan case ("Duke ESP"), the Commission took into account the interests the signatory parties represented in determining whether the Duke ESP Stipulation met the Commission's first criterion.[5] Accordingly, the fact that no representatives of non-residential or large energy users have signed the Stipulation is an important factor and should be afforded substantial weight in the Commission's consideration of whether a Stipulation that adversely impacts such energy users is reasonable. The Commission should not approve a Stipulation that could adversely impact large energy users when no representative of such

[4] OEG Ex. 6, Direct Testimony of Stephen J. Baron, Case No. 11-4393-EL-RDR (Nov. 18, 2011) ("Baron Testimony") at 4:11-15.

[5] Duke ESP Order at 42 ("Upon review of the stipulation, the Commission observes that, based upon the wide-range of issues addressed and resolved in the stipulation, which affect a very diverse and experienced group of parties that signed the stipulation, it is evident that the parties expended a great deal of time and effort to resolve the issues in these proceedings. The signatory parties represent interests including the company, municipalities, competitive suppliers, industrial consumers, commercial consumers, advocates for low- and moderate income customers, environmental advocates, and Staff.").

a customer signed that Stipulation. The range of interests represented by the signatory parties is too narrow and therefore the Stipulation fails to satisfy the Commission's first criterion.

b. The Stipulation, as a package, does not benefit ratepayers and the public interest.

The Commission should reject the Stipulation in this case because the settlement package does not benefit ratepayers or the public interest, particularly in light of the recently approved Duke ESP settlement.[6] When determining whether the Duke ESP Stipulation met the second criterion for reasonableness, the Commission noted that the Duke ESP Stipulation provisions "provide benefits to *all* stakeholders."[7] The Stipulation in this case does not provide benefits to *all* stakeholders or the public interest and therefore should be rejected.

i. The Stipulation provisions allowing for an incentive mechanism do not benefit stakeholders or the public interest.

One example of how the Stipulation benefits neither all ratepayers nor the public interest can be found in the Stipulation provisions allowing Duke to recover an incentive for its EE/PDR efforts. Specifically, the Stipulation provides for Duke to earn an incentive if Duke exceeds the statutory benchmarks for energy efficiency and peak demand reduction set forth in R.C. 4928.66.[8] The approval of an incentive mechanism is unreasonable for multiple reasons.

First, allowing Duke to recover an EE/PDR incentive is unreasonable because Duke has agreed to divest all of its generation assets. In the recently Commission-approved Duke ESP Stipulation, Duke agreed that:

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[6] Duke ESP Order at 51; Duke ESP Stipulation and Recommendation, Case No. 11-3549-EL-SSO (Oct. 24, 2011) ("Duke ESP Stipulation").
[7] Duke ESP Order at 43 (emphasis added).
[8] Stipulation at 4-5.

- PJM Interconnection, L.L.C. ("PJM") will charge wholesale supply auction winners for capacity at the applicable PJM Reliability Pricing Model price (relieving Duke of any future incremental capacity costs);[9]
- Duke will not participate in the Standard Service Offer auctions and will sell all of its generation energy into the PJM energy markets (relieving Duke from any future energy costs to serve SSO customers);[10] and
- Duke will transfer title of *all* of its generation assets out of the utility as soon as practicable but on or before December 2014,[11] thus having no future interest in generation-related capacity or energy costs to serve customers in its service territory.

Thus, under the Duke ESP Stipulation, the Company will no longer provide generation-related service to customers in its service territory and will soon have divested *all* of its generation assets.

When a utility has divested all of its generation assets, customers no longer receive a critical benefit of implementing energy efficiency measures - delaying the construction, and the substantial costs associated with the construction of a new power plant. There is little to no additional benefit of utility-sponsored energy efficiency programs for customers, particularly large industrial customers who already carefully manage their energy consumption and implement their own self-funded energy efficiency measures. Further, any benefits of reduced market energy prices resulting from energy efficiency are generic benefits spread throughout the PJM system and do not provide targeted savings solely to Duke's customers. The same could be said for any reliability or environmental benefits of energy efficiency. Thus, Duke's customers would pay the costs of energy efficiency efforts that benefit non-Duke customers who have not had to pay such costs.[12]

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[9] Duke ESP Stipulation at 7, paragraph II(B).
[10] Duke ESP Stipulation at 9-10, paragraph II(F).
[11] Duke ESP Stipulation at 25, paragraph VIII(A).
[12] Baron Testimony at 14:1-12.

When a utility no longer owns generation plants, it no longer makes sense for customers to pay for energy efficiency efforts, especially for over-compliance with energy efficiency benchmarks. The energy efficiency benchmarks established under S.B. 221 provide sufficient incentive for utilities to implement energy efficiency measures as well as cost recovery for utility EE/PDR programs. Once utilities have divested their generation assets, there is no justification for providing additional incentives. Requiring customers to pay an incentive for utilities to exceed EE/PDR benchmarks is not justified in a deregulated environment in which the market determines supply and prices.[13] And because Duke is divesting its generation assets, there are no lost shareholder returns that are foregone by investing in energy conservation rather than supply-side alternatives.[14] Thus, the Stipulation provisions regarding an incentive mechanism for Duke's EE/PDR efforts do not benefit ratepayers or the public interest.

Second, allowing Duke to recover an incentive in addition to recovering the costs to fund its EE/PDR efforts leads to excessive reimbursement, which places an unnecessary financial burden on Ohio residents and businesses in Southwest Ohio.[15] The costs of utility energy efficiency programs are significant. For example, Duke seeks to recover approximately \$34-35 million (depending on the inclusion of lost revenues) from customers in 2012 under Rider EE-PDR, approximately \$17-\$18 million of which would be recovered from non-residential customers.[16] Encouraging utilities to over-comply with the S.B. 221 energy efficiency benchmarks unnecessarily adds to these significant costs.

Third, the proposed incentive thresholds in the Stipulation are unreasonable. Under the incentive thresholds, Duke would earn the maximum payout if the Company achieves as little as 115% of the annual EE/PDR target.[17] This threshold appears to be designed to be easily met or exceeded, increasing

[13] Baron Testimony at 14:15-23.
[14] Baron Testimony at 16:17-22.
[15] Baron Testimony at 15:6-8.
[16] Duke Ex. 4, Direct Testimony of James E. Ziolkowski, Attachment JEZ-1 at 5 and JEZ-6 at 6.
[17] Stipulation at 5.

the likelihood of excessive rewards to the utility.[18] The following table summarizes reported Duke's EE/PDR performance in 2009 and 2010.

Year & Benchmark	Achievement (a)	Benchmark (b)	Over-Achievement (a - b)	% Achievement (b / a)
2009 EE	293,023 MWh[19]	68,233 MWh[20]	224,790 MWh[21]	429%
2009 PDR	97.4 MW[22]	44.6 MW[23]	52.78 MW[24]	218%
2010 EE	535,915 MWh[25]	109,536 MWh[26]	426,379 MWh[27]	489%
2010 PDR	178.4[28]	33.2 MW[29]	145.2 MW[30]	537%

The table demonstrates that Duke has significantly exceeded its SB 221 EE/PDR benchmarks in all years for which the program performance has been measured. In 2009, Duke achieved a remarkable 429% of its energy efficiency benchmarks and 218% of its peak demand reduction benchmarks. In 2010, Duke reported even greater overachievement with 489% achievement of its energy efficiency benchmarks and 537% achievement of its peak demand reduction benchmarks. And Duke projects that its EE/PDR overachievement will continue. Duke forecasts energy efficiency achievement of 364,482 MWh for 2011,[31] which significantly exceeds its approximate mandate of 153,350 MWh.[32] Thus, in 2011 Duke is projected to continue exceeding its benchmark, in this year by 211,132 MWh.

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[18] Baron Testimony at 15:11-16.
[19] OEG Ex. 3, *In the Matter of the Annual Energy Efficiency Portfolio Status Report of Duke Energy Ohio, Inc., Case No. 10-317-EL-EEC* (March 15, 2010) at 4.
[20] Id.
[21] Id.
[22] Id.
[23] Id.
[24] Id.
[25] OEG Ex. 4, *In the Matter of the Annual Energy Efficiency Portfolio Status Report of Duke Energy Ohio, Inc., Case No. 11-1311-EL-EEC* (March 15, 2011) at 8.
[26] Id.
[27] Id.
[28] Id.
[29] Id.
[30] Id.
[31] OEG Ex. 4 at 23.
[32] OEG Ex. 4, 2010 mandate of 109,536 MWh (Id. at 8) adjusted for compliance target increase from 0.5% in 2010 to 0.7% in 2011.

Duke's assertion that the compliance targets increase over time inappropriately ignores the fact that the 2011 EE compliance target of 0.7 percent of its baseline will increase only slightly over the next few years and will not exceed 1.0 percent until 2019.[33] During this same period, the Company's existing EE programs and over achievement carry forward will continue to significantly exceed its compliance mandate. In other words, the Company's ability to carry forward or "bank" its 2010 energy efficiency excess of 426,379 MWh[34] could result in Duke exceeding its benchmarks for the next several years, without taking into consideration the projected 2011 over-compliance, and without assuming any additional EE during those years. Given Duke's 429% energy efficiency achievement in 2009, its 489% energy efficiency achievement in 2010, and its projected overachievement in 2011, the Stipulation's provision establishing a maximum annual incentive to the Company for exceeding the mandate by as little as 15% are unreasonable and should be rejected by the Commission.

Fourth, the proposed incentives allowed for in the Stipulation are excessive. According to Duke witness Ziolkowski, the incentive component of Duke's proposed 2012 revenue requirement is estimated to be $4,477,041, assuming a 7.5% incentive payout.[35] But Duke's overachievement in 2009 and 2010, and its projected overachievement in 2011, suggests that Duke will greatly exceed its maximum incentive threshold for at least the near future, likely assuring Duke that it will recover the maximum incentive of 13%[36] for the next several years. After recalculating the incentive component of the revenue requirement with the assumption that Duke receives the 13% maximum incentive provided for in the Stipulation, Duke would receive a total incentive of $7,760,204 in 2012. Thus, the Stipulation's incentive provision effectively guarantees Duke an annual incentive payment of almost $8

[33] R.C 4928.66(A)(1)(a)
[34] OEG Ex. 4 at 8.
[35]Duke Ex. 4, JEZ Attachment 1 at 1, line 9. The incentive component of the revenue requirement accounts for both energy efficiency and peak demand reduction programs.
[36] Stipulation at 5.

million. In light of Duke's total projected 2012 revenue requirement of $33.9[37] million, the $8 million incentive constitutes an unreasonable additional Rider EE-PDR cost to be charged to customers.

Fifth, the incentive allowed by the Stipulation is also excessive because it represents an unreasonable amount relative to the energy reduction achieved. Duke estimates a 2012 incentive of $1,117,834[38] for residential energy efficiency and $2,783,025[39] for non-residential energy efficiency in its projected 2012 revenue requirement – or a total of $3,900,859 for energy efficiency programs, excluding peak demand reduction. This estimate was calculated assuming a 7.5% incentive. The corresponding 2012 energy efficiency MWh reduction, per Duke witness Ossege, is 190,337,446 kWh or 190,337.446 MWh.[40] The result of dividing the 2012 incentive estimate of approximately $3.9 million by the MWh expected to be achieved in 2012 is that the incentive cost of each MWh reduced is approximately $20.50. [41] The Stipulation would therefore provide Duke an incentive in excess of $20 per MWh of energy efficiency achieved. Assuming Duke receives the maximum 13% incentive provided for in the Stipulation, the incentive portion of Duke's revenue requirement for 2012 would be $6,761,488. When that approximately $6.8 million incentive is divided by Duke's projected 2012 energy reduction of 190,337.446 MWh, the Stipulation would allow Duke to receive an incentive of $35.52 per MWh[42] of energy efficiency achieved. Current power prices typically range from $30-$50/MWh. Accordingly, the cost of the EE/PDR incentive alone, excluding the actual costs paid for the EE/PDR programs themselves, is comparable to the cost of Duke actually buying power. Allowing Duke to receive such an excessive incentive is unreasonable and should be rejected by the Commission.

Duke fully recovers the costs associated with its EE/PDR programs. In light of the reasons discussed above, providing for the additional recovery of an incentive payment is unreasonable. There

[37] Duke Ex. 4, JEZ Attachment 1 at 1, line 14
[38] Duke Ex. 4, JEZ Attachment 1 at 1, line 22
[39] Duke Ex. 4, JEZ Attachment 1 at 1, line 33
[40] Duke Ex. 3, AJO Attachment 5 (Sum of "Gross Cumulative kwh w/losses" table values for 2012).
[41] Revenue requirement of $3,900,859 divided by 190,337.446 MWh achieved.
[42] Revenue requirement of $6,761,488 divided by 190,337.446 MWh achieved.

is no need for the Company to recover additional revenues from customers in the form of an incentive.[43] Moreover, Duke has a statutory mandate to meet the EE/PDR benchmarks established by Section 4928.66. This statutory mandate provides sufficient incentive for Duke to engage in EE/PDR efforts. There is no basis in this proceeding to permit Duke to charge customers the additional costs of incentive payments to stockholders for implementing EE/PDR measures. Further, the proposed incentive thresholds are unreasonably low and the proposed amount of incentive is excessive.

ii. The Commission should not approve the Stipulation and thereby effectively approve Duke's unjust and unreasonable non-residential cost allocation methodology for Rider EE-PDR, which does not benefit stakeholders or the public interest.

The Stipulation also adversely impacts ratepayers that are high energy users, such as industrial customers. Unnecessarily increasing the rates of large energy users, like industrial customers who provide a number of quality jobs in Ohio, is counter to economic development and the public interest. Under Duke's proposal, the non-residential EE-PDR revenue requirement would effectively be allocated to each non-residential rate schedule on the basis of kWh energy usage. The proposed non-residential rate is $0.001301 per kWh.[44]

Duke's proposed non-residential cost allocation methodology would have a substantial adverse impact on customers taking service under the transmission service rate schedule ("TS customers") who do not participate in the Company's EE/PDR programs. For example, the monthly utility bill for a large industrial customer who uses 100,000 MWh (100,000,000 kWh) would increase almost $150,000 per month.[45] If the Commission approved a rate class kWh usage allocation among all non-residential customers, a significantly greater proportion of such costs would be assigned to large industrial manufacturing and commercial customers with high energy usage, irrespective of which rate class

[43] Baron Testimony at 16:7-11.
[44] Duke Ex. 4, Attachment JEZ-3.
[45] 100,000,000 kWh * ($0.001301-$0.000049)

realizes the potential benefits purportedly produced by Duke's EE/PDR programs. Duke witness Ziolkowski conceded that a kWh allocation "puts a lot more cost on the TS customers"[46] and that "[h]igh load-type of customers would end up picking up more of the cost."[47] Thus, altering the non-residential cost allocation methodology would lead to detriment, rather than benefits to high energy users, including TS customers.

Currently, under Duke's Save-a-Watt Rider, the Company's EE/PDR costs are allocated to TS customers who do not participate in Duke's EE/PDR programs using distribution revenue by tariff.[48] Mr. Baron proposes that such an allocation methodology continue to be used for Duke's proposed Rider EE-PDR as well. Large industrial customers, like TS customers, are generally more sophisticated energy users who have already taken self-funded measures to maximize their energy efficiency and minimize their energy costs. Such customers may derive little to no benefit from Duke's EE/PDR programs. In fact, Duke witness Bright testified that he knew of only one TS customer who had participated in the Company's Save-a-Watt programs.[49] Yet such non-participating customers could be allocated substantial levels of Rider EE-PDR costs under Duke's proposed change to allocation based on kWh energy usage merely because of their high levels of kWh energy usage. It is unjust to require customers with high energy usage to pay significant levels of Duke's EE/PDR costs irrespective of the level of participation by such customers in Duke's EE/PDR programs. A non-residential EE/PDR cost allocation based upon distribution revenues, as OEG recommends, more closely aligns benefits with the costs of EE/PDR programs to such customers. And OEG's proposed allocation methodology would have no impact on residential customers.

Duke's proposed non-residential kWh allocation is also contrary to economic development and the public interest because of its potential impact on large businesses that are critical to jobs in Ohio.

[46] Tr. 88:5-7.
[47] Tr. 88:21-22.
[48] OEG Ex. 1, Duke Rider SAWR tariff sheet.
[49] Tr. 18:18-21.

Allocating the costs of Duke's EE/PDR programs on the basis of kWh energy usage may hinder economic development in Ohio. Large industrial customers, like TS customers, provide many quality jobs in Ohio. Inequitably increasing the electric rates of such customers by requiring them to pay disproportionate costs for EE/PDR programs from which they may derive little to no direct benefit may discourage large industrial companies from remaining in Ohio. Likewise, large industrial companies outside of Ohio may be reluctant to open facilities in Ohio if they could be subject to paying disproportionate costs for Ohio utility EE/PDR programs.[50] Approving Duke's proposed change in allocation will result in a substantial increase in the energy efficiency charges to approximately a dozen of the largest electric customers and employers in the Duke service territory.[51]

Duke has provided no ratemaking principle or Commission requirement that the non-residential EE-PDR revenue requirement be allocated on the basis of kWh usage in each non-residential rate class. And Duke has presented no evidence that allocating EE/PDR costs to all non-residential customers based on kWh energy usage is necessary in order for Duke to meet the EE/PDR benchmarks under S.B. 221. In fact, based on Duke's past performance, Duke appears to be very capable of meeting its EE/PDR benchmarks even with the current non-residential allocation based on distribution revenues by tariff. As discussed in detail above, Duke indicated that it achieved 489% of its energy efficiency benchmark and that it achieved 537% of its peak demand reduction benchmark in 2010.

Although large energy users are given an option to avoid a utility EE/PDR charges by filing an application for mercantile customer exemption in accordance with R.C. 4928.66 and Ohio Adm. Code 4901:1-39-08, a mercantile customer's application for an exemption from a utility's EE/PDR cost recovery mechanism is still subject to Commission approval and review. There is uncertainty regarding whether the Commission may ultimately approve a mercantile customer's application for an exemption from the utility's cost recovery mechanism. Duke's witness testified that an *individual* customer must

[50] Baron Testimony at 6:12-19.
[51] Baron Testimony at 7:5-7.

prove that they meet or exceed the *entire* benchmark for a utility in order to qualify for an exemption.[52] But Duke's witnesses could not clearly point to a regulation that outlines the level of EE/PDR savings a mercantile customer must achieve to qualify for an exemption from the rider.[53] Under Duke's interpretation, even if a mercantile customer's actions took every cost-effective EE/PDR effort possible for that customer using the customer's own funding, and the customer's efforts resulted in significant energy savings, the customer would not be eligible for any exemption unless that individual customer met the utility's entire annual benchmark. It is inequitable for such a customer to have to pay disproportionate EE/PDR costs under Duke's proposed kWH allocation to fund the EE/PDR efforts of other customers, who may include competing companies.

Further, the Commission has drawn a distinction between merely "behavioral" energy efficiency programs and those which require additional investments.[54] Thus, some energy efficiency measures adopted by large customers, even if those measures save significant amounts of energy, may not qualify them for the mercantile exemption. [55] And there may be a lag in the time from when a mercantile customer files an exemption application to the time when the Commission actually approves the mercantile customer's application. Accordingly, a mercantile customer who would qualify for an exemption from a utility's EE/PDR rider may end up paying disproportionate costs to the utility because of their high energy usage until the Commission approves the mercantile customer's application.

Additionally, large, energy-intensive industrial customers have a business incentive to engage in cost-effective energy conservation projects that meet the customer's internal rate of return criteria. But, at some point, it is logical that such a customer will reach a level where additional EE/PDR investments are not cost-effective (a so-called "exhaustion point"). This would also be true if one were to use the utility's avoided costs, rather than the customer's direct cost savings in the analysis. In other words, even on a total

[52] Tr. 33:6-17; Tr. 49:2-6.
[53] Tr. 34:1-23; Tr. 106:14-108:3.
[54] Tr. 22:2-6 (referring to OEG Ex. 2, PUCO Order in Case No. 10-834-EL-EEC (Sept. 15, 2010)).
[55] Tr. 27:19-28:4.

resource cost basis ("TRC"), there will be some point at which there are simply no EE/PDR projects available for a specific customer. Whether a customer whose EE/PDR efforts have reached this point will qualify for a mercantile exemption is uncertain since the exemption application is still subject to Commission approval.

Other states have recognized both the large industrial customers may reach on "exhaustion point"[56] or have unconditionally exempted very large industrial customers from participating in energy efficiency programs and paying a utility's energy efficiency surcharge, even without a demonstration that the customer has reached an "exhaustion point."[57] Although the law may differ in Ohio, it is important for this Commission to understand that other states recognize the unique position of large industrial customers in regard to EE/PDR measures and costs. Though Ohio law provides a mercantile self-direct exemption, the Commission can also address issues related to large industrial customers by adopting a more appropriate allocation of a utility's EE/PDR program costs than the methodology proposed by Duke in this proceeding. Consequently, the Commission should allocate non-residential Rider EE/PDR costs based on rate schedule distribution revenues since this methodology more reasonably aligns the benefits of utility EE/PDR

[56] APSC Docket No. 10-101-R, *In the Matter of the Institution of a Rulemaking to Adopt Amendments to the Commission's Rules on Conservation & Energy Efficiency to Allow Self-Directed Programs for Large Customers*, APSC Order No. 10 (Aug. 23, 2011) at 5. Under the Arkansas Commission's Order, a large industrial customer whose demand is 1 MW or greater can request a Certificate of Exemption to "opt out" of energy efficiency programs and thereby avoid paying a utility's energy efficiency surcharge. The customer must either demonstrate that it has implemented (or invested in) energy efficiency measures during the prior ten years, or it must demonstrate that it will implement (or invest in) measures during the period of the approved utility energy efficiency plan. Alternatively, the large industrial customer "may demonstrate that it has <u>exhausted its opportunity to conduct meaningful cost-effective EE programs</u>, or that it is unable to realize meaningful benefits through, its utility-provided EE programs." (emphasis added).

[57] Case No. PUE-2009-00071, *Ex Parte: In the matter of establishing rules of the SCC governing exemptions for Large General Service Customers under §56-585.1 A 5 c of the Code of Virginia*. In Virginia, large industrial customers whose demand exceeds 10 MW are unconditionally exempted from participation in utility energy efficiency programs and are not charged any energy efficiency surcharge or rider. The Virginia State Corporation Commission ("VSCC") explained the Virginia legislation in its November 13, 2009 Order in Case No. PUE-2009-00071. In that Order, the VSCC stated that, pursuant to §56-585.1 A 5 c of the Code of Virginia, "the legislation prohibits the utilities from recovering the costs of these programs from 'any customer that has a verifiable history of having used more than 10 megawatts of demand from a single meter of delivery.'" The programs that are referred to in that Order are the energy efficiency programs mandated by the legislation. The legislation also provides for an "opt out" for smaller industrial customers (500 kW to 10 mW) who can verify that they have "implemented energy efficiency programs that have produced or will produce measured and verifiable results consistent with industry standards and other regulatory criteria stated in [§56-585.1 A 5 c of the Code]." VSCC November 13, 2009 Order in Case No. PUE-2009-00071 at 1.

programs to very large customers with the costs paid by those customers, compared to the kWh allocation proposed by the Company.

Further, the Commission should note that other states with large manufacturing customers, who likely compete against Ohio manufacturers, allocate EE/PDR costs to very large customers in a manner that recognizes this benefit/cost relationship. For example, Kentucky requires that demand-side management program costs be specifically assigned to rate classes that receive the benefits of the programs.[58] Duke's proposal to allocate EE/PDR program costs to all rate classes in this proceeding, including the Company's largest customers, places Ohio manufacturing customers in a much less favorable position with regard to utility EE/PDR costs.

In considering the second criteria for the reasonableness of a stipulation, the Commission has examined whether a stipulation "contains provisions which promote economic development…."[59] Here, if the Stipulation is not modified to alter Duke's proposed non-residential cost allocation methodology, the Stipulation could actually have an adverse impact on economic development in Ohio. This is contrary to the public interest. Because the Stipulation provides for an unreasonable incentive as Commission approval of the Stipulation would effectively approve Duke's proposed non-residential cost allocation, the Stipulation does not benefit *all* stakeholders and is counter to the public interest. Consequently, the Stipulation does not satisfy the Commission's second criterion for reasonableness and should be rejected.

c. The Stipulation violates important regulatory principles or practices.

The Stipulation violates at least two important state policies outline in Ohio law and should be rejected. Under R.C. 4928.02(A), the policy of the state is to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service." As discussed in detail above, the Stipulation's provision for Duke to recover an incentive mechanism

[58] Kentucky Revised Statutes 278.285(3) ("The Commission shall assign the cost of demand-side management programs only to the class or classes of customers which benefit from the programs").
[59] Duke ESP Order at 43.

beyond its EE/PDR costs is unreasonable for multiple reasons, leading to unreasonably priced retail electric service for all of Duke's customers in violation of R.C. 4928.02(A). Further, Duke's proposed change to the non-residential cost allocation methodology for TS customers who do not participate in Duke's EE/PDR programs has a significant adverse impact upon such TS customers, resulting in unreasonably priced electric service to those customers. Accordingly, the Stipulation violates a critical state policy and should be rejected.

R.C. 4928.02(N) provides that it is the policy of the state to "[f]acilitate the state's effectiveness in the global economy." Adversely impacting large business interests by unnecessarily increasing their energy costs hinders Ohio's effectiveness in the global economy. In these difficult economic times, the Commission should not significantly increase the energy efficiency costs of large employers in Ohio. Rather, the Commission should use a non-residential allocation based on distribution revenues, as recommended by OEG. Such a methodology is consistent with the current practice and avoids a significant adverse impact to businesses that are large energy users in Ohio. Duke's proposed non-residential EE/PDR cost allocation based upon kWh energy usage is contrary to facilitating the state's effectiveness in the global economy and should be rejected.

Accordingly, the Stipulation violates the Commission's third criterion for reasonableness and should be rejected in this proceeding.

B. If the Commission does not reject the Stipulation in its entirety, at minimum, the Commission should modify the Stipulation to adopt OEG's recommendations regarding non-residential cost allocation and an incentive mechanism for EE/PDR.

The Commission should reject the Stipulation as it violates the Commission's three criteria for reasonableness. If the Commission does not reject the Stipulation in its entirety, at minimum, the Commission should adopt OEG witness Baron's proposed cost allocation methodology for non-residential customers, which allocates Rider EE-PDR costs on the basis of rate schedule distribution revenues. This allocation methodology represents a reasonable balance of assigning costs to non-residential rate schedules, does not unreasonably penalize large energy users, and is consistent with how Duke's EE/PDR costs are currently allocated to customers taking service under the transmission service rate schedule.[60] As noted above, OEG's proposed allocation methodology would have no impact on residential customers. Further, the Commission should reject the portions of the Stipulation related to the incentive mechanism, which are unreasonable, particularly in light of the recently approved Duke ESP Stipulation.

III. CONCLUSION

For the foregoing reasons, the Commission should adopt OEG's recommendations in this proceeding.

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[60] Baron Testimony at 5:5-9.

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