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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of **Duke Energy Ohio, Inc.**, for a Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in its Existing Portfolio.	:	Case No. 11-4393-EL-RDR

POST-HEARING BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

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INTRODUCTION

This case involves Duke Energy Ohio, Inc.'s (Duke) request for approval of a proposed cost recovery mechanism for its energy efficiency program. In addition, Duke also proposes adding three new energy efficiency and peak demand reduction (EE/PDR) programs to its portfolio. The Staff of the Public Utilities Commission of Ohio (Staff) and various intervenors filed comments regarding Duke's proposals. After settlement negotiations, Duke, Staff, and all intervenors, except Ohio Energy Group (OEG), entered into a Stipulation and Recommendation (Stipulation).[1] Thus, the issue before the Commission is whether the Stipulation is reasonable and should be adopted.

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[1] *In the Matter of the Application of Duke Energy Ohio, Inc., for a Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in its Existing Portfolio*, Case No. 11-4393-EL-RDR (hereinafter *In re Duke Energy*) (Stipulation and Recommendation) (November 18, 2011) (Joint Ex. 1).

As the sole party contesting the Stipulation, OEG challenges portions of the Stipulation, including the signatory parties' agreement regarding Duke's proposed methodology for allocating the EE/PDR amongst customer classes. In essence, OEG argues that its members, whom are largely transmission voltage (TS) customers, should not have to pay their share of Duke's energy efficiency programs. OEG's argument implicitly challenges the EE/PDR policy of this state. However, this is not the proper forum to debate the policy behind SB 221. Under the current law, OEG's members, like all other electric distribution utility (EDU) customers, are required to contribute to energy efficiency and peak demand reduction obligations of the EDUs. Allowing OEG members to avoid paying their fair share of the EE/PDR costs would be unfair to the rest of the customers in Duke's service territory and would place a larger share of energy efficiency compliance costs upon, primarily, commercial customers. The proposed methodology for allocating such costs set forth in the Stipulation is just and reasonable. Therefore, the Commission should adopt the Stipulation.

DISCUSSION

Rule 4901-1-30, O.A.C., authorizes parties to Commission proceedings to enter into stipulations. Although not binding upon the Commission, the terms of such agreements are to be accorded substantial weight.[2] The ultimate issue for the Commission's consideration is whether the agreement, which embodies considerable time and effort by

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[2] *Consumers' Counsel v. Pub. Util. Comm'n*, 64 Ohio St, 3d 123, at 125 (1992), citing *Akron v. Pub. Util. Comm'n* , 55 Ohio St, 2d 155(1978).

the signatory parties, is reasonable and should be adopted. The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings.[3] In considering the reasonableness of a stipulation, the Commission has used the following criteria;

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

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

(3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve cases.[4] When the Commission reviews a contested stipulation, as is the case here, the Court has also been clear that the requirement of evidentiary support remains operative. While the Commission "may place substantial weight on the terms of a stipulation," it "must determine, from the evidence, what is just and reasonable."[5] The

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3 *See, e.g.*, *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (Order on Remand) (April 14, 1994); *Ohio Edison Co.*, Case No. 92-1463-GA-AIR, *et al.* (Opinion and Order) (August 26, 1993); *Ohio Edison Co.*, Case No. 89-1001-EL-AIR (Order on Remand) (August 19, 1993); *The Cleveland Electric Illumination Co.*, Case No. 88-170-EL-AIR (Opinion and Order) (January 31, 1989); and *Restatement of Accounts and Records (Zimmer Plant)*; Case No, 84-1187-EL-UNC (Opinion and Order) (November 26, 1985).

4 *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm'n*, 68 Ohio St. 3d 559 (1994), citing, *Consumers' Counsel, supra,* at 126.

5 *Consumers' Counsel v. Pub. Util. Comm'n*, 64 Ohio St. 3d 123, 126, 592 N.E.2d 1370 (1992).

agreement of some parties is no substitute for the procedural protections reinforced by the evidentiary support requirement.[6]

The signatory parties, and Staff, respectfully submit that the Stipulation here satisfies the reasonableness criteria, and that the evidence of record supports and justifies a finding that its terms are just and reasonable.

A. The Stipulation is the product of serious bargaining among capable, knowledgeable parties.

The list of parties that signed the Stipulation represents a variety of diverse interests, which include Staff, Duke, OCC, Vectren Retail, and a number of environmental and residential customer advocacy groups.[7] The signatory parties represent a wide range of customers located in Duke's service territory.[8] Furthermore, the signatory parties have an extensive history of participation in matters before the Commission, and have considerable knowledge regarding the issues of this particular case.[9]

All parties had ample opportunity to provide input in this case and various parties filed comments regarding their positions. After settlement negotiations, which included OEG, the signatory parties came to an agreement that constitutes a reasonable resolution of this case. In fact, every intervening party, except for OEG, has signed the Stipulation.

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6 *In re Application of Columbus S. Power Co.*, 129 Ohio St. 3d 46 (2011).

7 *In re Duke Energy* (Stipulation and Recommendation) (Joint Ex. 1)).

8 *In re Duke Energy* (Supplemental Direct Testimony of Timothy J. Duff on Behalf of Duke Energy Ohio, Inc. at 2, 4) (Duke Ex. 7)).

9 *In re Duke Energy* (Supplemental Direct Testimony of Timothy J. Duff on Behalf of Duke Energy Ohio, Inc. at 4 (Duke Ex. 7)).

Furthermore, although OEG contested the Stipulation, it failed to introduce any evidence that the Stipulation was not the product of serious bargaining. Therefore, there is no dispute the Stipulation meets the first prong of the three-part test.

B. The Stipulation, as a package, benefits ratepayers and the public interest.

The Stipulation satisfies the second prong of the test because (1) it benefits ratepayers by adding three new programs to Duke's EE/PDR portfolio and (2) it promotes the public interest by furthering the energy efficiency and peak demand reduction policy of Ohio. Each individual signatory party sees certain portions of the Stipulation as more valuable or beneficial than other portions. However, the Stipulation must be evaluated as a total package and, in this light, the Stipulation provides benefits for all customer classes in Duke's service territory and for Ohio overall. Below, Staff will address some of the more significant benefits.

1. Benefit to ratepayers

The Stipulation provides that three new EE/PDR programs will be added to Duke's EE/PDR portfolio of programs. These proposed programs will have a number benefits for customers that directly participate in these programs and indirectly for those that are nonparticipants.

The Appliance Recycling Program will encourage customers to replace and responsibly dispose of older, inefficient refrigerators and freezers.[10] Customers will benefit directly from this program because participating customers' old units will be picked up from their homes for free and customers will receive an incentive for participating in the program.[11] As customers replace the older, inefficient units with newer, more efficient models, they can expect lower energy usage and costs. Furthermore, the Appliance Recycling Program will have a positive environmental impact because 95% of the disposed units will be recycled.[12]

Duke also proposes implementing the Low Income Neighborhood Program. Under this program, Duke will directly install energy efficiency measures and educate low income customers on better ways to manage their energy bills.[13] The Low Income Neighborhood Program will be available to both homeowners and renters occupying single family and multi-family dwellings in the target neighborhoods. [14] Duke will initially perform energy assessments in participating customers' homes and will then install the appropriate energy efficiency measures if the customer elects to have them installed.[15]

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10 *In re Duke Energy* (Direct Testimony of Casey Mather on Behalf of Duke Energy Ohio, Inc. at 5) (Duke Ex. 6).

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 6.

15 *Id.*

The third proposed program is Home Energy Solutions or the Home Energy Management Program (HEM).[16] HEM is smart grid technology that enables customers and Duke to manage in-home devices and information in order to deliver energy efficiency optimization and demand response benefits. [17] HEM is intended to provide customers with the capability to set preferences on how and when they can use high-use energy devices. [18]Customers will receive critical feedback regarding their energy usage and current energy rate, which will allow these customers to meet their energy savings goals. [19]

All of the proposed programs are designed to deliver energy efficiency and peak demand reduction in a cost effective manner. [20] In addition, all of the proposed programs were presented to the Duke Energy Community Partnership Collaborative.[21] Based on this evidence, the Commission should conclude that these proposed programs, once included in Duke's portfolio, will benefit ratepayers.

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16 *In re Duke Energy* (Direct Testimony of Casey Mather on Behalf of Duke Energy Ohio, Inc. at 6) (Duke Ex. 6).

17 *Id.* at 7.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.* at 5.

2. Public interest

The Stipulation will also benefit the general public by continuing to promote and expand energy efficiency and peak demand reduction in the state of Ohio. The General Assembly determined that EE/PDR programs are in best interest for the state. SB 221 placed statutory demands upon Ohio's regulated electric distribution utilities to meet specified EE/PDR reduction requirements.[22]

Through implementation of its EE/PDR programs, Duke is able to meet these statutory requirements by capturing productivity gains in the use of electricity and maximizing those gains for the benefit of all customers.[23] Furthermore, all customers in Duke's service territory benefit from EE/PDR programs, including transmission voltage (TS) customers, because there is an overall reduction of Duke's EE/PDR rider when the EE/PDR programs are successful. That means that all customers within Duke' service territory that pay the EE/PDR rider, including TS customers, will ultimately pay lower electric bills. Therefore, the benefit of the Stipulation positively affects all customers within Duke's service territory and benefits the public by accomplishing the statutory goals of SB 221.

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22 *In re Duke Energy* (Direct Testimony of Timothy J. Duff on Behalf of Duke Energy Ohio, Inc. at 3) (Duke Ex. 5).

23 *Id.* at 4.

C. The Stipulation does not violate any important regulatory principle or practice.

1. The Stipulation is consistent with the SB 221 and the Commission's EE/PDR rules

The Stipulation is consistent with long-standing regulatory principles and practice. More importantly, it is in line with the overall policy of this state. SB 221 mandates that all electric distribution utilities are required to meet annual, increasing energy efficiency and peak demand reduction benchmarks. [24] Although the requirements of SB 221 are placed specifically upon electric distribution utilities, the General Assembly and the Commission have recognized that EDU's cannot possibly meet these statutory requirements without participation and cooperation from electric utilities' customers. This is because the energy usage and coincident peak demand loads of customers within each EDU's service territory are directly related to statutory benchmarks the EDUs are required to meet.

The statutory EE/PDR benchmarks are measured against the energy sales and peak demand baselines of each EDU. For the energy efficiency requirements, the baseline is determined by averaging the total kilowatt hours the electric distribution utility sold in the preceding three calendar years.[25] For the peak demand requirements, the baseline is determined by averaging the peak demands of the utility in the preceding three calendar years. These baselines set the bar as to what level of energy usage and peak demand

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24 Ohio Rev. Code Ann § 4928.66(A)(2) (West 2011).

25 *Id.*

reduction is required by Duke in order to comply with Ohio law. The higher the baseline is, the higher the compliance requirement for Duke.[26]

All customers in Duke's service territory, including TS customers, are included in Duke's baseline for determining Duke's energy efficiency and peak demand obligations.[27] An increase in TS customers' electricity usage and peak demand loads will increase Duke's annual energy efficiency and peak demand reduction obligations. Thus, it is fair to ask TS customers to pay a reasonable share of EE/PDR rider and participate in the energy efficiency and peak demand reduction programs offered by Duke Energy Ohio. In order for electric distribution utilities' to successfully comply with their EE/PDR obligations, they must be able to recover EE/PDR costs from customers in their service territories who are included in the EDU's statutory baselines. This necessarily includes large industrial customers like TS customers.

OEG argues that large industrial customers have the ability to implement their own, independent EE/PDR measures and, in such circumstances, it may be less equitable to require these customers to pay the EE/PDR rider. But the General Assembly contemplated this very issue, and the Commission has established a method for large industrials customers to avoid paying EE/PDR riders or receive rebates that would offset EE/PDR rider payments. Under R.C. 4928.66(2)(c), mercantile customers can commit their self-funded EE/PDR programs for integration with electric distribution utilities' EE/PDR pro-

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26 Tr. 185.

27 Ohio Rev. Code Ann. § 4928.66(A)(2) (West 2011); Tr. at 185.

grams. This is accomplished by filing a mercantile application with the Commission.[28] By committing its self-funded EE/PDR programs to the EDU's programs, the mercantile customer reduces the EDU's EE/PDR requirements, thus, reducing statutory obligation of the EDU.[29] In exchange for committing its EE/PDR program to the EDU, a mercantile customer can apply for an exemption from paying the EE/PDR rider.[30] Therefore, TS customers that perform self-funded EE/PDR measures can avoid paying Duke's EE/PDR rider by filing a mercantile application with the Commission. Furthermore, TS customers have the ability to enter into reasonable arrangements with Duke that could potentially exclude the charges or costs related to Duke's EE/PDR programs. [31]

2. OEG failed to present any evidence that the Stipulation violates any regulatory principle or practice

OEG has not presented any evidence suggesting the Stipulation violates any regulatory principle or practice. OEG largely opposes the Stipulation because it disagrees with policy behind energy efficiency and peak demand reduction requirements. But the General Assembly has already spoken regarding this issue and SB 221 is the policy of the state.

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28 Ohio Admin. Code § 901:1-39-05(G) (West 2011).

29 Ohio Rev. Code Ann. § 4928.66(A)(2)(c) (West 2011).

30 Ohio Admin. Code §§ 4901:1-39-07(A)(2), 4901:1-39-08 (West 2011).

31 *E.g., In the Matter of the Application for Establishment of a Reasonable Arrangement Between Marathon Petroleum Company LP and Ohio Power Company*, Case No. 10-2777-EL-AEC (Order and Opinion) (May 25, 2011).

OEG disagrees with Duke's proposed methodology for allocating the EE/PDR costs amongst customer classes by the kWh consumed and claims that TS customers "may derive little to no benefit from Duke's EE/PDR programs." [32] OEG would prefer that Duke allocate energy efficiency cost based on distribution rate revenue, which would make OEG's members' share of the energy efficiency costs inconsequential and allow OEG's members to effectively avoid the costs of energy efficiency programs. [33] OEG's position, however, is inequitable and contrary to the policy of SB 221 for a number of reasons.

First, all customers in Duke's service territory benefit from Duke's EE/PDR programs because these programs help reduce the generation energy and capacity costs throughout Duke's service territory, which ultimately benefits all of Duke's customers whether they are shopping customers or not. Therefore, it is equitable to have all distribution customers of Duke Energy Ohio pay the EE/PDR rider on a kWh or kW basis. Second, this argument ignores the fact that TS customers already have the ability to avoid paying the EE/PDR rider by filing a mercantile application. Unlike residential and non-mercantile commercial customers, mercantile customers such as TS customers have the ability to commit their self-funded EE/PDR programs to Duke's programs and obtain an exemption from the EE/PDR rider. OEG, however, presented no evidence that

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32 *In re Duke Energy* (Direct Testimony of Stephen J. Baron on Behalf of The Ohio Energy Group at 5) (OEG Ex. 6).

33 *In re Duke Energy* (Direct Testimony of Timothy J. Duff on Behalf of Duke Energy Ohio, Inc. at 4) (Duke Ex. 5).

any of its members have performed self-funded measures to maximize energy efficiency and reduce their energy costs.[34] Furthermore, OEG failed to present any evidence that any of its members have ever filed mercantile applications. [35] Although OEG's witness apparently has concerns about the efficiency of the mercantile application process, he admits that he was unaware of the automatic approval process and admits that he is not aware of the Commission ever denying any mercantile application. [36]Thus, OEG's witness is clearly not familiar with the mercantile application process and his opinion regarding this matter should be ignored.

At the end of the day, OEG apparently wants it its members to be able to avoid any of the EE/PDR obligations set forth by SB 221. But such a result would be fundamentally unfair because OEG members' energy load comprises a substantial portion of overall load used to quantify Duke's EE/PDR reduction requirements.[37] These large industrial customers constitute a significant component of Duke's baseline for energy efficiency requirements.[38] Requiring Duke to meet EE/PDR requirements based upon this baseline while allowing OEG members to avoid paying their fair share of the EE/PDR

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34 Tr. at 178, 180, and 189.

35 *Id.* at 208.

36 *Id.*

37 *In re Duke Energy* (Supplemental Testimony of James E. Ziolkowski on Behalf of Duke Energy Ohio, Inc. at 2) (Duke Ex. 8).

38 *Id.* at 2-3

costs would be unfair to the rest of the customers in Duke's service territory. [39] More specifically, this would place a larger share of energy efficiency compliance requirements, and costs, upon primarily commercial customers.[40] The Commission should avoid such an unfair result and approve the Duke's proposed methodology for allocating the EE/PDR costs amongst customer classes.

CONCLUSION

The Stipulation meets all prongs of the three-part test and OEG, the sole party contesting the Stipulation, has introduced no evidence to the contrary. On these bases, the Commission should adopt the stipulation as its order in this case.

Respectfully Submitted,

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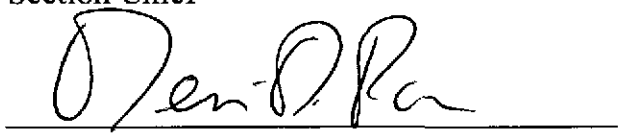

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39 *In re Duke Energy* (Supplemental Testimony of James E. Ziolkowski on Behalf of Duke Energy Ohio, Inc. at 2-3) (Duke Ex. 8).

40 *Id.;* Tr. at 211- 212.

PROOF OF SERVICE

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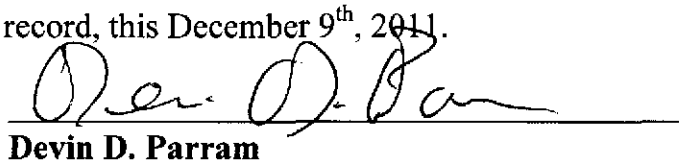

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