BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. 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

OPINION AND ORDER

The Public Utilities Commission of Ohio, having considered the record in this matter and the stipulation and recommendation submitted by the signatory parties, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

Amy B. Spiller, Elizabeth H. Watts, and Rocco O. D'Ascenzo, 2500 Atrium II, 139 East Forth Street, Cincinnati, Ohio 45201, on behalf of Duke Energy Ohio, Inc.

Mike DeWine, Ohio Attorney General, by Devin D. Parram, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of Staff of the Commission.

Bruce J. Weston, Ohio Consumers' Counsel, by Melissa R. Yost and Kyle L. Kern, Assistant Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215, on behalf of the residential utility consumers of Duke Energy Ohio, Inc.

Boehm, Kurtz & Lowry, by David F. Boehm and Jody M. Kyler, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of the Ohio Energy Group.

Colleen L. Mooney, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839, on behalf of Ohio Partners for Affordable Energy.

Trent A. Dougherty and Cathryn Loucas, 1207 Grandview Avenue, Suite 201, Columbus, Ohio 43212, on behalf of Ohio Environmental Council.

Christensen & Christensen, LLP, by Mary W. Christensen, 8760 Orion Place, Suite 300, Columbus, Ohio 43240, on behalf of People Working Cooperatively, Inc.

Tara C. Santarelli, 1207 Grandview Avenue, Suite 201, Columbus, Ohio 43212, on behalf of the Environmental Law and Policy Center.

Joseph M. Clark, 6641 North High Street, Suite 200, Worthington, Ohio 43085, on behalf of Vectren Retail, LLC d/b/a Vectren Source.

Williams, Allwein, and Moser, LLC, by Christopher Allwein, 1373 Grandview Avenue, Suite 212, Columbus, Ohio 43212, on behalf of the Natural Resources Defense Council.

Henry W. Eckhart, 2100 Chambers Road, Room 106, Columbus, Ohio 43212, on behalf of the Sierra Club.

OPINION:

I. Background

On July 20, 2011, Duke filed an application and supporting testimony, proposing the creation of an energy efficiency/peak-demand reduction (EE/PDR) rider (Rider EE/PDR) to supplant its save-a-watt rider (Rider SAW), which was initially approved in *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan,* Case No. 08-920-EL-SSO, et al., Opinion and Order (December 17, 2008) (*Duke 2008 ESP Case*), at its expiration on December 31, 2011. As proposed, Rider EE/PDR will recover the cost of Duke's energy efficiency compliance programs and portfolio of energy efficiency and peak-demand reduction programs. Duke also proposes the following three additional programs to be added to its portfolio of programs approved in *In the Matter of the Report of Duke Energy Ohio, Inc. Concerning its Energy Efficiency and Peak-Demand Reduction Programs and Portfolio Planning,* Case No. 09-1999-EL-POR (09-1999): Appliance Recycling Program, Low-Income Neighborhood Program, and Home Energy Solutions. Duke does not propose any modifications to any existing programs.

By entry issued on July 28, 2011, the attorney examiner established the procedural schedule in this case. Specifically, August 12, 2011, was set as the deadline for the filing of motions to intervene, and comments and reply comments were due on September 14, 2011, and September 28, 2011, respectively.

By entry issued on September 12, 2011, at the request of Staff, the deadlines for the filing of comments and reply comments were extended to September 21, 2011, and October 5, 2011, respectively. In addition, motions to intervene filed by Ohio Consumers' Counsel (OCC), Ohio Partners for Affordable Energy (OPAE), People Working Cooperatively, Inc. (PWC), The Ohio Energy Group (OEG), Natural Resources Defense Council (NRDC), Environmental Law and Policy Center (ELPC), Ohio Environmental Council (OEC), Bottomline Resource Technologies, LLC (Bottomline), Vectren Retail, LLC d/b/a Vectren Source (Vectren), and the Sierra Club were granted.

On September 21, 2011, comments were filed by Staff, OPAE, PWC, and the Ohio Consumer and Environmental Advocates (OCEA), which is comprised of OCC, OEC, NRDC, and the Sierra Club. Reply comments were filed by Duke, OEG, and OPAE on October 5, 2011. On September 22, 2011, Bottomline filed a request to withdraw its motion to intervene.

By entry issued on October 7, 2011, this matter was set for hearing to commence on November 29, 2011. On November 18, 2011, a stipulation and recommendation (stipulation) (Jt. Ex. 1), signed by Duke, Staff, OCC, OPAE, OEC, PWC, ELPC, Vectren, NRDC, and the Sierra Club, was filed. The stipulation purports to resolve all of the issues raised by the signatory parties relative to the instant application filed by Duke. OEG was not a signatory party to the stipulation.

The hearing in this matter commenced, as scheduled, on November 29, 2011, at the offices of the Commission. At the hearing, Duke witnesses Bright (Duke Ex. 2), Ossege (Duke Ex. 3), Ziolkowski (Duke Exs. 4, 8), and Duff (Duke Exs. 5, 7) testified in support of the stipulation. OEG witness Baron offered testimony in opposition to the stipulation (OEG Ex. 6). Briefs were filed by Duke, Staff, OEG, and OPAE on December 9, 2011, as was a joint brief filed by NRDC, OCC, OEC, and the Sierra Club.

By entry issued on March 21, 2012, the Commission reopened the record in this case to consider whether Duke's application complied with the procedural requirements established in Chapter 4901:1-39, Ohio Administrative Code (O.A.C.), and to receive more information regarding what criteria should be used to evaluate the incentive mechanism proposed in Duke's application. In an effort to begin receiving feedback on these issues, the Commission directed Duke to review the requirements of Chapter 4901:1-39, O.A.C., and file a request for a waiver of the applicable rules by April 4, 2012, along with any arguments addressing why Duke did not believe a waiver would be necessary.

On April 4, 2012, Duke filed a response to the Commission's March 21, 2012, entry. By entry issued on May 9, 2012, the Commission explained that it found Duke's response unpersuasive and scheduled a hearing to commence on June 7, 2012, for the express purposes of receiving additional information on Duke's compliance with the procedural requirements of Chapter 4901:1-39, O.A.C., and regarding how the Commission should evaluate the appropriateness of the incentive mechanism proposed in Duke's application.

The hearing commenced as scheduled on June 7, 2012. At the hearing, Duke presented testimony by Timothy J. Duff (Duke Ex. 10). Additional testimony was presented by OEG witness Lane Kollen (OEG Ex. 7), Staff witness Gregory C. Scheck (Staff Ex. 3), and NRDC witness Dylan Sullivan (NRDC Ex. 1). Post-hearing briefs were filed on June 22, 2012, by Duke, Staff, OEG, OCC, OPAE, and jointly by OEC and NRDC.

II. Applicable Law

Section 4928.66(A)(1)(a) and (b), Revised Code, provides, in pertinent part, that, beginning in 2009, an electric distribution utility (EDU) shall implement:

> (a) energy efficiency programs that achieve energy savings equivalent to at least three-tenths of one percent of the total, annual average, and normalized kilowatt-hour (kWh) sales of the EDU during the preceding three calendar years to customers in this state. The savings requirement, using such a three-year average, shall increase to an additional five-tenths of one percent in 2010, seven-tenths of one percent in 2011, eight-tenths of one percent in 2012, nine-tenths of one percent in 2013, one percent from 2014 to 2018, and two percent each year thereafter, achieving a cumulative, annual energy savings in excess of 22 percent by the end of 2025.
>
> (b) peak-demand reduction programs designed to achieve a one percent reduction in peak demand in 2009 and an additional 75 hundredths of one percent reduction each year through 2018.

Further, in accordance with Section 4928.66, Revised Code, the Commission adopted the rules contained in Chapter 4901:1-39, O.A.C., Energy Efficiency and Demand Reduction Benchmarks, which became effective December 10, 2009.

III. Summary of the Application

In its application, Duke explains that Rider SAW was originally approved in the *Duke 2008 ESP Case*, and was effective through December 31, 2011. Accordingly, Duke is proposing a new recovery mechanism, Rider EE/PDR, to recover costs associated with implementing energy efficiency and peak-demand reduction programs, including ongoing approved programs. The proposed cost recovery mechanism will include program costs, evaluation, measurement, and verification costs and a performance-based incentive. (Duke Ex. 1 at 1-3; Duke Ex. 5 at 2.)

Duke also seeks approval of three new programs to be included in its portfolio: Appliance Recycling Program, Low-Income Neighborhood Program, and Home Energy Solutions. Duke explains that its three new programs were introduced to the Duke Energy Community Partnership Energy Efficiency Collaborative (Duke Collaborative). (Duke Ex. 1 at 2-4.)

IV. Procedural Issues

In its March 21, 2012, entry, the Commission explained that, in the instant application, Duke sought approval for the adoption of three new programs; however, Duke did not make its application in conjunction with the portfolio planning requirements put forth in Rule 4901:1-39-04, O.A.C., or the annual update mechanism, pursuant to Rule 4901:1-39-05, O.A.C. Moreover, this Commission recognized that Duke did not seek a waiver of those rules to allow it to update its portfolio outside of the context of the portfolio filing requirements delineated in Chapter 4901:1-39, O.A.C. As a final concern, the Commission noted that Duke requested approval of new programs, but the record does not contain all of the content prescribed in Rule 4901:1-39-04(C), O.A.C., which is intended to allow the Commission to properly review Duke's proposed programs. Accordingly, we ordered Duke to review Chapter 4901:1-39, O.A.C., and file a request for waiver of the applicable rules for the Commission's consideration.

On April 4, 2012, Duke filed its response to the Commission's request. In its response, Duke stated that it believed requesting the approval of new programs in its current application was in the spirit of administrative economy given that the programs had already been reviewed by the Duke Energy Efficiency Collaborative (DEEC). Moreover, Duke explained that it did not deem it necessary or appropriate to include all of the detail that would be required for the triennial portfolio approval. Duke also opined that requesting the addition of new programs, once a company already has an approved portfolio, is not addressed in Chapter 4901:1-39, O.A.C., and Duke did not believe it needed to file a new portfolio application. In the alternative, should the Commission conclude that Chapter 4901:1-39, O.A.C., is applicable to this proceeding, Duke requested that the Commission grant a waiver of the rules contained therein for the purpose of this application only.

We considered Duke's request in our May 9, 2012, entry and concluded that Duke's argument was unpersuasive. In particular, the Commission noted that the stated purpose of Chapter 4901:1-39, O.A.C., as set forth in Rule 4901:1-39-02, O.A.C., is to establish rules for the implementation of programs that will encourage innovation and market access for cost-effective energy efficiency and peak-demand reduction, achieve the statutory benchmark for peak-demand reduction, and meet or exceed the statutory benchmark for energy efficiency. The Commission does not believe that Duke can implement its portfolio of programs, or any new programs, and seek recovery pursuant to the mechanism contained in Rule 4901:1-39-07, O.A.C., without its application falling under the requirements of Chapter 4901:1-39, O.A.C. To remedy its defective filing, we directed Duke to provide the necessary detailed information at the hearing.

At the hearing, Duke witness Duff explains that Duke's intent in proposing new programs was to supplement its current portfolio, not propose an entirely new portfolio of programs. In an effort to assist the Commission with its review of the new proposed programs, Duke attached all information required by Rules 4901:1-39-03 through 4901:1-39-05, O.A.C., with the exception of the assessment of potential, to the testimony of Duke witness Duff. Duke also explains that it filed its portfolio status report on May 15, 2012, which also contains information in support of its portfolio. (Duke Ex. 10 at 3-5.)

With regard to the assessment of potential for the new programs, Duke requests a one-time waiver of the requirement set forth in Rule 4901:1-39-03, O.A.C. Duke maintains that this waiver will be for a short period of time, as it will make a new portfolio filing in 2013, which will contain an assessment of potential. Duke further explains that it will use the assessment of potential to determine if there are significant programmatic gaps in its portfolio that should be addressed to ensure that all meaningful cost-effective energy efficiency programs are included in its offerings to customers. Duke commits to including a summary of these findings and a plan to address any gaps when it files the assessment of potential with the Commission. (Duke Ex. 10 at 4-7.) Upon consideration of Duke's request for a waiver of the assessment of potential in this case, the Commission finds that it is reasonable and should be approved.

In support of its new proposed programs, Duke further asserts that, in addition to vetting the three new programs with the DEEC, it anticipated that these programs would be reconsidered when Duke files its application for a new portfolio in early 2013. (Duke Ex. 10 at 4-7.) Contrary to Duke's assertions in this case, the Commission notes that Chapter 4901:1-39, O.A.C., requires proposals for new programs to be filed in conjunction with a full portfolio application, which is to be filed every three years to ensure that the portfolio continues to be built upon the best information available about technologically, economically, and market achievable measures. However, given the circumstances of this case, the Commission will grant Duke's request for a one-time waiver of the rules contained in Chapter 4901:1-39, O.A.C., and allow Duke to institute the three new programs, consistent with the findings in this order.

With respect to Duke's application for a new cost recovery mechanism outside of the filing of a full portfolio application, Duke explains that it was necessary to seek approval of a new cost recovery mechanism in the current application because its previously approved mechanism, Rider SAW, expired at the end of 2011. (Duke Ex. 10 at 7.) While the Commission recognizes Duke's need to seek a new cost recovery mechanism to replace the now-expired Rider SAW, we believe the such a mechanism may only be sought in the context of an ESP or pursuant to the requirements of Rule 4901:1-39-07, O.A.C., which allows a cost recovery mechanism to be sought as part of a portfolio filing. However, in light of the fact that Rider SAW has now expired, the Commission finds that Duke's motion for a onetime waiver from the requirements of certain rules contained in Chapter 4901:1-39, O.A.C., to permit the implementation of the new rider mechanism outside of a full portfolio filing is reasonable and should be approved.

The Commission wishes to make clear that, although we are granting a one-time waiver, when Duke files its next portfolio filing, which it must make by April 15, 2013, it should expect to not only make a filing detailing its programs, but it also must make a filing to update its cost recovery mechanism in such a way that it will have a cost recovery mechanism in place for the full duration for which it is seeking program approval, which would be through the April 15, 2016, filing. The Commission recognizes that Duke has had difficulty aligning its cost recovery mechanism duration with the duration of approval of its programs and believes that the April 15, 2013, filing will provide an opportunity for Duke to synchronize its filings.

V. Comment Summary

In its comments, OCEA expressed concern with the use of a lost revenue adjustment mechanism, as such a mechanism can resulted in implementation of ineffective programs, creates bias toward easily measured programs, penalizes consumers, and may be unnecessarily costly. OCEA also opines that the Commission should ensure that Duke's shared savings mechanism excluded avoided cost savings from transmission and distribution projects. With respect to the incentive structure proposed by Duke, OCEA recommends that the tiers be restructured and the savings percentages modified. (OCEA Ex. 1 at 4-11.) OPAE also expresses concern that Duke's proposed recovery mechanism may cause consumers to overpay for energy efficiency (OPAE Ex. 1 at 8). In its reply comments, OEG asserts that Rider EE/PDR should be allocated by rate class and schedule based on that schedule's direct benefit from the proposed EE/PDR programs, rather than a per kWh charge that is standard for all nonresidential customers (OEG Ex. 5 at 2).

VI. Summary of the Stipulation

As stated previously, a stipulation signed by Duke, Staff, OCC, OEC, ELPC, NRDC, PCW, Vectren, Sierra Club, and OPAE was filed in this case on November 18, 2011. The stipulation was intended by the signatory parties to resolve all outstanding issues in this proceeding. The following is a summary of the provisions agreed to by the stipulating parties and is not intended to replace or supersede the stipulation:

(1) Duke will be provided recovery of certain costs incurred as a result of its programs that provide increased energy efficiency and peak demand reduction for customers. Duke's rates shall be subject to an incentive mechanism that includes shared savings as follows:

Achievement of Annual Target	After-Tax Shared Savings
≤100	0.0%
>100-105	5.0%
≥105-110	7.5%
≥110-115	10.0%
≥115	13.0%

(2) The incentive mechanism shall expire at the end of 2015 and be reevaluated by all interested parties no sooner than the third quarter of 2014 to allow interested parties to assess the reasonableness and effectiveness of the incentive mechanism, and to consider whether or not they support its further use for the remaining year of the five year portfolio.

(3) Duke shall not seek to recover lost distribution revenues associated with energy efficiency impacts in the rate classes included in the distribution revenue decoupling mechanism filed pursuant to the stipulation in Case No. 11-3549-EL-SSO, et al., if the Commission approves the decoupling mechanism. If the Commission does not approve the distribution revenue decoupling mechanism, Duke shall be entitled to request recovery of lost distribution revenues. Duke reserves the right to request lost distribution revenues in the rate classes excluded from the distribution revenue decoupling mechanism. The other parties reserve their rights to take any position regarding such requests.

(4) The Low-Income Neighborhood Program proposed in the application will be added to Duke's portfolio of energy efficiency programs.

(5) Duke will continue to work with the DEEC to develop a more comprehensive low-income program. This program will be designed to complement the Low-Income Neighborhood Program proposed in the application, as well as existing low-

income weatherization programs that are performed outside of Duke's existing energy efficiency portfolio of programs.

(6) The Home Energy Manager Program proposed in the application will be added to Duke's portfolio of energy efficiency programs.

(7) The Appliance Recycling Program proposed in the application will be added to Duke's portfolio of energy efficiency programs.

(8) The costs related to mercantile customer programs, including incentives paid to mercantile customers, will be included in the calculation of Rider EE/PDR, as set forth in the application. Program costs will be assigned for recovery purposes to the rate classes whose customers are directly participating in the programs. Impacts that are achieved through mercantile programs shall be included in Duke's annual efficiency achievements report to the Commission in annual energy efficiency status reports. However, mercantile self-direct programs and their results shall not be used for calculations that determine the level of incentive payments that Duke is permitted under the shared savings mechanism. For purposes of computing any shared savings incentive payments, mercantile self-direct customers' load shall be excluded from the three-year annual average sales baseline used to determine the annual energy savings target that Duke's performance is measured against, and the impacts of mercantile self-direct programs shall be excluded from the portfolio impacts used to determine performance relative to this target. Duke shall not include the avoided costs of the mercantile self-direct programs in the calculation of its shared savings mechanism.

(9) For purposes of the shared savings mechanism, transmission and distribution investments that reduce line losses shall also not be counted in annual savings used to determine Duke's degree of over-compliance with the energy efficiency benchmark, and shall not be eligible for any shared savings incentive. Duke will not receive a percentage of the avoided costs from transmission and distribution projects that reduce line losses.

(10) Vectren Products and Services, LLC, d/b/a/ GreenStreet Solutions, shall be permitted to participate in the DEEC meetings.

(Joint Ex. 1 at 4-7.)

VII. Consideration of the Stipulation

Rule 4901-1-30, O.A.C., 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. See *Akron v. Pub. Util. Comm.,* 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, e.g., *Cincinnati Gas & Electric Co.,* Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.,* Case No. 93-230-TP-ALT (March 30, 1004); *Ohio Edison Co.,* Case No. 91-698-EL-FOR, *et al.* (December 30, 1993); *Cleveland Electric Illum. Co.,* Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant),* Case No. 84-1187-EL-UNC (November 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. 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 issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 559, citing *Consumers' Counsel v. Pub. Util. Comm., 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992).* 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. *Consumers'Counsel* at 126.

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

Duke witness Duff testified that the signatory parties are represented by capable, knowledgeable counsel, who regularly participate in rate proceedings before the Commission and are very knowledgeable in regulatory matters. Furthermore, Mr. Duff explains that the signatory parties represent a broad range of interests and that all of the issues raised by the signatory parties in the proceeding were thoroughly reviewed and addressed during negotiations. According to Duke witness Duff, the settlement discussions leading up to the stipulation resulted in beneficial modifications and compromises from the original application. (Duke Ex. 7 at 4-5.)

Staff and OCEA maintain that the stipulating parties represent a variety of diverse interests and a wide range of customer groups (Initial Staff Br. at 4; Initial OCEA Br. at 3). Staff points out that all parties had ample opportunity to provide input in this case and that, after settlement discussions, which included OEG, the signatory parties came to an agreement that constitutes a reasonable resolutions of the case. Furthermore, Staff submits that, while OEG contests the stipulation, OEG fails to introduce any evidence on the record showing that the stipulation is not the product of serious bargaining; therefore, there is no dispute that the first prong of the three-part test is met. (Initial Staff Br. at 4-5.)

Conversely, OEG asserts that the signatory parties do not represent a broad range of interests, in that no nonresidential representatives are signatory parties, notably there are no industrial or commercial customer signatories. Moreover, OEG opines that large energy users, such as industrial customers, are the ones most significantly impacted by Duke's proposed cost allocation methodology for nonresidential customers. According to OEG, approval of Duke's nonresidential cost allocation methodology based upon kWh usage would assign a significantly greater proportion of the cost to large industrial customers with high energy usage, irrespective of which rate class realizes the potential benefits from Duke's EE/PDR programs. Therefore, OEG argues that the fact that no representatives of nonresidential customers or large energy users have signed the stipulation should be afforded substantial weight in the Commission's consideration of whether a stipulation is the product of serious bargaining among capable parties. (Initial OEG Br. at 3-4.)

The Commission notes that, in considering the first prong of the three-prong test, we must determine whether the evidence of record supports a finding that the settlement was the product of serious bargaining among capable knowledgeable parties. While OEG would have the Commission conclude that the first prong was not met based on the observation that no nonresidential customer signed the stipulation, rejection based on that point alone would not be appropriate. To say that the nonresidential interests were not considered is misleading. As pointed out, OEG was included in the settlement discussions and was able to present its issues to all of the parties. No contention has been made or evidence presented that supports a finding that the settlement discussions did not involve serious bargaining or that the parties were not represented at the negotiations table by capable representatives. Further, we note that both the signatory and nonsignatory parties, all of which were included in settlement discussions, routinely participate in complex Commission proceedings and that counsel for these parties have extensive experience practicing before the Commission in utility matters. It is evident that the parties expended both time and effort to resolve the issues in this proceeding and, with respect to the residential and environmental groups that signed the stipulation along with Duke and Staff, they addressed and resolved a wide-range of issues in the stipulation. Accordingly, the Commission finds that the stipulation meets the first prong of the test and appears to be the product of serious bargaining among capable, knowledgeable parties.

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

(1) General

Duke witness Duff opines that the stipulation, as agreed to by the signatory parties, provides benefits for all customer groups and interested stakeholders, while advancing and remaining consistent with state policy (Duke Ex. 7 at 6). Staff points out that the stipulation benefits ratepayers and the public interest because it adds three new programs to Duke's EE/PDR portfolio, which will have a direct benefit for participants and will indirectly benefit nonparticipants (Initial Staff Br. at 5-8). OEG argues that the Commission should reject the stipulation because the stipulation does not provide benefits to all stakeholders and is not in the public interest (Initial OEG Br. at 4).

(2) Incentive Mechanism

In support of Duke's application, Duke witness Duff projects that, based upon historical program performance and market conditions, Duke could earn an incentive of $4.5 million by exceeding its annual statutory target by 8.5 percent, but emphasizes that the actual amount of incentive revenue that can be earned will vary based on actual program participation and the actual costs incurred to achieve the energy efficiency impacts. Mr. Duff estimates that the incentive could range from zero to approximately $8.2 million. (Duke Ex. 10 at 8.) Staff witness Scheck opines that Duke's potential incentive earning could be anywhere from $0 to $8.5 million per year on an after-tax basis, depending on levels of customer participation and total program costs (Staff Ex. 3 at 7). NRDC witness Sullivan testified that he believes that Duke's maximum incentive earned under the proposed mechanism could be up to $12.5 million (Tr. Vol. II at 160).

In considering what performance should be used to calculated the incentive payment, Duke states that it does not believe that its incentive should be limited to performance that exceeds the annual statutory benchmarks. In support of Duke's argument, Duke witness Duff explains that, assuming Duke exceeds its annual statutory benchmark by approximately 8.5 percent, Duke would earn an after-tax incentive of $4,477,041. However, under the same scenario, if the incentive were only earned on Duke's performance that exceeded the annual stator benchmarks, it would only receive an incentive of $352,520. Mr. Duff argues that a possible incentive of roughly $350,000 on a project portfolio that involves spending over $25 million would provide a meaningful incentive. Instead, Duke witness Duff explains that, by providing Duke a meaningful shared savings based upon the net benefit associated with all impacts, Duke is motivated to deliver as much energy efficiency as it can in the most cost effective manner possible. Duke also asserts that the Commission has approved incentive mechanisms for other utilities in Ohio that include an incentive for performance that does not exceed statutory benchmarks. (Duke Ex. 10 at 8-9.) Staff and NRDC agree that the incentive that could be earned by Duke should not be limited to an incentive only on performance that exceeds the statutory benchmarks (Staff Ex. 3 at 8; NRDC Ex. 1 at 5). OEG maintains that no incentive mechanism is necessary (Second OEG Br. at 4).

With respect to the question regarding whether the incentive earned on energy efficiency should be greater than the return on investment (ROI) that Duke would earn on utility infrastructure, Duke witness Duff opines that, given both the energy and nonenergy related benefits that are associated with utility offered energy efficiency, Duke's ROI should be greater than what it would receive on a traditional investment into utility infrastructure. Moreover, Mr. Duff argues that this type of analysis puts too much emphasis on what a utility spends on energy efficiency and not on cost-effectiveness, which aligns Duke's interests with those of customers because the incentive mechanism is designed to give Duke a small percentage of the net benefits achieved through its portfolio plan where Duke exceeds its annual energy efficiency mandates. (Duke Ex. 10 at 10-11.) Staff and NRDC argue that, in order to encourage more investment in energy efficiency by Duke, the rate of return on energy efficiency investments would likely need to be relatively high in relation to any other alternative investments with similar risks (Staff Ex. 3 at 9; NRDC Ex. 1 at 7). In contrast, OEG maintains that Duke should not earn an ROI on energy efficiency investments, but rather should recover those investments on a dollar for dollar basis (OEG Ex. 7 at 7).

In considering Duke's incentive mechanism in light of the significantly excessive earnings test (SEET), Duke witness Duff explains that incentive earning will be captured in the calculation of the SEET every year. Moreover, Duke states that it does not believe it should be required to examine incentive earning on its own in comparison to the SEET.

(Duke Ex. 10 at 14-15.) OEG maintains that any incentive earned should be included in Duke's calculation of its yearly earnings in light of the SEET (OEG Ex. 7 at 7.)

OEG maintains that any incentive mechanism for complying with state energy efficiency standards is inappropriate and unnecessary. OEG witness Baron explains that allowing Duke to recover an incentive, in addition to recovering the costs to fund its EE/PDR efforts, leads to excessive reimbursement and places an unnecessary cost burden on residents and businesses. (OEG Ex. 6 at 15; OEG Ex. 7 at 2-3.) Specifically, OEG opines that the costs of Duke's EE/PDR programs are significant and allowing for recovery of an incentive increases the burden on customers to an unreasonable level, especially when considering that Duke has exceeded its benchmarks for the last few years and is projected to continue to do so. Moreover, OEG opines that the incentive structure proposed in the stipulation is excessive, as OEG calculates that the stipulation's incentive provision effectively guarantees Duke an annual incentive payment of almost $8 million, which is excessive both when viewed in light of the projected 2012 revenue requirement of $33.9 million, and relative to the energy reduction achieved. OEG explains that, based on its calculations, the incentive cost of each megawatt hour reduced is between $20.50 and $35.52. (Second OEG Br. at 6-8.)

OEG argues that allowing Duke to recover an incentive for its EE/PDR efforts is unreasonable, given that Duke has agreed to divest its generation assets in its most recent electric security plan. In support of its assertion, OEG opines that, when a utility divests all of its generation assets, customers no longer receive a critical benefit of implementing energy efficiency measures, i.e., the delay of construction and costs associated with building new power plants. Moreover, OEG avers that any benefits of reduced market energy prices resulting from energy efficiency are generic benefits spread throughout the PJM Interconnection, LLC (PJM) system and not savings targeted solely to Duke customers. Accordingly, OEG concludes that, once a utility has divested its generation assets, there is no justification for providing additional incentives where the market determines supply and pricing. (Initial OEG Br. at 4-5.)

Duke rejects OEG's recommendation that an incentive mechanism not be allowed for Duke, based upon the transfer of title of Duke's generation assets. Instead, Duke explains that an EDU that transfers its generation assets is not subject to altered EE/PDR requirements because its standard service offer supply is procured through a competitive bid process. Accordingly, Duke avers that its transfer of its generation assets should have no impact on whether an incentive mechanism should be approved. (Initial Duke Br. at 8-9.)

With regard to the question of whether a cap should be imposed on the incentive mechanism, Duke argues that the Commission should not impose a cap on its potential incentive earnings because the higher the amount of incentive realized by Duke, the higher amount of value and savings that will be realized by customers. Duke witness Duff opines that, for every dollar of net benefit realized through customer participation in Duke's energy efficiency programs, customers will earn no less than 87 percent of the value. Accordingly, he concludes that the more incentive earned by Duke, the better off customers are because it is a shared savings mechanism. (Duke Ex. 10 at 13.) Staff and NRDC oppose a cap on Duke's potential earnings under the incentive mechanism (Tr. Vol. II at 133-136; 159). Staff witness Scheck explains that Staff is only in favor of capping Duke's potential earnings in light of the SEET, and recommends that a cap, in the context of the SEET, is appropriate (Staff Ex. 3 at 8). OEG witness Kollen provides OEG's recommendation that, should the Commission adopt the incentive mechanism, it should cap the mechanism at three percent of the total annual energy efficiency expenditures or $1 million annually (OEG Ex. 7 at 5.)

Upon consideration of the arguments raised regarding the incentive mechanism proposed in the stipulation, the Commission finds that the proposal set forth by the stipulating parties will benefit ratepayers and the public interest. Specifically, the Commission finds that the incentive mechanism proposed by Duke is appropriately structured to incent Duke to deliver as many benefits as possible to customers. In addition, we believe it is important to recognize that Duke's shared savings mechanism still allows customers to retain at least 87 percent of the savings. When Duke delivers more energy in the most cost effective way, customers receive a direct benefit. With respect to a cap mechanism, based upon the evidence presented in this case, the Commission

(3) Ratepayer Impacts

OEG also contends that the stipulation adversely impacts high energy users, such as industrial customers, who provide a number of quality jobs in Ohio; therefore, it is counter to economic development and the public interest. According to OEG, increasing electric rates for industrial customers may discourage large industrial companies from remaining in Ohio or opening new facilities within the state. Duke's proposed allocation methodology for nonresidential customers would have a substantial impact on customers taking service under Rate TS (Service at Transmission Voltage Primary), who do not participate in EE/PDR programs. OEG predicts that these customers' monthly bills would increase almost $150,000 per month irrespective of whether they realize the potential benefit produced by Duke's EE/PDR programs. To correct this, OEG advocates allocating costs under Rider EE/PDR in the same manner as costs were allocated under Duke's SAW rider for Rate TS customers, wherein customers who take service under Rate TS, who do not participate in Duke's EE/PDR programs, have rates based on distribution revenues by tariff. In support of this proposal, OEG avers that large industrial customers are generally more sophisticated energy users who have largely taken self-funded measures to maximize their energy efficiency and minimize their energy costs and who may derive little or no benefit from Duke's EE/PDR programs. OEG also explains that, although large energy users have the option to avoid EE/PDR charges by filing an application for a mercantile customer exemption, the application is still subject to Commission approval and review. There is uncertainty in that application process and the individual customer is required to prove that its meets or exceeds a utility's entire benchmark. OEG argues that it is it unfair that a customer is not eligible for any exemption unless its meets a utility's entire benchmark and that there is no consideration if a customer has reached a point where additional EE/PDR investments are not cost-effective. Therefore, OEG concludes that the Commission should reject the stipulation due to any potential negative impacts it may have on economic development resulting from the cost allocation for nonresidential customers which is counter to the public interest. (Initial OEG Br. at 10-15; Tr. at 88.)

In response to OEG's concerns, Duke points out that OEG witness Baron was unaware if the prospect of having to pay Duke's proposed Rider EE/PDR would actually prevent a business from locating in Ohio or encourage a business to relocate outside of the state. Moreover, Duke explains that, despite Mr. Baron's assertions to the contrary, he had no evidence to support that the Commission's mercantile customer exemption programs are unduly burdensome or risky. (Initial Duke Br. at 6-8.)

Initially, the Commission notes the absence of any testimony citing any negative impacts for residential consumers. Furthermore, while OEG raises bald claims that the EE/PDR programs may adversely affect some of the Rate TS customers, there is no evidence on the record as to what, if any, actual harm could occur. Moreover, although OEG acknowledges that a large energy user has the option to avoid EE/PDR charges by filing an application for a mercantile customer exemption, OEG discounts this alternative by inferring that the process, which is based on the statute, is somehow unfair and voicing a concern about the need for Commission review and approval. However, the Commission notes that the record in this case does not contain any examples of OEG's clients having difficulty with the mercantile customer exemption, arrangements, or any meaningful examples of difficulties that could be expected in the future should Duke's Rider EE/PDR be implemented as proposed. While the record reflects that Rate TS nonresidential customers will see a change in the cost allocation methodology in Rider EE/PDR from that utilized under Rider SAW, the Commission continues to believe that Rate TS customers should be held accountable for Duke's energy efficiency benchmarks that are related to the customers' usage and, should a Rate TS customer have no further EE/PDR measures to commit to Duke's benchmarks, they should be required to pay a fair share of Duke's costs to meet it benchmarks and not be exempted. In addition to the mercantile exemption, the Commission notes that customers are also free to apply for a variety of arrangements provided for in Chapter 4901:1-38, O.A.C.

(4) Conclusion

Accordingly, based upon the evidence on the record in this proceeding, the Commission finds that the stipulation, as a package, benefits ratepayers and promotes the public interest.

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

Mr. Duff opines that, based on his experience, involvement in the proceeding, and review of the stipulation, the stipulation complies with all relevant and important regulatory principles and practices. Specifically, Mr. Duff explains that the stipulation furthers important regulatory principles and practices through the advancement of energy efficiency and peak-demand reduction that is consistent with Ohio energy policy. (Duke Ex. 7 at 5.)

OEG states that Section 4928.02, Revised Code, provides that the policy of the state is to ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service. If Duke is allowed to recover an incentive, OEG argues that the EE/PDR costs will result in unreasonably priced retail electric service for all of Duke's customers. Further, OEG opines that Duke's proposal for the allocation of costs to Rate TS customers who do not participate in Duke's EE/PDR programs has a significant adverse impact on such customers, resulting in unreasonably priced electric service to those specific customers. Moreover, OEG explains Section 4928.02, Revised Code, also provides that it is the policy of the state to facilitate the state's effectiveness in the global economy. OEG argues that, since Duke's Rider EE/PDR adversely impacts large business interests by unnecessarily increasing their energy costs, thus, hindering Ohio's effectiveness in the global economy, the Commission should reject the stipulation. (Initial OEG Br. at 15-16.)

Staff explains that the stipulation is consistent with regulatory principles and practices and is consistent with the overall policy of the state. EDUs are required to meet annual, increasing EE/PDR benchmarks. Because all customers in Duke's service territory, including customers taking service under Rate TS, are included in Duke's EE/PDR benchmark, Staff believes it is fair to ask all customers to pay a reasonable share of Rider EE/PDR and participate in the EE/PDR programs offered by Duke. Staff asserts that this participation is necessary for Duke to meet its benchmarks. Staff also argues that OEG's contention that large industrial customers have the ability to implement their own, independent EE/DR measures was contemplated by the legislature when Section 4928.66, Revised Code, was drafted and a method for large industrial customers to avoid paying EE/PDR riders or to receive rebates to offset EE/PDR rider payments was established. According to Staff, under Section 4928.66(2)(c), Revised Code, mercantile customers can commit their self-funded EE/PDR programs for integration with EDUs' EE/PDR programs by filing an application with the Commission. By committing its self-funded EE/PDR programs to an EDU's programs, a mercantile customer reduces the EDU's EE/PDR requirements and can apply for an exemption from paying the EE/PDR rider. Staff argues that the availability of this mechanism provides a fair mechanism under which mercantile customers can avoid paying an EE/PDR rider. (Initial Staff Br. at 8-11.)

Section 4928.02, Revised Code, establishes 14 state policy objectives, of which the Commission should be mindful when making its decision. However, the state policies contained in Section 4928.02, Revised Code, should not be viewed in isolation. Many other goals and policies are contained throughout the code, including the energy efficiency benchmarks contained in Section 4928.66, Revised Code. In the present case, the Commission believes that OEG's concerns are based on an assumption that energy efficiency is not worth the cost of the incentive mechanism and the conjecture that Duke's proposed cost allocation mechanism for Rate TS customers will hinder business development for industrial customers in Ohio, despite the availability of the mercantile customer exemption and various arrangements under the statute and Chapter 4901:1-38, O.A.C. We do not agree. Accordingly, based upon the evidence of record in this proceeding, the Commission finds that the stipulation does not violate any important regulatory principles or practices, nor does it violate the policy of the state as explained in Section 4928.02, Revised Code.

VIII. Conclusion

Based on our review, we find that the stipulation meets the three-pronged test and should be approved, with the clarification and modification that we are only approving Rider EE/PDR through the Commission's review and consideration of Duke's 2013 portfolio filing. As previously stated, the Commission expects Duke to make its April 2013, filing in such a way that the duration of the portfolio of programs is aligned with the duration of Duke's cost recovery mechanism. The Commission believes that our rules require the portfolio filings to be a total package of programs and a cost recovery mechanism. While the Commission expects Duke to make a filing to align the timing of its programs with its cost recovery mechanism, the Commission clarifies that it does not intend to provide a second bite at the apple for the issues litigated in this case. Although the Commission will review the cost recovery mechanism, in light of any new information presented, we are mindful that the review of the April 2013, portfolio filing will begin less than a year after the issuance of this order. Therefore, we expect to adhere to our decision regarding the appropriateness of an incentive mechanism, which was fully litigated in this case.

In addition, we direct Duke to work with industrial and commercial customers to increase awareness of Duke's portfolio of programs and increase participation by those customers in its energy efficiency collaborative. In the April 2013, portfolio filing, Duke will be expected to demonstrate that it has a well developed and functioning portfolio of nonresidential programs that are targeted toward commercial and industrial customers. With respect to its April 2013 filing, we direct Duke to address to what extent it is bidding its energy efficiency resources into the PJM capacity auction.

As a final matter, the Commission directs Duke to file new proposed tariffs for Commission approval which appropriately reflect that the lost revenue recovery mechanism is only intended to cover distribution revenue and that no lost generation revenue (fixed or variable) should be included.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) Duke is an electric light company, as defined in Section 4905.03(A)(3), Revised Code, and a public utility under Section 4905.02, Revised Code.

(2) On July 28, 2011, Duke filed its application in this case.

(3) On September 21, 2011, comments on the application were filed by Staff, OPAE, PWC, and OCEA.

(4) Reply comments were filed by Duke, OEG, and OPAE on October 5, 2011.

(5) On September 12, 2011, OCC, OPAE, PWC, OEG, NRDC, ELPC, OEC, Vectren, and the Sierra Club were granted intervention.

(6) A stipulation signed by Staff, Duke, OCC, OPAE, OEC, PWC, ELPC, Vectren, NRDC, and the Sierra Club was filed November 18, 2011. OEC did not sign the stipulation.

(7) The hearing in this matter was held on November 29, 2011, and June 7, 2012.

(8) The stipulation, as modified, meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted.

(9) Duke should be authorized to create Rider EE/PDR consistent with this order.

ORDER:

It is, therefore,

ORDERED, That Duke's motion for a one-time waiver of certain requirements contained in Chapter 4901:1-39, O.A.C., is approved as set forth in this order. It is, further,

ORDERED, That Duke comply with all requirements contained herein regarding its portfolio filing to be made by April 15, 2013. It is, further,

ORDERED, That the stipulation of the parties, as modified, be adopted and approved. It is, further,

ORDERED, That Duke take all necessary steps to carry out the terms of the stipulation and this order. It is, further,

ORDERED, That, consistent with this opinion and order, Duke file, in the above-captioned case, proposed revised tariffs within seven days of the issuance this opinion and order. It is, further,

ORDERED, That nothing in this opinion and order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further, ORDERED, That a copy of this opinion and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

Lynn Slaby

KLS/CMTP/sc

Entered in the Journal

AUG 15 2012

Barcy F. McNeal

Barcy F. McNeal
Secretary