BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to its Energy Efficiency and Demand Response Programs.	))))))	Case No. 14-457-EL-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to its Energy Efficiency and Demand Response Programs.	))))))	Case No. 15-534-EL-RDR

OHIO PARTNERS FOR AFFORDABLE ENERGY'S POST-HEARING BRIEF

I. Introduction

Ohio Partners for Affordable Energy ("OPAE") herein submits this post-hearing brief in the above-captioned matters considering the applications of Duke Energy Ohio, Inc. ("Duke") for recovery of program costs, lost distribution revenue, and performance incentives related to Duke's Energy Efficiency and Demand Response programs. On January 6, 2016, Duke and the Staff of the Commission ("Staff") filed a Stipulation and Recommendation ("2016 Stipulation") purporting to resolve one issue in these cases, i.e., Duke's use of energy efficiency savings from previous years to trigger a shared savings incentive in years when Duke did not meet the statutory energy efficiency benchmarks. The Commission issued a Finding and Order on May 20, 2015 agreeing with several intervenors, including OPAE, that Duke could *not* use energy efficiency savings

from previous years to claim a shared savings incentive for a year in which Duke did not meet the benchmarks. The 2016 Stipulation is an unlawful attempt by Duke and the Staff to negate the Commission's May 20, 2015, Finding and Order. For many reasons, the 2016 Stipulation fails all three parts of the Commission's test for the reasonableness of stipulations and therefore must be rejected.

II. The 2016 Stipulation is not the product of serious bargaining among parties representing a diverse group of interests.

The first part of the Commission's three-part test for the reasonableness of stipulations is whether the stipulation is the product of serious bargaining among parties representing a diverse group of interests. The 2016 Stipulation is the product of discussions between the two stipulating parties, Duke and the Staff. There could be no bargaining because the Staff had nothing at stake and Duke simply wants money from ratepayers. None of the intervening parties to these cases participated in the settlement discussions.

Duke and the Staff met on December 28, 2015, and on December 30, 2015 Duke and the Staff had a teleconference to discuss the 2016 Stipulation. No intervenors were invited to participate in these discussions. There were no negotiations at all with the intervening parties to these cases to reach the settlement. Tr. II at 411. The discussions for the 2016 Stipulation excluded every intervening party to the cases. Tr. II at 419.

Nor were there lengthy negotiations between Duke and the Staff as the 2016 Stipulation erroneously claims. Joint Exhibit 1; 2016 Stipulation at 2. Duke

and the Staff met on December 28. On December 30, OPAE learned via email sent from the Staff that a settlement agreement between Duke and the Staff had been reached. The Staff informed OPAE and the other intervenors that it had discussed settlement terms with Duke and attached a document to the email. The Staff's email asked the intervenors to review the proposed settlement and let the Staff know by noon on Wednesday January 6, 2016 whether their clients would sign on to the settlement. No further settlement discussions were proposed; the agreement was presented to the intervenors as a fait accompli. Tr. II at 411-419. No intervenor responded by noon that their client would sign the Duke-Staff settlement. The Staff filed the 2016 Stipulation at the end of the day of January 6, 2016.

The settlement requires that consumers pay $19.75 million to Duke as an incentive for years in which Duke did not meet the statutory benchmarks for energy efficiency. None of the consumer parties whose members or clients will pay the incentive to Duke for its nonperformance with the annual statutory benchmarks was consulted during the discussions for the 2016 Stipulation and none of the consumer parties have signed the agreement. OPAE Ex. 3 at 10; OCC Ex. 3 at 9. There was no bargaining because neither of the two parties to the 2016 Stipulation, Duke and the Staff, has anything at risk; neither will pay any amount of the incentive for the nonperformance of Duke's 2013 and 2014 energy efficiency programs, and Duke will in fact be paid for poor performance. The 2016 Stipulation simply gives $19.75 million in ratepayer funds to Duke.

III. The 2016 Stipulation fails the second part of the Commission's three-part test because the 2016 Stipulation does not benefit ratepayers and is not in the public interest.

The 2016 Stipulation ostensibly benefits ratepayers because it claims to mitigate the risk that ratepayers could be forced to pay as much as $55 million in pre-tax dollars for incentives for Duke for calendar years 2013, 2014, 2015, and 2016 combined if the Commission's May 20, 2015 Finding and Order is reversed on rehearing. 2016 Stipulation at 6. The 2016 Stipulation grossly over-estimates the risk to ratepayers.

At the time the 2016 Stipulation was signed by Duke and the Staff, and currently, Commission precedent is that Duke has no claim to any incentives for these years at all. Duke's shared savings mechanism was established in Case No. 11-4393-EL-RDR. In that case, Duke accepted the shared savings incentive proposal submitted by the Ohio Consumer and Environmental Advocates as part of their comments filed on October 5, 2011. Duke is to receive a percentage of the value of customer avoided costs as an incentive if the energy efficiency savings achieved during the year exceed the statutory benchmarks. The incentive mechanism established in Case No. 11-4393-EL-RDR was identical in structure to the incentive mechanism approved by the Commission for AEP Ohio in Case Nos. 11-5568-EL-POR and 11-5569-EL-POR with the sole exception that Duke had no cap on its incentive. But like AEP Ohio's shared savings mechanism, Duke could not collect shared savings incentives for any program year unless the efficiency savings during that program year exceeded the annual statutory benchmarks. OPAE Ex. 3 at 6. Exceeding the statutory benchmark

requirement is determined annually and all the savings accruing in that year count toward the determination of the shared savings incentive in that year.

Duke has sought to create confusion that “savings banks” can be used to trigger a shared savings incentive. This is not the case. “Banked savings” is a statutory term that allows utilities over-complying with the statutory benchmarks in one year to use the banked savings for compliance with the annual statutory benchmarks in future years. Tr. II at 349. This is the purpose of banked savings. While banked savings, i.e., savings from prior years, may be used for future compliance with the statutory benchmarks, there is no provision in state law, nor Commission order, nor any stipulation between intervenors and Duke for excess savings from prior years to be used to achieve the shared savings incentive. OPAE Ex. 3 at 7. Banked savings do not trigger a shared savings incentive. Tr. II at 351-352, 387-388. Duke can point to no provision that allows it to use prior years’ savings to achieve an incentive in years that Duke did not comply with the benchmarks.

It is uncontroverted that Duke failed to produce enough energy savings to meet the annual statutory benchmark requirements in 2013 and 2014. Duke used banked savings from previous years to achieve compliance with the statutory benchmarks, which Duke is permitted to do. If Duke does not produce enough savings to meet the benchmarks in the current year, Duke does not qualify for a shared savings incentive. Tr. II at 356-357.

Duke’s claim to a shared savings incentive for years 2013 and 2014 is predicated on its use of excess savings from previous years to reach the annual

statutory benchmarks. OCC Ex. 3 at 12-13. The Commission's May 20, 2015 Finding and Order in Case No. 14-457-EL-RDR rejected Duke's use of banked savings to earn an incentive in years when Duke complied with the statutory benchmarks by using prior years' savings. Given the Commission's May 20, 2015 Finding and Order, Duke will collect from customers $0 for shared savings for 2013 and $0 for 2014. OMA Ex. 1 at 3.

If Duke has met the statutory benchmarks for 2015 with energy efficiency savings in 2015, which cannot be known until Duke files its 2015 data, Duke will receive a shared savings incentive for 2015. This is Commission precedent. If Duke has not met the statutory benchmark for 2015 with energy efficiency savings in 2015, Duke will not receive an incentive pursuant to Commission precedent.

Duke will also collect $0 shared savings for 2016 because its shared savings mechanism expires at the end of 2015 under current Commission precedent. OMA Ex. 1 at 4. In short, Duke has no basis to claim any shared savings incentive for calendar years 2013, 2014, 2015, and 2016 at this time under current Commission precedent. The 2016 Stipulation has no benefit; it only results in $19.75 million in costs to ratepayers.

The Staff and Duke premise their agreement on the possibility that Duke could be successful in its application for rehearing from the May 20, 2015 Finding and Order in Case No. 14-457-EL-RDR ($40 million value for Duke) and in another case, Case No. 14-1580-EL-RDR, in which Duke is attempting to be

awarded incentives for 2016 (another $15 million for Duke) so that customers are at risk for a total $55 million for the years 2013-2016. OCC Ex. 3 at 14.

Curiously, OPAE also filed an application for rehearing from the May 20, 2015 Finding and Order seeking a cap on Duke's excessive incentive claims, but the Staff never approached OPAE to participate in settlement negotiations on OPAE's application for rehearing. It is not apparent why the Staff believed that it should negotiate a "settlement" of Duke's application for rehearing and not OPAE's application for rehearing or why the Staff believed that Duke's application for rehearing put ratepayers at risk so as to warrant a "settlement" while OPAE's applications for rehearing did not warrant a settlement.

The possibility of Duke's success in winning incentives in Case No. 14-457-EL-RDR and Case No. 14-1580-EL-RDR is a long shot. OCC Ex. 3 at 15. It is not Duke and the Staff who determine whether Commission precedent will be overturned. The Commission has already issued a Finding and Order that Duke cannot collected shared savings incentives for years in which Duke relied on prior years' savings to achieve compliance with the benchmarks and has issued two Opinions and Orders in Case No. 11-4393-EL-RDR and Case No. 13-431-EL-POR that specifically do not authorize incentives for 2016. It was improper for the Commission's Staff to enter into a stipulation premised on the assumption that the Commission's May 20, 2015 Finding and Order would be overturned and that the application in Case No. 14-1580-EL-RDR will be granted.

The $19.75 million given to Duke in the 2016 Stipulation is an exorbitant incentive payment for Duke failing to meet its annual statutory benchmarks.

Duke's efforts are less than stellar and do not merit an incentive payment. OCC Ex. 3 at 15; OPAE Ex. 3 at 11. The 2016 Stipulation awards Duke $19.75 million without customers receiving any benefit. Duke underachieved and did not meet its annual benchmarks in 2013 and 2014. Under current precedent, Duke could have earned shared savings incentives for energy efficiency savings in 2013, 2014, and 2015 if Duke had met the benchmarks, but Duke chose not to do so. The 2016 Stipulation does not incentivise better performance from Duke but rewards Duke for not achieving. This is not in the public interest. OMA Ex. 1 at 5-6; OEG Ex. 1 at 6-8. It is not in the public interest to reward a utility that fails to meet the statutory standards during a program year. It is not a benefit to ratepayers nor is it in the public interest to reward Duke incentives for poor performance. Id. at 12.

IV. The 2016 Stipulation fails the third part of the Commission's three-part test for the reasonableness of stipulations because it violates important regulatory principles and practice.

As discussed above, the 2016 Stipulation countermands existing precedent by attempting to override the Commission's May 20, 2015 Finding and Order, which already found that Duke could not earn a shared savings incentive in years when Duke relied on savings from previous years to meet the statutory benchmarks. There is also a second Commission precedent in a fully litigated case that savings can only be counted toward a shared savings incentive in the year the savings are earned. *Cleveland Electric Illuminating Company, Ohio Edison Company, and the Toledo Edison Company,* Case Nos. 12-2190-EL-POR, et al., Opinion and Order (March 23, 2013), at 15-17. Thus, the 2016

Stipulation violates important regulatory principles and practices by countermanding existing precedent that savings from prior years cannot be used to trigger a shared savings incentive. OPAE Ex. 3 at 13.

The Commission's Staff is on record as having argued that banked savings cannot be used to trigger a shared savings incentive. Staff Reply Comments, Case No. 14-1580-EL-RDR, at 6. Staff was reflecting the current state of the law that banked savings cannot be used to trigger shared savings incentives. Given these comments, it violates regulatory principles and practice for the Staff to sign an agreement which disregards Commission precedent, let alone its own position in prior cases.

The 2016 Stipulation also violates regulatory principles and practice by including a sham provision. The 2016 Stipulation states that Duke will not recover a shared savings incentive for the remaining years of its approved energy efficiency and peak demand reduction portfolio (i.e., 2015 and 2016) but also states that "[s]hould any change in law or regulation regarding shared savings occur, the parties expressly agree that Duke Energy Ohio is permitted to seek a shared savings incentive consistent with such change in law, regulation, or order." 2016 Stipulation at 6. This sentence completely undermines the idea that there is value in the 2016 Stipulation. Duke's commitment in the 2016 Stipulation that no shared savings will be collected for 2015 and 2016 is worthless because a Commission "order" would negate the commitment. The word "order" could allow Duke to recover shared savings for 2016 if the Commission were to grant Duke's request in Case No. 14-1580-EL-RDR to

extend its shared savings incentive to 2016. Such an order would moot the agreement in the 2016 Stipulation that Duke will forego recovery of shared savings for 2016.

Obviously, an "order" in this case approving the 2016 Stipulation negates the value of the 2016 Stipulation. A change in law and a subsequent change in regulation are also possible given that the General Assembly is contemplating action in response to the two-year freeze on annual benchmarks that was included in Senate Bill 310. OPAE Ex. 3 at 13.

The 2016 Stipulation violates important regulatory principles and practice by including this sham provision in which Duke does not actually forego a shared savings incentive for the years 2015 and 2016. OPAE Ex. 3 at 13. The 2016 Stipulation has "holes" that could easily allow Duke to collect shared savings incentives as a result of savings in prior years, an outcome that is in conflict with the language of the 2016 Stipulation. Tr. II at 343. The "holes" in the 2016 Stipulation make it an ersatz agreement that the Commission should not approve.

The 2016 Stipulation also violates important regulatory principle and practice because the Supreme Court of Ohio has determined that excluding an entire class from settlement negotiations is contrary to the Commission's negotiation standards. *Time Warner AxS v. PUCO* (1996), 75 Ohio St. 3d 229, 234, n. 2. Excluding all intervenors from the settlement discussions violates the regulatory principles established by the Commission and the Ohio Supreme Court. Id.

V. Conclusion

The Commission must reject the 2016 Stipulation filed in these cases on January 6, 2016 because the agreement fails all three parts of the Commission's three-part test for the reasonableness of stipulations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Post-Hearing Brief will be served by electronic mail by the Commission's Docketing Division upon the parties of record all of whom are electronically subscribed on this 28th day of April 2016.

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