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 Nos. 14-457-EL-RDR 15-534-EL-RDR

INITIAL BRIEF OF THE OHIO MANUFACTURERS' ASSOCIATION

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I. Introduction

The Public Utilities Commission of Ohio (Commission) recently ruled that Duke Energy Ohio, Inc. (Duke) could not receive an incentive payment (shared savings incentive) by using banked savings to reach the incentive level.[1] The Commission specifically stated: "the Company may only use the banked savings to reach its mandated benchmark. Therefore, the Commission finds Duke's use of banked savings to claim an incentive is improper."[2] Duke's attempt to use energy efficiency savings achieved during prior years (e.g., banked savings) to maximize its incentives earned through the shared savings mechanism is unlawful and undermines the purpose of shared savings mechanisms to motivate and reward electric distribution utilities for exceeding energy efficiency standards in a given year.[3]

Accordingly, per the Commission's Order, Duke will collect from customers $0 for its shared savings incentive for its 2013 energy efficiency and peak demand reduction portfolio program (EE Program). Given the ruling associated with the 2013 program, Duke presumably would also collect $0 from customers for its shared savings incentive for its 2014 EE Program.

Nonetheless, subsequent to the Commission issuing its decision in this case, Duke and Staff of the Commission (Staff) filed a Stipulation and Recommendation (Stipulation), authorizing Duke to recover $19.75 million from customers as its shared savings incentive for its 2013 and 2014 EE Programs.[4] Not only does the proposed Stipulation unlawfully permit the use

[1] *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, Finding and Order at 5 (May 20, 2015), reh'g pending (14-457 Order).

[2] Id.

[3] *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, Finding and Order at 5 (May 20, 2015), reh'g pending (14-457 Order).

[4] Joint Ex. 1 at 6 (Stipulation).

of banked savings to meet shared savings incentives for Duke's 2013 and 2014 EE Programs, but the Stipulation fails to satisfy the criteria established by the Commission in evaluating the reasonableness of a stipulation. Specifically, provisions in the proposed Stipulation result in unjust, unreasonable, and unlawful customer payments, completely undermining the intent of shared savings incentive programs. The Stipulation also directly ignores the Commission's directive to conduct an audit and flow through any necessary true-ups through the rider rate,[5] which contradicts past Commission practice in rider proceedings and the Commission's 14-457 Order.[6] As the Commission has recently explained, a "stipulation cannot circumvent the authority of the Commission."[7]

For the reasons discussed herein, the Ohio Manufacturers' Association (OMA) respectfully requests that the Commission reject the proposed Stipulation as it was not the product of serious bargaining, is not in the public interest, and violates several important regulatory principles. Accordingly, the proposed Stipulation is unreasonable and should be rejected.

II. Procedural History

Duke filed an application for recovery of program costs, lost distribution revenue, and shared savings incentives related to its energy efficiency and demand response programs (2013

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[5] Joint Ex. 1 at 7 (Stipulation).

[6] 14-457-EL-RDR Order at 5.

[7] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 52 (March 31, 2016).

Recovery Case) on March 28, 2014.[8] The Commission subsequently modified and approved Duke's application for recovery, finding that Duke's use of its banked savings to achieve its mandated benchmark was improper.[9] Both Duke and Ohio Partners for Affordable Energy (OPAE) filed motions for rehearing, which were granted for further consideration of the issues by the Commission on July 8, 2015. The rehearing is currently pending before the Commission.

Additionally, prior to the conclusion of the case regarding the 2013 application, Duke filed another application for recovery of program costs, lost distribution revenue, and shared savings incentives related to its EE Programs for 2014 (2014 Recovery Case) on March 30, 2015.[10] That case is currently pending before the Commission.

Duke and Staff filed a Stipulation on January 6, 2016, which, they allege represents a resolution of the issues in the 2013 Recovery Case and the savings mechanism issue involved in the 2014 Recovery Case.[11] An evidentiary hearing commenced on March 10, 2016 and concluded March 15, 2016. OMA actively participated in the two pending cases, as well as the evidentiary hearing on the Stipulation filed in both cases.

III. Standard of Review

The Commission has established and used the following criteria in evaluating whether a stipulation is reasonable and merits adoption:

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[8] *In the Matter of the Application of Duke Energy Ohio, Inc., for the 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, Application (March 28, 2014).

[9] 14-457 Order at 5.

[10] *In the Matter of the Application of Duke Energy Ohio, Inc., for the 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, Application (March 30, 2015).

[11] Joint Ex. 1 at 2 (Stipulation).

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?[12]

As further explained below, the Stipulation proposed in this proceeding fails each prong of this test.

IV. Argument

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

The Stipulation excludes all customers and does not represent a wide variety of interests as there are only two signatory parties – Duke and Staff. None of the intervening parties in this case support the Stipulation, including the industrial, commercial, and residential customer classes.[13] As the Supreme Court of Ohio has previously noted, stipulations that exclude an entire customer class are of "grave concern" and "contrary to the Commission's negotiations standard in *In re Application of Ohio Edison to Change Filed Schedules for Electric Service,* case No. 87–689–EL–AIR (Jan. 26, 1988), at 7, and the partial settlement standard endorsed in *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 125–126, 592 N.E.2d 1370, 1373."[14]

[12] See, e.g., *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 48-49 (March 31, 2016).

[13] OCC Ex. 3 at 10 (Gonzalez Direct); *See also*, Motion to Intervene by the Office of the Ohio Consumers' Counsel and Memorandum in Support in PUCO Case No. 14-457-EL-RDR (April 30, 2014).

[14] See *Time Warner Axs v. PUCO* (1996), 75 Ohio St. 3d 229, 234, n.2.

As presented, the Stipulation not only excludes an entire class of customers, it excludes all classes of customers. The Stipulation, therefore, does not represent a compromise of all issues raised by the intervening parties and includes only a compromise between Duke and the Staff. Additionally, while Duke characterizes the Stipulation as a product of "lengthy" negotiations,[15] the evidence presented shows otherwise. First, the signatory parties to the Stipulation (e.g., Duke and Staff) were involved in a total of only four meetings among various individuals within the organizations.[16] Intervening parties were not even informed of the existence of two of the four meetings until Duke supplemented its initial discovery responses after the deposition of Mr. Timothy Duff on March 1, 2016.[17] This was well after the meetings initially occurred on October 2, December 28, December 29, and December 30, 2015.[18] It is critical that in order for parties to engage in serious bargaining and negotiation, there must be transparency in the process. Here, not only were intervening parties not invited to participate in negotiation discussions,[19] but they were also not provided complete information regarding how the terms of the Stipulation came to realization and when negotiation meetings occurred.[20]

Staff and Duke reached agreement on the Stipulation in a meeting on December 30, 2015, at which point the signatory parties circulated a copy of the negotiated final agreement to intervening parties, requesting a response by January 6, 2016.[21] With the intervening holidays, this provided intervenors only three business days for review and to decide whether to join as a

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[15] Joint Ex. 1 at 2 (Stipulation).

[16] OMA Ex. 14.

[17] Id.

[18] Tr. Vol. I at 259.

[19] OMA Ex. 15; Tr. Vol. I at 104 and 267 and 296.

[20] OMA Ex. 14.

[21] OMA Ex. 21.

signatory party.[22] In the concluding sentence of the email circulating the Stipulation, Staff and Duke stated:

> Please review the attached proposed settlement draft and let me know by noon on Wednesday, January 6, 2016 whether your client has an interest in being a signatory party.[23]

Intervening parties were not asked to participate in negotiating the terms of the Stipulation or provide feedback regarding the already negotiated terms of the Stipulation.[24] Rather, intervenors were merely given the Stipulation and asked if they had an interest in signing onto the Stipulation. Although, the correspondence purported that the settlement circulated was a draft, the Stipulation did not change from the time it was distributed to the intervening parties on December 30, 2015 to the time it was filed with the Commission on January 6, 2016.[25]

All of the parties were *not* "invited to attend multiple meetings to discuss settlement proposals, and were [*not*] offered an opportunity to discuss the terms to be included in the [S]tipulation."[26] In fact, the only meeting in which the intervening parties were invited to even discuss the Stipulation occurred 21 days *after* the Stipulation was filed. At this meeting, intervening parties were informed that the provision providing Duke with $19.75 million in shared savings for its 2013 and 2014 EE Programs would be "hard to move off," thereby removing any discussion (let alone robust discussion) among all intervening parties of a substantive provision of the Stipulation that would cost customers $19.75 million.[27] This

[22] Tr. Vol. I at 119.

[23] Id.

[24] Id. at 62 and 314.

[25] Tr. Vol. I at 116-117.

[26] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 52 (March 31, 2016).

[27] Specifically, Staff witness Donlon testified that intervening parties were told it "would be hard to move off that number" given there existed a signed stipulation between Staff and Duke. Tr. Vol. I at 309-310.

evidence presents a clear lack of serious bargaining when intervening parties are not permitted to fully discuss a critical provision of the Stipulation.

It appears that Duke's own witness also was not invited to participate in all of the meetings related to approval of the Stipulation. Specifically, Mr. Duff testified that he was only involved in two (of the four) discussions between Duke and Staff on December 29 and 30, 2015 via telephone,[28] and was not involved directly in finalization of the settlement document.[29] He did state, however, that he was not aware of any parties being involved in the negotiation of the Stipulation prior to Staff and Duke arriving at an agreement as to its terms.[30] Mr. Duff testified that by the time he participated in the settlement meetings between Staff and Duke, the $19.75 million provision for the 2013 and 2014 shared savings incentive "had already been determined."[31] When asked why intervening parties were not invited to participate in the negotiation discussions prior to reaching a settlement, no rationale was forthcoming.[32] This is hardly the serious bargaining contemplated by the Commission in the three-part settlement test. Therefore, the Stipulation fails the first prong of the Commission's test.

B. The Stipulation does not benefit ratepayers and is not in the public interest.

1. The terms of the Stipulation provide additional monetary payments to Duke with no benefits to customers, thereby undermining the intent of a shared savings incentive mechanism.

The Stipulation also fails to satisfy the second prong of the three-part settlement test given the terms of the Stipulation will not benefit customers and are not in the public interest. Furthermore, the Stipulation is in direct contradiction with the intent of the shared savings

[28] Tr. Vol. I at 102 and 117-118.

[29] Id. at 117-118.

[30] Id. at 62.

[31] Id. at 22

[32] See e.g., Id. at 255.

mechanism. Shared savings incentive mechanisms were designed to align a utility company's interests with its customers regarding energy efficiency and demand response programs, which produce cost-savings benefits for ratepayers by reducing costs associated with generation, transmission, and distribution.[33] "Incentive payments are not an entitlement for the Company."[34] Rather, shared savings payments encourage and reward utility companies for running effective Demand-Side Management (DSM) programs that produce such savings.[35]

The Commission agrees that the purpose of the shared savings incentive structure is to motivate utility companies to exceed energy efficiency standards on an annual basis even when mandated benchmarks continue to rise.[36] As the Commission clearly stated in its 14-457 Order in Duke's 2013 Recovery Case:

> Therefore, the Commission finds Duke's use of banked saving to claim an incentive is improper. We note the tired incentive structure is designed to motivate and reward the utilities for exceeding energy efficiency standards on an annual basis. As the mandated benchmark rises every year, Duke must continue to find ways to encourage energy efficiency. If it has a large bank of accrued savings to rely on, the motivation to push energy efficiency programs in following years diminishes. Thus, in order for the structure to continue to serve as a true incentive for Duke to exceed the benchmarks, the Commission finds that banked savings cannot be used to determine the annual shared savings achievement level.[37]

It is undisputed that Duke failed to meet its mandated energy efficiency benchmarks in 2013 and 2014 without the use of banked savings.[38] Duke relied completely on prior banked savings from 2009, which were easy to obtain at the time due to the low mandated benchmark, and converted those into shared savings dollars in order to achieve its annual benchmarks *and* to

[33] OMA Ex. 1 at 2 (Seryak Direct).

[34] OEG Ex. 2 at 8 (Baron Direct).

[35] OMA Ex. 1 at 2 (Seryak Direct).

[36] 14-457 Order at 5.

[37] Id.

[38] Tr. Vol. I at 141.

receive an incentive.[39] These actions in no way align with the intent of the shared savings mechanism and fails to incent Duke to engage in any long-term EE Programs that could reduce costs to customers.[40] Rather, Duke's actions remove customers from receiving any benefits from the shared savings incentive mechanism (e.g., in the form of energy efficiency and cost savings), and instead claim shared savings incentive payments when Duke did not even meet the minimum annual statutory benchmarks. Once intervening parties became aware of Duke's improper intentions to use banked savings to claim an incentive and challenged Duke's actions, Duke had sufficient time to increase the energy efficiency achieved through its programs in 2015 and 2016.[41] Duke, however, chose not to do so. The terms of the proposed Stipulation only rewards Duke's inaction by requiring customers to pay Duke $19.75 million for not managing its energy efficiency and demand response programs responsibly.[42]

Allowing Duke to use banked savings to achieve shared savings incentive payments does not benefit ratepayers, is not in the public interest, and directly contradicts the purpose of shared savings incentive mechanisms as originally proposed and established.

2. The terms of the Stipulation heavily favor Duke and provide little benefit to customers.

In addition to ignoring the customer benefits associated with a shared savings incentive mechanism, the terms of the Stipulation also create significant costs for customers. While Duke claims that the amounts it could recover from customers if it is successful on rehearing would be

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[39] Id. at 230-231.

[40] OMA Ex. 1 at 4-5 (Seryak Direct).

[41] Id. at 5; Tr. Vol. II at 394.

[42] OPAE Ex. 3 at 11 (Rinebolt Direct).

"significantly in excess" of the amount that it will receive in shared savings under the Stipulation,[43] Duke grossly overstates the amounts that actually could be recovered.

If it is successful in reversing the Commission's prior decision, Duke asserts that it could be entitled to a shared savings incentive of as much as $55 million in pre-tax dollars for calendar years 2013, 2014, 2015, and 2016 combined.[44] Duke's calculation, however, fails to consider a number of facts. First, the Commission's 14-457 Order in Duke's 2013 Recovery Case prohibited the use of banked savings to claim a shared savings incentive and prohibited Duke from collecting shared savings for 2013.[45] Second, because Duke failed to meet the annual statutory benchmarks for energy efficiency absent the use of banked savings in 2014, per the 14-457 Order, Duke also cannot collect shared savings for 2014.[46] Thus, the true potential cost to customers during the 2013 and 2014 years would be $0. Third, Duke attributes $15 million of the purported $55 million in potential costs to customers to 2016, despite the fact that the shared savings mechanism expired at the end of 2015.[47] Given the expiration, Duke filed to establish a new shared savings mechanism for 2016 in PUCO Case No. 14-1580-EL-RDR (2016 Extension Case).[48] To date, Duke has not been authorized to extend the shared savings mechanism and collect shared savings in 2016. Therefore, Duke's $55 million in estimated costs grossly exaggerates the true potential costs to customers.

Additionally, although Duke purports to make a number of concessions in the Stipulation, those concessions are illusory as the provisions in the Stipulation include language that contains

[43] Duke Ex. 1 at 6 (Duff Direct).

[44] Joint Ex. 1 at 6 (Stipulation).

[45] 14-457 Order at 5.

[46] Tr. Vol. I at 141.

[47] See Entry at 2 (February 2, 2016).

[48] Tr. Vol. I at 60-61.

a "number of holes,"[49] and, in reality, results in little risk for Duke while creating significant costs for customers. For example, provision (a) of the Stipulation permits Duke to recover a total of $19.75 million in shared savings for calendar years 2013 and 2014 and Duke will forego any shared savings during the 2015 and 2016 calendar years.[50] This is not a concession by Duke, however, because, as explained above, Duke is permitted to recover $0 in shared savings for the 2013 and 2014 calendar years.[51] Further, Duke provides no concession related to the provision to forego a shared savings in 2016 when the shared savings incentive mechanism already expired at the end of the 2015.[52]

Although provision (3)(a) of the Stipulation states that beginning in calendar year 2017, Duke will not file for recovery of a shared savings mechanism in any year after 2014 in which banked savings have been used to meet the annual benchmark standards, the provision also includes an exception that permits Duke to seek a shared savings incentive during this time period consistent with any change in law, regulation, or order regarding shared savings.[53] Therefore, Duke could still file for recovery of a shared savings incentive or establishment of a shared savings incentive in 2015, 2016, and beyond if the Commission issues an order that somehow changes the existing law or Commission precedent with respect to shared savings. This includes Duke's pending 2013 and 2014 Recovery Cases (PUCO Case No. 14-457-EL-RDR and PUCO Case No. 15-534-EL-RDR), Duke's 2016 Extension Case (PUCO Case No. 14-1580-EL-RDR),[54] or any other future proceeding or legislative enactment. As such, Duke makes no

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[49] Tr. Vol. II at 343.

[50] Joint Ex. 1 at 6 (Stipulation).

[51] Tr. Vol. I at 132 and 141.

[52] Tr. Vol. I at 60-61.

[53] Joint Ex. 1 at 6-7 (Stipulation).

[54] Tr. Vol. II at 367-368.

concession to forgo future shared savings incentive requests given the broad exception in this provision.

Additionally, Duke makes no concession in provision (3)(c) of the Stipulation as Duke's EE Programs are already subject to the Commission's Evaluation, Measurement and Verification process.[55] The inclusion of this term provides nothing additional to customers beyond what is already required in Rule 4901:1-39-05, Ohio Administrative Code (O.A.C.).

Provision (3)(d) of the Stipulation provides that Duke will retire 150,000 MHW of the Company's banked energy savings that have never been used.[56] Similar to the other provisions in the Stipulation, the alleged concessions related to this term are illusory and provide no value to customers. According to the Commission's recent 14-457 Order in Duke's 2013 Recovery Case, which rejected Duke's use of banked savings for shared savings incentive purposes, it is unlikely the 150,000 MWH in banked savings will ever be used for incentive purposes.[57] This term can only be a concession if one assumes that the Commission's current order is overturned and banked savings will be permitted in calculating shared savings.[58]

Duke and Staff's assertion that the Stipulation provides an additional benefit of reducing the risk of protracted litigation and appeals due to the finality of the issue of banked savings is over exaggerated.[59] Regardless of whether a case is resolved through a Stipulation or through a Commission order, there is always a risk of additional litigation either via litigation of the Stipulation or the appeals process.[60] Further, the loophole exception in provision (a) of the

[55] Tr. Vol. I at 133.

[56] Joint Ex. 1 at 7 (Stipulation).

[57] OCC Ex. 3 at 19-20 (Gonzalez Direct).

[58] Tr. Vol. I at 135.

[59] Duke Ex. 1 at 4 (Duff Direct); Staff Ex. 1 at 5 (Donlon Direct).

[60] Tr. Vol. I at 166-168.

Stipulation permits Duke to file for a shared savings mechanism consistent with a new law, regulation or order, providing no real finality to the issue of using banked savings to calculate shared savings.[61] This does not reduce the risk of litigation.

Finally, the testimony regarding when Staff's 2013 audit was completed and whether any disallowances would be appropriately trued-up is inconsistent. Specifically, Duke witness Duff testified that the 2013 audit is "still open" and Duke has not yet received findings from Staff regarding the audit.[62] However, Staff witness Donlon testified that the 2013 audit has been completed and Staff is accepting Duke's as-filed 2013 cost recovery per section (3)(b) of the Stipulation, regardless of whether the application included errors in rates, costs, or expenses.[63] It appears from the testimony that the terms of the Stipulation provide Duke impunity from appropriately accounting for errors or incorrect inclusion of costs passed through to customers, which is the typical practice of audits conducted by Staff or independent auditors. It is clearly not in the interest of ratepayers who will be forced to pay for imprudent and unreasonable costs incurred by Duke with no opportunity for recourse, particularly if those costs are a result of a coding or accounting error where an expense was merely charged to an incorrect account.

The terms of the Stipulation do not benefit ratepayers and are not in the public interest. The Stipulation fails the second prong of the three-part test.

C. The Stipulation violates important regulatory principles and practices and violates prior Commission orders.

The Stipulation also fails to satisfy the final prong of the three-part test as the proposed Stipulation violates several important regulatory principles and practices.

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[61] Joint Ex. 1 at 6-7 (Stipulation).

[62] Tr. Vol. I at 81-82.

[63] Tr. Vol. I at 284-86.

As explained above, Staff witness Donlon explained during his testimony that agreement to the Stipulation resulted in Staff's acceptance of Duke's as-filed application in the 2013 Recovery Case.[64] He stated that provision (3)(b) of the Stipulation was subject to modifications included in the Stipulation, but was *not* dependent on the results of the 2013 audit of Duke's costs included in the rider rate.[65] Not only would this presumably be inconsistent with mainintaing Duke's books and records in accordance with generally utility accounting practices, but it violates the long-standing audit process and practice established by the Commission that occurs in rider proceedings. Historically, the audit process serves as a protection for customers from paying for imprudent costs and expenses inadvertently allocated to the incorrect account or non-jurisdictional affiliate or imprudently incurred by the regulated utility, which will otherwise be passed on to customers. The process includes Staff requesting numerous discovery documents from the utility in order to review and audit various costs included in the rider rate that the regulated utility seeks to pass on to customers.[66] If Staff finds a particular cost that was incorrectly or unreasonably included in the rider rate, Staff will work with the utility company to remove that cost from the rider rate or will recommend a disallowance of the expense to the Commission.

In this case, Staff appears to have completed the 2013 audit, but does not appear to have worked with the utility company to remove from the rider rate any unreasonable, incorrect, non-jurisdictional costs or has not filed an audit report with disallowance recommendations. Instead, according to the Stipulation, Staff accepted Duke's as-filed 2013 cost recovery application,

[64] Tr. Vol. I at 283.

[65] Id.

[66] Id. at 284-285.

including any unreasonably or imprudently incurred costs included in the rider rate.[67] This provision deviates from common Commission practice and removes any customer protections afforded through the audit process, violating important regulatory principles. This provision also directly violates the Commission 14-457 Order that specifically conditioned the approval of the rider rate on Staff's audit and the Commission's "ultimate consideration of the audit and any necessary true-ups."[68]

None of the intervening parties to this proceeding support the Stipulation, including those who represent industrial, commercial, or residential customers in Duke's service territory.[69] Moreover, none of the intervening parties were invited to participate in settlement discussions that culminated in the Stipulation and, therefore, were intentionally excluded from such discussions.[70] As previously noted, the Supreme Court of Ohio has determined that intentional exclusion of an entire settlement class from settlement negotiations is of grave concern and not in alignment with the partial settlement standard endorsed by the Court in previous cases.[71] This clearly violates the important regulatory principles established by the Commission and the Supreme Court of Ohio regarding negotiations.

As discussed previously, the Stipulation also violates the Commission's previous 14-457 Order issued in Duke's 2013 Recovery Case. In that case, Duke claimed entitlement to a shared

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[67] Id. at 285-286.

[68] 14-457 Order at 5.

[69] Tr. Vol. I at 251; OCC Ex. 3 at 10 (Gonzalez Direct); See also, Motion to Intervene by the Office of the Ohio Consumers' Counsel and Memorandum in Support in PUCO Case No. 14-457-EL-RDR (April 30, 2014).

[70] OMA Ex. 15; Tr. Vol I at 104 and 267 and 296.

[71] See *Time Warner Axs v. PUCO* (1996), 75 Ohio St. 3d 229, 234, n.2.

savings incentive based on the use of banked savings from previous years.[72] The Commission issued a Finding and Order on May 20, 2015 stating:

> As to Duke's use of banked savings, the Commission agrees with OMA and finds the Company may only use the banked savings to reach its mandated benchmark. Therefore, the Commission finds Duke's use of banked savings to claim an incentive is improper.[73]

Both Staff witness Donlon and Duke witness Duff acknowledge that this Commission order is binding on Duke until it is modified by the Commission or overruled by the Supreme Court.[74] Therefore, the Stipulation provision that provides Duke with $19.75 million for its shared savings incentive mechanism for 2013 and 2014[75] is inconsistent with Commission precedent as Duke used banked savings to achieve its annual benchmarks and claim its shared savings incentive in 2013 and 2014.[76]

Duke argues that it is entitled to use banked savings to claim a shared savings incentive based on the stipulation approved in a previous cost recovery case, PUCO Case No. 11-4393-EL-RDR.[77] However, nowhere in the stipulation in that case was the term "banked" utilized or discussed,[78] or did the subsequent order in that case explicitly discuss banked savings.[79] Instead, Duke incorrectly relies on comments filed regarding Duke's application to speculate as to what the intent of a party may have been when entering into a stipulation that explicitly does not

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[72] 14-457 Order at 2.

[73] Id. at 5.

[74] Tr. Vol. I at 65 and 264.

[75] Joint Ex. 1 at 6 (Stipulation).

[76] Tr. Vol. I at 132 and 141.

[77] Id. at 26.

[78] Id. at 196.

[79] Id. at 87.

address the issue that the party complained about in its comments.[80] There is no record evidence to support Duke's claim. Regardless, the argument is irrelevant as the issue of utilizing banked savings to achieve shared savings in not located in the four corners of the stipulation in that case. Moreover, Duke's own witness Duff submitted testimony in support of the stipulation in Case No. 11-4393, stating, "The incentive mechanism does not apply until the Company has exceeded its target for annual compliance with the Commission's regulations for energy efficiency."[81] Thus, Duke has apparently reversed its previous position regarding the use of banked savings to claim a shared savings incentive.

In addition, provision (3)(a) of the Stipulation states that Duke will forego a shared savings incentive for the 2015 and 2016 calendar years.[82] This is inconsistent with Duke's pending 2016 Extension Case, in which Duke requests approval to continue its cost recovery mechanism for EE Programs through 2016.[83] Importantly, it should be noted that Staff filed reply comments in that case, stating:

> The Company should not be allowed to use accrued banked savings to earn shared savings in a future year. The primary purpose of allowing the use of banked savings to meet energy efficiency requirements, it to provide recognition that the currently required energy efficiency savings have already been achieved by the Company in a *prior* period. This has no relationship to the purpose of shared savings, which is to incentivize the Company to optimize its implementation of its portfolio plan in the *current* period. Therefore, in 2014 and going forward, the Company should only be able to use banked savings to satisfy energy efficiency mandates, not to achieve additional recovery under the shared savings mechanism.[84]

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[80] Id. at 91-92.

[81] OMA Ex. 13 at 2 (Duff Direct in 11-4393-EL-RDR).

[82] Joint Ex. 1 at 6 (Stipulation).

[83] OMA Ex. 5 at 1 (Attorney Examiner Entry in Case No. 14-1580-El-RDR).

[84] OCC Ex. 2 at 6 (Reply Comments of Staff in PUCO Case No. 14-1580-EL-RDR).

Thus, Staff's adoption of the Stipulation in this case appears to be inconsistent with its prior position regarding the use of accrued banked savings to earn shared savings in a future year.

The Stipulation violates several regulatory principles, Commission regulatory audit practices, utility accounting practices, and Commission orders. Accordingly, the Stipulation fails to satisfy the third prong of the three-part test and should be rejected.

V. Conclusion

As discussed herein, the Staff and Duke's proposed Stipulation fails to satisfy the requirements established by the Commission for evaluating the reasonableness of a stipulation. It is not the product of serious bargaining, does not represent a wide variety of interests, does not benefit ratepayers, is not in the public interest, violates several regulatory principles and practices, and violates Commission precedent. Therefore, OMA respectfully requests that the Commission reject the Stipulation as proposed and deny Duke's request for re-hearing of the 14-457 Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on April 28, 2016.

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