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 REPLY BRIEF

I. Introduction

Ohio Partners for Affordable Energy ("OPAE") submits this reply 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. Herein, OPAE replies to the initial briefs filed by the Staff and Duke.

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

Duke argues that the first part of the Commission's test for the reasonableness of stipulations does not incorporate a diversity of interest component. Duke Brief at 4. To support its apparent argument that bargaining for a settlement does not require parties with diverse interests to bargain to reach a settlement, Duke cites a recent Commission case, *Ohio Edison Company,* et al., Case No. 14-1297-EL-SSO, Opinion and Order (March 31, 2016) at 39. There is no discussion that defines the adequate number of parties with diverse interests in the Opinion and Order in the case cited by Duke, nor what constitutes serious bargaining. The Commission simply restates the three-part test used to determine the reasonableness of stipulations. Duke points to no case in which the Commission even considered whether serious bargaining occurs when the stipulating parties do not represent a diversity of interest, let alone found that a diversity of interest was not necessary for serious bargaining.

Duke also claims that the Commission does not require that any single party agree to a stipulation in order for the first part of the test to be met. Duke argues that it is the quality of the parties that is determinative, not the quantity, citing *Ohio Power Company*, Case No. 14-1693-EL-RDR, Opinion and Order (March 31, 2016) at 52. Duke is attempting to co-opt a standard argument used in cases with partial stipulations where some, but not all, parties have agreed to the stipulation. The argument does not work here because not a single intervening party has agreed to the 2016 Stipulation. Customer groups intervened in these cases, and no customer group supports the 2016 Stipulation.

The Staff argues that the 2016 Stipulation represents serious bargaining among capable, knowledgeable parties with diverse interests because the Staff believes it represents diverse interests all by itself. The Staff claims it is accountable for balancing interests of all of Ohio's ratepayers and represents the lowest income residential consumers, the largest industrial consumers, and everyone in between. Staff Brief at 8. However, in these cases, the Office of the Ohio Consumers' Counsel, the Ohio Energy Group, the Ohio Manufacturers' Association, the Kroger Company, the Environmental Law and Policy Center, and OPAE are all intervenors. The representation of diverse interests in the settlement discussions is not addressed with clichés about the Staff's role. The intervenors, all of whom were excluded from the settlement discussions, represent the relevant diversity of interests.

The 2016 Stipulation is the product of discussions between the two stipulating parties, Duke and the Staff. 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, 419.

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. 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, January 6, 2016.

The Ohio Supreme Court has disapproved of settlement negotiations that exclude entire customer classes. In *Time Warner AxS*, the Court overturned the Commission's approval of a settlement of an alternative regulation plan for Ameritech Ohio, in which all competitive local exchange companies were excluded from participating in the settlement negotiations. The Court stated:

> The partial stipulation arose from settlement talks from which an entire customer class was intentionally excluded. This was 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. … We would not create a requirement that all parties participate in all settlement meetings. However, given the facts in this case, we have grave concerns regarding the commission's adoption of a partial stipulation which arose from the exclusionary settlement meetings.

Time Warner AxS v. PUCO (1996), 75 Ohio St. 3d 229, 234, n. 2. The Commission recently stated that "no particular customer class may be intentionally excluded from negotiations." *Ohio Power Company*, Case No. 14-1693-EL-RDR (March 31, 2016) at 53.

The intentional exclusion of customer classes from the discussions here is more egregious than in *Time Warner AxS*. Instead of excluding one customer class, the negotiations excluded *all* customer classes. The discussions were conducted without inviting any of the intervenors to participate. Once Duke and the Staff reached agreement, it was clear that Duke and the Staff were unwilling to compromise with intervenors regarding the settlement and the $19.75 million giveaway to Duke.

Staff argues that the compromises made by Duke and the Staff show that the 2016 Stipulation is a product of serious bargaining. Staff claims that by stipulating to the $19.75 million giveaway to Duke, both Duke and Staff assessed the risk and compromised their initial positions. Staff Brief at 9. However, Staff has nothing at risk and will pay none of the $19.75 million. Staff participated in settlement discussions that deliberately excluded the intervening customer groups representing those who will pay the $19.75 million. The 2016 Stipulation fails the first part of the Commission's three-part test.

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.

Duke claims that the $19.75 million in shared savings it will receive under the 2016 Stipulation is a "significant concession" because Duke relinquishes its claim to approximately $55 million in shared savings. Duke Brief at 5. Duke claims that it has agreed to "give up" shared savings for 2015 and 2016. Id.

Duke has no claim to any shared savings 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. 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 true. "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. 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, Commission order, nor any stipulation between intervenors and Duke for excess savings from prior years to be used to give rise to a shared savings incentive. OPAE Ex. 3 at 7. Banked savings do not trigger a shared savings incentive because the incentive exists to award Duke for over-compliance with the annual benchmarks. Tr. II at 351-352, 387-388. Duke can point to no provision in the prior agreements nor any precedent that allows Duke to use prior years' savings to achieve an incentive in years that Duke did not comply with the benchmarks.

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. But because Duke did not produce enough savings to meet the benchmarks in 2013 and 2014, Duke does not qualify for the shared savings incentive in those years. Tr. II at 356-357. 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 incentives 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.

Staff believes that Duke has agreed to forego "recovery" for shared savings in 2015 and 2016. Staff Brief at 10. Staff argues that the 2016 Stipulation settles the "debated issue" whether Duke could use banked savings to achieve the maximum level of shared savings. Id. at 10. Staff claims that Duke will no longer use its "cumulative" methodology moving forward and that Duke has agreed it cannot "recover" shared savings in a year where it uses banked savings for compliance. Id. at 10. Staff argues that Duke contracted with third-party vendors to support its approved programs and incurred costs for its portfolio plan. Staff Brief at 11. Staff states that the 2016 Stipulation reduces the "cost" of shared savings that consumers would pay if Duke prevailed in its application for rehearing from the May 20, 2015 Finding and Order. Id. at 11. Staff argues that under the 2016 Stipulation Duke will now need to over-comply with the energy efficiency requirements in order to earn an incentive. Id. at 11.

The Staff is confused about the issue here. There is no issue of cost recovery here. Duke will recover its program costs. The issue here is the shared savings incentive. Shared savings are rewards for over-compliance with the statutory benchmarks. Simple compliance is required under the law. Only over-compliance can earn shared savings. This has always been true. 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 shared savings incentives for the years in which Duke did not meet the statutory benchmarks.

Moreover, contrary to the Staff's belief, there is no "debated issue." The Commission had already issued a Finding and Order on May 20, 2015 confirming that banked savings from previous years cannot be used to receive the shared savings incentive. Staff knew this when it negotiated the agreement with Duke.

The 2016 Stipulation is simply a giveaway to Duke of $19.75 million in ratepayers' money, and that is not in the public interest.

The Staff is also mistaken if it believes that the 2016 Stipulation will end Duke's quest to be awarded shared savings for years that Duke fails to meet the statutory benchmarks. As discussed below at 10-11, the 2016 Stipulation gives Duke the opportunity to continue its quest.

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.

Duke argues that the 2016 Stipulation does not violate any important regulatory principle or practice and that no party has cited a law or regulation that the 2016 Stipulation violates. Duke Brief at 6. The Commission's test refers to regulatory principles or practice, many of which the 2016 Stipulation violates.

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. There is also a second Commission precedent in a fully litigated case that energy efficiency 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 efficiency savings from prior years cannot be used to trigger a shared savings incentive. OPAE Ex. 3 at 13.

Staff claims that under the 2016 Stipulation Duke must comply with Staff's methodology for earning a shared savings incentive for the remainder of this portfolio plan and future portfolio plans. Staff Brief at 11. Staff claims that under the 2016 Stipulation Duke is not allowed to propose a similar mechanism in the future, which creates efficiency for future proceedings. Id.

The Staff is mistaken. The 2016 Stipulation 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 the 2016 Stipulation resolves the shared savings issues. 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. Obviously, an "order" in this case could negate Duke's commitment. The word "order" could also 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.

A change in law and a subsequent change in regulation are also possible. The General Assembly is already 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 allow Duke to collect shared savings incentives as a result of savings in prior years, an outcome that is in conflict with 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 Reply 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 13th day of May 2016.

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