

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke :
Energy Ohio, Inc. for Recovery of : Case Nos. 14-457-EL-RDR
Program Costs, Lost Distribution : 15-534-EL-RDR
Revenue, and Performance Incentives :
Related to its Energy Efficiency and :
Demand Response Programs. :

REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

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**On behalf of the Staff of
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May 13, 2016

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INTRODUCTION

The Stipulation presented in this matter benefits the ratepayers of Duke Energy Ohio (Duke or the Company), while resolving a contested issue between the Staff of the Public Utilities Commission of Ohio (Staff) and Duke: Whether the Company can use banked savings to meet its annual energy efficiency mandate and, in the same year, claim a shared savings incentive achievement level. Staff generally agrees with the Commission's earlier policy holding in this case that banked savings cannot be used to determine the annual shared savings achievement level. However, Staff believes that Duke's Application for Rehearing presents good cause for creating a limited exception in this case. Through the Stipulation, Staff is asking the Commission to grant Duke shared savings for 2013 and 2014, and prohibit the Company from using banked savings to earn a shared savings achievement level in the future.

The Intervenors,¹ who chose not to respond to an invitation to negotiate, contest the Stipulation in this proceeding. Despite their arguments to the contrary, the Stipulation meets the three-part test for reasonableness. It represents compromises by Duke and Staff to resolve the contested issue efficiently and mitigate the costly risk to ratepayers inherent in these proceedings. The Commission should approve the Stipulation and give consumers certainty moving forward.

DISCUSSION

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

The Stipulation is the product of serious bargaining among capable, knowledgeable parties because of the diverse interests represented by the signatory parties, the open and fair negotiation process, and the compromises made by each side.

1. The signatory parties represent diverse interests.

First, Duke and Staff represent diverse interests. As stated in Staff's Post-Hearing Brief, Staff is accountable for balancing the interests of all of Ohio's ratepayers and is concerned with ensuring reliable service and fair rates for consumers.² OEG is mistaken and mischaracterizes testimony when it states that Staff is representing the Company's

¹ The Intervenors include: Ohio Consumers' Counsel (OCC), Ohio Partners for Affordable Energy (OPAE), Ohio Energy Group (OEG), Kroger Company (Kroger), and Ohio Manufacturers' Association (OMA).

² Tr. I at 246-47, 259.

interests.³ Staff is a neutral party. It does not represent one single customer class or party; rather, it seeks to balance the interests of all of Ohio's energy consumers with that of the regulated industry.⁴

OCC argues that Staff's position on the use of banked savings is not clear, and, therefore, it is unclear what compromises were made by Staff. However, as several intervening parties pointed out,⁵ Staff made its position clear in Case No. 14-1580-EL-RDR.⁶ Staff again clarified its position on banked savings in its Post-Hearing Brief in this case.⁷ Staff does not support the Company's use of banked savings to earn a shared savings incentive. Staff's position in this case is no different than previously stated; Staff is only asking for a limited exception to be created in this case to mitigate the risk created by Duke's Application for Rehearing and to resolve Duke's unique circumstances.⁸

³ OEG Brief at 4.

⁴ Tr. I at 246-47.

⁵ See OEG Initial Brief at 7; OMA Initial Brief at 17; OPAE Initial Brief at 9.

⁶ OCC Ex. 2 at 6 (*In re Duke Energy Ohio, Inc.*, Case No. 14-1580-EL-RDR (Reply Comments submitted on behalf of the Staff of the Public Utilities Commission of Ohio) (Jan. 9, 2015).

⁷ See Staff Initial Brief at 5, 10.

⁸ Well after two years into Duke's current plan, S.B. 310 became law and provided utility companies a short window to amend their existing plans. Duke's flawed methodology went unnoticed until it was too late for Duke to amend its portfolio plan and implement the correct methodology.

2. The Stipulation was the product of lengthy negotiations between the signatory parties.

OMA argues that serious bargaining could not take place in four meetings.⁹ This argument is flawed for many reasons. First, there is no standard requiring a minimum number of meetings to take place in order for there to be serious bargaining. That OMA fails to cite such a standard highlights that fact. Second, the four meetings mentioned in the record spanned from October to December.¹⁰ Those lengthy meetings were the formal meetings that took place between Staff and Duke’s counsel and substantive experts;¹¹ it does not account for the informal communications that took place between counsel.¹² Those meetings also do not account for the time taken by each signatory party internally to contemplate and discuss the terms presented by the opposing party.¹³ Absent a clear standard to the contrary, the fact that four formal meetings occurred does not negate serious bargaining.

⁹ OMA Initial Brief at 5.

¹⁰ See OMA Ex. 14 (OCC-INT-02-010).

¹¹ See OMA Ex. 18 (OCC-INT-02-011).

¹² See Tr. I at 290 (explaining that “there was a lot of negotiations back and forth”).

¹³ See *id.* at 246.

3. The intervening parties failed to respond and showed no interest when Staff invited them to participate in the negotiations.

A major topic covered by all of the parties is the content of and intent behind the email sent by Staff’s counsel on December 30, 2015.¹⁴ OCC and OEG misrepresent the evidence on the record. The email does not contain an ultimatum¹⁵ or a caveat.¹⁶ Parties were explicitly asked if they had an interest in becoming a signatory party.¹⁷ The email contains no language stating or suggesting that the amount of shared savings was not open for further discussion.¹⁸ Staff witness Donlon testified that “the whole document was negotiable at that point,”¹⁹ and that Staff’s intent was to have further negotiations if the parties so desired.²⁰ The Intervenors are ignoring the evidence on the record and mischaracterizing the language of the email in order to speculate about Staff’s intent. The fact is that no intervening party inquired about whether the terms were open for discussion²¹ so they must resort to speculation.

¹⁴ See OCC Initial Brief at 6-8; OPAE Initial Brief at 2-3; Kroger Initial Brief at 4-5; OEG Initial Brief at 3; OMA Initial Brief at 6-7.

¹⁵ OCC Initial Brief at 7.

¹⁶ OEG Initial Brief at 3.

¹⁷ OMA Ex. 21 (Staff’s email to Intervenors regarding the draft stipulation).

¹⁸ See *id.*

¹⁹ Tr. I at 250.

²⁰ *Id.* at 275.

²¹ *Id.* at 278.

The Intervenor also complain about the deadline given (January 6th at noon) to respond to the email.²² But, again, no intervening party asked for an extension of the deadline. The importance of the email is that it shows that the Intervenor received a draft of the “rough agreement”²³ between Staff and Duke and were given the opportunity to review it and consult with the signatory parties if they had such an interest. After not receiving any kind of response from any intervening party, it became clear to Staff and Duke that the Intervenor did not have an interest in the Stipulation. This is evident by their late responses: OCC responded at 5:45pm on January 6th;²⁴ OMA responded at 6:08pm on January 6th;²⁵ and OPAE responded at 6:41pm that same day.²⁶ It is no coincidence that, after having a week to respond to Staff, three of the intervening parties responded to Staff within a two-hour window — after the Stipulation was filed. After waiting an extra four hours after the noon deadline on January 6th, the Stipulation was filed with only Duke and Staff as signatory parties.²⁷

²² See OCC Initial Brief at 6-8; OPAE Initial Brief at 2-3; Kroger Initial Brief at 4-5; OEG at 3; OMA Initial Brief at 6-7.

²³ Tr. I at 276.

²⁴ *Id.* at 307.

²⁵ *Id.* at 278-79.

²⁶ *Id.* at 308.

²⁷ See Joint Ex. 1 at 1 (Stipulation and Recommendation) (Jan. 6, 2016).

4. The terms of the Stipulation are fair and reasonable, and represent compromises by the signatory parties.

The Intervenors argue that some of the terms of the Stipulation are illusory. First, and most contested, is the point at which the \$19.75 million that the Stipulation provides to Duke for shared savings became final. Kroger and OMA hang on the testimony of Company witness Duff that the amount was “determined” before he was brought into the negotiation.²⁸ The parties conveniently overlook Staff witness Donlon’s testimony that the amount only became final when the Stipulation was filed.²⁹ The two testimonies are not mutually exclusive. Although Staff and Duke had determined an amount that both could agree on, it was still subject to further input from the intervening parties.³⁰ Because no input was received, the terms of the Stipulation stayed as Staff and Duke had originally agreed upon.

Staff later held a meeting for the Company and the Intervenors to discuss the terms of the Stipulation and potential modifications.³¹ At that meeting, the parties were told that the amount of shared savings would be “hard to move off of” *after* the Stipulation was signed and filed.³² However, Staff witness Donlon specifically testified that all

²⁸ See Kroger Initial Brief at 5; OMA Initial Brief at 7.

²⁹ Tr. I at 290-91.

³⁰ See *id.* at 275.

³¹ *Id.* at 308.

³² *Id.* at 309-10.

terms were open for discussion *before* the document was filed.³³ The Intervenors are purposefully confusing that distinction.

After the meeting, all of the parties to this case joined together to request an extension of the procedural schedule in order to continue settlement discussions.³⁴ The fact that Staff held a meeting and joined the motion shows that Staff was open to further negotiation of the terms. It further shows that, had the intervening parties responded to Staff with interest by the January 6th deadline, the signatory parties would have continued negotiations with the intervening parties.

Another term that the Intervenors object to allows the Company to use banked savings to earn a shared savings incentive if there is a change in law, regulation, or order.³⁵ For the sake of clarification, Case No. 14-1580-EL-RDR does not address the actual recovery of shared savings. It only addresses an extension of the present mechanism to 2016.³⁶ Duke will have to file for recovery of 2016 next year in a different case. For that reason, the order in Case No. 14-1580-EL-RDR cannot nullify the Stipulation. Furthermore, the reason that Staff does not support Duke's use of banked savings in the manner debated is because it is contrary to the policy set by the Commission in this case.

³³ Tr. I at 250.

³⁴ *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 (Joint Motion for Extension of Time and to Clarify Scope of Hearing on Stipulation, and Request for Expedited Treatment) (Jan. 29, 2016).

³⁵ Joint Ex. 1 at 6-7 (Stipulation and Recommendation) (Jan. 6, 2016).

³⁶ Tr. I at 53.

Should there be a change in that policy, or a new statute or regulation addressing the issue, it follows that Duke should be entitled to pursue that change and alter its programs.

B. The Stipulation benefits consumers and the public interest.

The Stipulation benefits consumers and the public interest by creating a cap that limits the amount of shared savings that Duke can earn for 2013, 2014, 2015, and 2016; by mitigating the risk of \$55 million dollars that Duke's Application for Rehearing presents; and by incentivizing Duke to increase energy efficiency savings.

OPAE and OMA contest the amount of risk that Duke's Application for Rehearing actually presents.³⁷ Although the Commission has not decided whether to extend Duke's recovery mechanism into 2016, there is a legitimate risk that the Commission will do so.³⁸ The Stipulation accounts for that risk. Even if the Commission denies Duke's request to extend its mechanism, the risk for years 2013, 2014, and 2015, is still about \$40 million,³⁹ double the amount of shared savings the Stipulation grants to Duke. The Stipulation arose from the Commission's granting Duke's Application for Rehearing for further consideration of the issues raised in that application.⁴⁰ That decision presented the risk that the Commission could modify its Order and allow Duke to use banked savings to earn a shared savings incentive. Should that occur, Duke could earn up to \$55

³⁷ See OPAE Initial Brief at 7; OMA Initial Brief at 10.

³⁸ Tr. I at 61.

³⁹ See *id.*

⁴⁰ Joint Ex. 1 at 5 (Stipulation and Recommendation) (Jan. 6, 2016).

million over the term of its portfolio plan.⁴¹ If the Commission did not find any valid issues to consider in the Company's Application for Rehearing, it would have denied it.

OMA argues that Duke could have changed its programs.⁴² However, that was not lawfully possible. S.B. 310 gave each utility the option to amend its portfolio plan, but it could only do so within thirty days of S.B. 310's effective date.⁴³ Duke chose not to amend its current portfolio plan. As a result, the Company was locked into its current portfolio plan, without the option of amending it in later years. The Stipulation, then, protects consumers from potentially paying \$55 million in shared savings if rehearing favors Duke.

OMA also argues that the 150,000 megawatt hours that Duke agrees to retire is an illusory term and of no value to consumers.⁴⁴ OMA misunderstands this term. This term is one of the compromises that Duke made in exchange for receiving \$19.75 million in shared savings.⁴⁵ Those megawatt hours represent the amount of banked savings that Duke would have used to meet its mandated benchmark and to earn shared savings. Without this term, those megawatt hours could be used by Duke in the future to meet its mandated benchmark. Rather, Duke's retirement of the 150,000 megawatt hours benefits

⁴¹ Joint Ex. 1 at 6 (Stipulation and Recommendation) (Jan. 6, 2016).

⁴² OMA Initial Brief at 9.

⁴³ See Sub.S.B. No. 310.

⁴⁴ OMA Initial Brief at 12.

⁴⁵ See Joint Ex. 1 at 7 (Stipulation and Recommendation) (Jan. 6, 2016).

the public interest by forcing Duke to increase its energy efficiency savings because it will not have the benefit of those retired savings in its bank.

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

The Stipulation does not violate any important regulatory principle or practice. In fact, the Stipulation efficiently resolves all of the issues in Case No. 14-457-EL-RDR and one issue in Case No. 15-534-EL-RDR.⁴⁶ The Intervenors mistakenly lean on the May 20 Order in Case No. 14-457-EL-RDR as precedent here to argue that the Stipulation violates the Commission's policy in this case.⁴⁷ But that Order is not final; it is subject to modification because the Commission granted rehearing. The May 20 Order, then, cannot be relied on as precedent when its findings and conclusions are being disputed in this proceeding.

OPAE argues that the Company's application in Case No. 14-1580-EL-RDR is improper because the Commission did not authorize incentives for 2016. OPAE overlooks the term in the 2011 and 2013 stipulations that allows for an extension of the recovery mechanism into 2016 if the parties agree.⁴⁸ It also provides for the present

⁴⁶ Duke Ex. 1 at 6 (*In re Duke Energy Ohio, Inc.*, Case Nos. 14-457-EL-RDR and 14-534-EL-RDR (Supplemental Direct Testimony of Timothy J. Duff on behalf of Duke Energy Ohio) (Feb. 19, 2016).

⁴⁷ OCC Initial Brief at 10; OPAE Initial Brief at 8; Kroger Initial Brief at 11; OEG Initial Brief at 6; OMA Initial Brief at 16.

⁴⁸ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Energy Efficiency and Peak-Demand Reduction Portfolio Programs*, Case No. 13-431-EL-POR (Opinion and Order at 6) (Dec. 4, 2013).

circumstance in which the parties did not agree on an extension by allowing Duke to file an application pursuing an extension of the mechanism.⁴⁹ Therefore, the risk of about \$15 million presented by that potential extension is legitimate and addressed in the Stipulation.

OPAE also argues that the Stipulation violates Commission precedent set in Case No. 12-2190-EL-POR.⁵⁰ But the Order in that case has one sentence that mentions the use of banked savings.⁵¹ It does not contain any context or discussion to give meaning to that language.⁵²

The Intervenors all argue that the Stipulation violates policy set by the Supreme Court of Ohio that parties cannot be intentionally excluded from negotiation discussions.⁵³ Again, no parties here were intentionally excluded. All intervening parties received the email circulating the draft and asking if any parties had an interest in becoming a signatory party.⁵⁴ By not responding to Staff, the intervening parties demon-

⁴⁹ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Energy Efficiency and Peak-Demand Reduction Portfolio Programs*, Case No. 13-431-EL-POR (Opinion and Order at 6) (Dec. 4, 2013).

⁵⁰ OPAE Initial Brief at 8.

⁵¹ *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015*, Case No. 12-2190-EL-POR (Opinion and Order at 16) (Mar. 20, 2013).

⁵² *See id.*

⁵³ OCC Initial Brief at 10; OPAE Initial Brief at 10; Kroger Initial Brief at 11; OEG Initial Brief at 4; OMA Initial Brief at 15.

⁵⁴ *See* OMA Ex. 21 (Staff's email to Intervenors regarding the draft stipulation).

strated that they had no interest in representing their client's interest in the Stipulation and excluded themselves from any further discussions. In the dicta cited by the Intervenor, the Court also states that it "would not create a requirement that all parties participate in all settlement meetings."⁵⁵ The parties here did not show an interest until after the Stipulation was signed and filed. It is no coincidence that it benefits the Intervenor's litigation position to argue after-the-fact that they indeed had an interest in negotiating the Stipulation. Staff could not assume that the intervening parties had an interest absent their communication of that to Staff.

Kroger and OMA argue that the Stipulation violates a regulatory principle because the amount of shared savings is not subject to the findings of Staff's audit of Duke's application in Case No. 14-457-EL-RDR. However, neither Kroger nor OMA point to any evidence establishing errors with Duke's application.⁵⁶ Furthermore, Staff witness Donlon testified that Staff had completed the audit at the time that Staff and Duke entered into the Stipulation. It is unnecessary to make the Stipulation subject to the audit when Staff already knew its results at the time it negotiated the Stipulation. Because the audit was completed beforehand, there are no surprises awaiting Staff.

⁵⁵ *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St. 3d 229, 233, 661 N.E.2d 1097 (1996).

⁵⁶ *See* Tr. I at 285-86 (asking hypothetically about errors with Duke's application, but refraining from asking whether Staff found any errors in the application).

CONCLUSION

The Stipulation meets all prongs of the three-part test. It is the product of serious bargaining among knowledgeable, capable parties; it benefits consumers and the public interest; and it does not violate any important regulatory principle or practice. Therefore, the Commission should approve the Stipulation in this case.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Post-Hearing Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following Parties of Record, this 13th day of May, 2016.

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