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 FOR 2014.	CASE NO. 15-534-EL-RDR

OPINION AND ORDER

Entered in the Journal on October 26, 2016

I. SUMMARY

{¶ 1} The Commission adopts the application for recovery of program costs, lost distribution revenue, and performance incentives related to its energy efficiency and demand response programs for 2014, subject to modifications, and, in doing so, adopts the stipulation and recommendation submitted by Duke Energy Ohio, Inc. and Staff regarding performance incentives.

II. PROCEDURAL BACKGROUND

{¶ 2} Duke Energy Ohio, Inc. (Duke or the Company) is an electric distribution utility (EDU) as defined in R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an EDU shall provide customers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO must be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} Pursuant to R.C. 4928.66, EDUs are required to implement energy efficiency and peak demand response (EE/PDR) programs. Through these programs, the EDUs are mandated to achieve a specific amount of energy savings every year.

{¶ 5} By Opinion and Order issued August 15, 2012, the Commission approved a stipulation entered into between Duke and some of the parties. *In re Duke Energy Ohio, Inc.*, Case No. 11-4393-EL-RDR (*Rider Case*). Specifically, among other things, the Commission approved the recovery of program costs, lost distribution revenue, and performance incentives related to Duke's EE/PDR programs. In the Order, Duke was granted a waiver allowing the Company to create a new cost recovery mechanism, provided it filed a new portfolio application in 2013. The cost recovery mechanism, as approved, encouraged Duke to seek energy savings through a tiered incentive mechanism. If Duke exceeded the mandated annual benchmark, it is entitled to a percentage of shared savings, depending on how far it surpasses the benchmark. The incentive mechanism expired at the end of 2015, unless the interested parties decided the incentive is reasonable and effective and should continue for another year. By Opinion and Order issued December 4, 2013, the Commission adopted a stipulation that approved Duke's portfolio application and maintained the cost recovery mechanism as permitted in the *Rider Case*. *In re Duke Energy Ohio, Inc.*, Case No. 13-431-EL-POR (*Portfolio Case*). Additionally, on September 9, 2014, Duke filed an application to continue the cost recover mechanism for its EE/PDR programs through 2016. *In re Duke Energy Ohio, Inc.*, Case No. 14-1580-EL-RDR (*Recovery Extension Case*).

{¶ 6} On March 30, 2015, Duke filed an application for recovery of program costs, lost distribution revenue, and performance incentives related to its energy efficiency and demand response programs for 2014. *In re Duke Energy Ohio, Inc.*, Case No. 15-534-EL-RDR (*2014 Recovery Case*). The previous year, on March 28, 2014, Duke filed a similar application for recovery for 2013. *In re Duke Energy Ohio, Inc.*, Case No. 14-457-EL-RDR (*2013 Recovery Case*).

{¶ 7} On April 29, 2015, the attorney examiner set forth a procedural schedule. June 17, 2015 was the deadline to file motions to intervene as well as the deadline to file comments on the application. July 1, 2015 was set as the deadline for all parties to file reply comments.

{¶ 8} Timely motions to intervene were filed Ohio Manufacturers' Association (OMA), the Ohio Consumers' Counsel (OCC), the Ohio Energy Group (OEG), the Kroger Company (Kroger), the Environmental Law and Policy Center (ELPC), and Ohio Partners for Affordable Energy (OPAE). No one filed memoranda contra to the motions. The Commission finds the motions to intervene are reasonable and should be granted.

{¶ 9} A motion to practice pro hac vice and a certificate of pro hac vice registration was filed on behalf of Justin Vickers for representation of ELPC on June 17, 2015. Gov.Bar R. XII(2)(A) provides rules governing eligibility to practice pro hac vice in Ohio. Pursuant to Gov.Bar R. XII(2)(A)(6), motions for admission pro hac vice must be accompanied by a certificate of pro hac vice registration furnished by the Supreme Court Office of Attorney Services. No one filed memoranda contra to the motion. The Commission finds that the motion should be granted.

{¶ 10} On June 17, 2015, comments were filed by OPAE, OEG, Kroger, Staff, and OMA. Reply comments were filed by OMA, Kroger, and Duke on July 1, 2015.

{¶ 11} On January 6, 2016, Duke and Staff filed a joint stipulation and recommendation (stipulation) regarding the *2013 Recovery Case* and the *2014 Recovery Case* for the Commission's consideration. As to the *2014 Recovery Case*, the stipulation purports to only resolve issues regarding the shared savings mechanism, and not program costs or lost distribution revenue. Duke and Staff filed testimony in support of the stipulation on February 19, 2016. On March 4, 2016, OPAE, OEG, OCC, and OMA filed testimony in opposition to the stipulation.

{¶ 12} A hearing on the stipulation was held on March 10, 2016. Thereafter, on April 28, 2016, Duke, Staff, OEG, OPAE, OMA, OCC, and Kroger filed initial briefs. Reply briefs were filed by Duke, Staff, OEG, OPAE, OMA, OCC, and Kroger on May 13, 2016.

{¶ 13} On June 23, 2016, Staff filed a review and recommendations.

III. Application

{¶ 14} On March 30, 2015, Duke filed an application for recovery of program costs, lost distribution revenue, and performance incentives related to its energy efficiency and demand response programs. According to Duke, the total revenue recovery during 2014 was $33,673,530. As explained in its application, Duke's calculation for Rider EE-PDRR in this case includes the revenue requirement for the period January 2014 through December 2014, as well as the expected costs for 2015 and the reconciliation balances from 2013, which were filed in *2013 Recovery Case*.

{¶ 15} In their comments, OEG, OMA, OPAE, and Kroger argue that Duke should not be permitted to use banked efficiency savings to earn a shared savings incentive. The parties assert that, based on the May 20, 2015 Finding and Order in the *2013 Recovery Case*, Duke's use of banked savings is improper. OMA claims that Duke's banked efficiency savings should only be used to fulfill the energy efficiency benchmark, not to exceed it. OMA believes the Company's use of banked savings to qualify for the incentive is improper, as Duke should not be able to benefit when, without using savings, the Company falls short of the mandated benchmarks. OEG and Kroger agree, as OEG requests that the approximately $24 million of claimed shared savings incentives be removed from Duke's revenue requirement. Duke replies that its ability to use banked savings towards earning the shared savings incentive is not at issue in this case, as the Commission already approved the methodology in the *Rider Case*.

{¶ 16} Kroger further comments that a decision should not be made until an audit is completed in the *2013 Recovery Case* and a proper audit has been completed in this case. OMA notes that Duke's program costs, compared to other utilities, are significantly higher. Thus, OMA agrees with Kroger that a decision should be delayed until a proper audit is finished. Staff states that any Commission decision be subject to consideration of its audit and any necessary true-ups. In reply, Duke agrees that a Commission decision after the conclusion of an audit would be prudent.

{¶ 17} Another issue, according to OMA, is that Duke did not bid all available energy efficiency resources into PJM Interconnection, LLC (PJM), which results in the overstatement of the avoided costs used to calculate shared savings. OMA avers Duke should be bidding back into PJM the savings that occurred through its energy efficiency programs and crediting those proceeds to its customers. Duke counters that it does bid its resources back into PJM and its methodology is consistent with the stipulation in the *Portfolio Case*.

IV. Stipulation of the Parties

{¶ 18} As noted above, on January 6, 2016, Duke and Staff filed a stipulation that, if adopted, would resolve the shared savings issue in the *2014 Recovery Case* and all of the issues in the *2013 Recovery Case*. The following is a summary of the stipulation and is not intended to supersede or replace the stipulation.

{¶ 19} Duke and Staff recommend that the Commission approve the application, as filed on February 17, 2016, subject to the following conditions:

(1) Duke will recover a total of $19.75 million for its shared savings incentive mechanism under its EE/PDR plan for 2013 and 2014, collectively. For the remaining years of the portfolio plan, the Company will not recover a shared savings incentive. Beginning in 2017, Duke will not file for recovery of the shared savings mechanism in any portfolio plan year after 2014 in which banked savings have been used to meet the annual benchmark. If there is a change in law or regulation regarding shared savings, Duke may seek a shared savings incentive consistent with such change in law, regulation, or order.

(2) Staff will accept Duke's application for recovery as filed in the *2013 Recovery Case*. For the *2014 Recovery Case*, Staff will file its audit findings within six months of the filing of this stipulation and the program cost and lost distribution recovery will be addressed through a separate review process.

(3) Duke's 2013, 2014, 2015, and 2016 energy efficiency programs will remain subject to the Commission's evaluation, measurement and verification process (EM&V).

(4) Duke will retire 150,000 MWh of its banked energy savings that have never been used for the purposes of determining the incentive in the past.

V. STAFF REVIEW AND RECOMMENDATIONS

{¶ 20} As discussed, Staff filed its review and recommendations on June 23, 2016. Staff states it audited Duke's EE/PDR program expenses and calculations to verify accuracy and prudency. According to Staff, it used a statistical sampling method to examine 37,258 lines of data in order to have a 95 percent confidence level in its analysis. In its review, Staff contends it identified $409,096 in operations and maintenance expenses that should be deducted from the Duke's recovery request. This includes expenses associated with pay incentives, meals and entertainment, and other miscellaneous charges that Staff found were outside of the scope of the EE/PDR program and did not benefit Ohio customers.

{¶ 21} Staff states it has reviewed the methodology of Duke's lost distribution revenue calculations and determined it is appropriate. Staff further asserts, however, that the claimed energy savings have yet to be verified and approved through the Commission's EM&V process. Because the claimed energy savings form the basis of Duke's lost distribution revenue calculation, Staff requests Commission approval of

EE/PDR rate adjustments be subject to further review in subsequent proceedings when costs are trued-up. Additionally, in acknowledging the stipulation that was filed in this case, Staff avers that, if it is approved, the 2015 projected shared savings calculation in Duke's filing should not be included in future rate adjustments.

{¶ 22} Additionally, Staff addresses concerns with Duke's increasing costs and expenses associated with the EE/PDR program. Staff states Duke internal labor costs have increased 21 percent in the past year. Staff further contends that the workforce charging time to the program is extremely large, and a majority of the employees are associated with out-of-state Duke affiliates. Staff also states Duke's expenses and allocation have become increasingly excessive and difficult to verify. Staff requests that Duke be ordered to improve upon its accounting practices to be more descriptive and to ensure availability.

VI. Discussion and Commission Conclusion

{¶ 23} Before the Commission is Duke's application to recover program costs, lost distribution revenue, and performance incentives associated with its EE/PDR program. We have reviewed the comments and the Staff's review and recommendations regarding the entirety of the application. Additionally, we have also reviewed the evidence and comments concerning the stipulation that purports to resolve matters with the shared savings performance incentive.

A. *Stipulation regarding shared savings*

{¶ 24} Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are afforded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), *citing Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented in the proceeding in which it is offered.

{¶ 25} The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994); *In re Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT, Opinion and Order (Mar. 30, 1994); *In re Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al., Opinion and Order (Dec. 30, 1993); *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Jan. 31, 1989); *In re Restatement of Accounts and Records*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 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?

{¶ 26} 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.*, 68 Ohio St.3d 559, 629 N.E.2d 423 (1994), *citing Consumers' Counsel* at 126. 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.

1. IS THE SETTLEMENT A PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES?

{¶ 27} During the hearing, Duke and Staff offered witnesses in support of the stipulation. Duke witness Timothy J. Duff testified that the stipulation meets all three criteria for approval by the Commission. Regarding the first prong of the test, Mr. Duff asserts that the stipulation is result of serious bargaining among capable, knowledgeable parties. Staff witness Patrick Donlon agrees. Both witnesses note that both Staff and Duke were parties to the stipulations in the *Rider Case* and the *Portfolio Case* and both parties are represented by counsel that regularly appear before the Commission. Both parties contend that each side made concessions in order to reach an agreement. (Duke Ex. 1 at 4-5; Staff Ex. 1 at 4-5.)

{¶ 28} OCC, OEG, OMA, OPAE, and Kroger argue that the stipulation fails to meet the first prong of the test. OCC states that the intervenors were excluded from any settlement negotiations and thus the stipulation was not the result of serious bargaining, to which OEG, OMA, OPAE, and Kroger agree. OCC avers the intervenors were first notified on December 30, 2015, that parties were negotiating and that a settlement was reached between Duke and Staff (OMA Ex. 21). According to OCC, they had a week to provide notice whether they would sign the agreement and the stipulation was filed on January 6, 2016. OCC contends this was not a reasonable amount of time to review the document nor was it a sincere effort to seek input from the intervenors. (OCC Br. at 6-8.) OMA states the intervenors were not invited to any discussions prior to the drafting of the stipulation and they were not able to meet with Duke and Staff until after the stipulation was filed. At that meeting, according to OMA, the intervenors were informed that the $19.75 million shared savings amount would not likely be changed. (Tr. Vol. 1 at 116; OMA Br. at 5-6.) OEG asserts this exclusionary process deprived the actual ratepayers from a meaningful opportunity to negotiate (OEG Br. at 4).

{¶ 29} OCC, OEG, OMA, OPAE, and Kroger further contend that the stipulation fails the first part of the test because the parties to the stipulation do not represent diverse interests. OPAE asserts that neither Duke nor Staff have anything at risk. According to OPAE, Staff does not represent an actual customer class that will have to pay the incentive. (OPAE Br. at 2-3.) OEG avers that Staff represents various interests, including the utility, and no customer class was singularly represented in the drafting of the stipulation. (OEG Br. at 4.) OCC states Staff considers itself a neutral arbitrator and does not have a formal position in the proceedings, as it did not file comments (Tr. Vol. 1 at 329; OCC Br. at 8-9). OMA affirms that none of the intervening parties, which represent industrial, commercial, and residential customers, support the stipulation. Therefore, OMA avers all customer classes were excluded and the stipulation does not reflect a compromise of all of the issues in the case. (OMA Br. at 4.)

{¶ 30} In reply, Duke asserts that the intervening parties were not excluded and that the stipulation is the result of serious bargaining. Duke states that all parties were invited to participate in the settlement discussions when it e-mailed a draft of the stipulation to all of the intervening parties (OMA Ex. 21). According to Duke, although the stipulation was filed as originally drafted, the entire document was open to discussion with the intervenors (Tr. Vol. I at 250). Further, Duke contends that parties were invited to discuss settlement of the issues after the stipulation was filed, noting that a joint motion for continuance was filed in order to continue negotiations. Thus, Duke argues no parties were intentionally excluded; rather, parties had an opportunity to participate in negotiations, but chose not to sign the stipulation. According to Duke, to meet the first prong of the test, it is not necessary for all parties to agree to a stipulation, but all parties must have an opportunity to participate in discussions. (Duke Reply Br. at 2-5.)

{¶ 31} Staff replies that the stipulation is the result of lengthy negotiations among signatory parties representing diverse interests. Staff asserts its meetings with Duke occurred over a three-month span and does not include other informal discussions that transpired between counsel (OMA Ex. 14; Tr. Vol. I at 290). Staff disagrees with OCC's contention that Staff did not have a position on banked savings. Staff states it argued against Duke's banked savings interpretation in the initial briefs of these proceedings and in the *Recovery Extension Case.* According to Staff, the intervening parties declined to participate in discussions after being invited by Staff. Staff states its invitation was not an ultimatum and that everything in the draft was negotiable, as discussed by Staff witness Donlon (Tr. Vol. I at 250). Staff avers no one requested to extend the deadline and no party showed any interest in negotiating until after the document was filed. (Staff Reply Br. at 2-9.)

{¶ 32} The Commission finds that the first portion of the test is satisfied. Initially, we note that the signatory parties are knowledgeable, capable parties. Both Duke and Staff are represented by counsel that routinely appear before the Commission and participate in complex proceedings. *See, e.g., Rider Case and Portfolio Case.* We also find that the stipulation is result of serious bargaining. The agreed-upon settlement represents significant compromises made by both Duke and Staff that was the result of several meetings over a three-month span. (OMA Ex. 14; Tr. Vol. I at 290.) While aware that intervening parties did not sign the stipulation, we do not find that they were purposely excluded from negotiations. A proposed settlement was offered to the intervening parties and they were given an opportunity to respond before the stipulation was ultimately filed (OMA Ex. 21). Further, hearings regarding the stipulation were rescheduled due to a joint request by all of the parties to continue having settlement negotiations (Jan. 29, 2017 Jt. Motion for Extension of Time). Thus, it is clear that no parties were excluded from discussions regarding the agreement. Additionally, we find the signatory parties represent diverse interests, as contentions that Staff has no legitimate interests in the case are without merit. As Staff discussed, it has an interest in balancing the concerns of all of Ohio's ratepayers and ensuring reliable service and fair rates (Tr. Vol. 1 at 246; Staff Br. at 8). Although the intervening parties also represent diverse interests, the Commission has consistently found that one party or group of parties cannot effectively nullify a stipulation. *Dominion Retail v. Dayton Power & Light Co.,* Case No. 03-2405-EL-CSS, Opinion and Order (Feb. 2, 2005) at 18; Entry on Rehearing (Mar. 23, 2005) at 7; *In re Ohio*

Edison Co., Cleveland Elec. Illum. Co., Toledo Edison Co., Case No. 14-1297-EL-SS), Opinion and Order (March 31, 2016) at 43. In sum, we find the stipulation is the result of serious bargaining among capable and knowledge parties, and that the first portion of the test is satisfied.

2. DOES THE SETTLEMENT, AS A PACKAGE, BENEFIT RATEPAYERS AND THE PUBLIC INTEREST?

{¶ 33} Duke submits that the stipulation benefits ratepayers and the public interest and thus meets the second prong of the test. Mr. Duff testified that Duke is making considerable concessions in agreeing to the stipulation and avoiding significant litigation costs in this case and others. (Duke Ex. 1 at 6; Duke Br. at 4-5.) Staff agrees, stating the $19.75 million cap on earnings provides certainty for consumers and is less than the $55 million Duke would have been entitled to if it prevailed on rehearing. (Staff Br. at 10-11.)

{¶ 34} The intervenors argue the stipulation does not benefit ratepayers. Kroger, OCC, OEG, OMA, and OPAE assert Duke was not likely to prevail on rehearing, so Duke receiving any money is not beneficial to ratepayers. OPAE and OCC note that the Commission already found that Duke's use of banked savings is impermissible in this case. (OPAE Br. at 4-7; OCC Br. at 10-11.) OMA states that, even if Duke prevailed on rehearing, it would not be entitled to $55 million, as it claims. OMA avers that Duke is assuming it will prevail in the *Recovery Extension Case*, which is still pending before the Commission. (OMA Br. at 7-8.) OEG contends that the $19.75 million settlement rewards Duke even though, without the banked savings, the Company failed to achieve the even the mandatory benchmarks (OMA Br. at 5). Kroger, OCC, and OMA also contend that the alleged benefit of defrayed costs of future litigation are illusory, as there is always risk of litigation. (OCC Br. at 11; OMA Br. at 12-13.) Additionally, Kroger and OMA aver that the stipulation approves the 2013 rider recovery rates as filed, without the completion of a Staff audit. According to Kroger and OMA, ratepayers would forced to cover any improper expenses from Duke. (OMA Br. at 12.)

{¶ 35} In reply, Duke and Staff state the stipulation benefits ratepayers in multiple ways. They assert the stipulation resolves issues in multiple cases and provides certainty going forward on how specific issues will be handled. (Duke Reply Br. at 6-9.) Duke and Staff further aver that the stipulation avoids the risk of ratepayers being responsible for up to $55 million in shared savings. They also note that by retiring 150,000 on banked MWh hours, this assures Duke will continue to make efforts to increase its energy efficiency savings in order to meet the mandatory benchmarks. (Duke Reply Br. at 6-9; Staff Reply Br. at 9-10.)

{¶ 36} In consideration of the impact this stipulation has on resolving the issues of this case, as well as the other shared savings cases, we find that the stipulation ultimately benefits ratepayers and the public interest. We note that the issue of shared savings, and, in particular, Duke's use of banked savings, has been heavily litigated in the *2013 Recovery Case*, *2014 Recovery Case*, and the *Recovery Extension Case*, with future recovery filings yet to be initiated. A resolution of the issues for these cases, and, thus, going forward, is beneficial to ratepayers and in the public interest. While the intervenors, and Staff, argued that Duke was not entitled to any shared savings, Duke, as discussed, believed it had earned up to $55 million (Tr. Vol. I at 329). A compromise of $19.75 million, combined with Duke's agreement to not pursue future shared savings, alleviates the risk to ratepayers of having to pay significantly more (Duke Ex. 1 at 4-5). Additionally, it serves the public interest by providing certainty regarding the shared savings issue going forward. It resolves Duke's issues on rehearing in this case, in the *2014 Recovery Case*, and going forward in other shared savings recovery cases (Jt. Ex. 1 at 5-7). This prevents protracted litigation, and the costs associated with it, and allows the utilities and ratepayers to efficiently plan for the future.

{¶ 37} Additionally, Duke's retirement of 150,000 MWh of banked savings serves as a significant benefit to the public interest. The purpose of the EE/PDR program is to encourage energy efficiency. Duke accumulated a significant amount of banked savings early in the program and was able to rely on those savings to ensure it reached the mandate. If Duke agreed not to seek shared savings, but still had its full allotment of accumulated banked savings, the Company could continue to rely on its banked savings and not pursue energy efficiency. This would defeat the purpose of the program. By retiring a large portion of its banked hours, and settling the issues going forward, Duke will continue to promote its energy efficiency programs. (Staff Ex. 1 at 5.) Therefore, the settlement between Duke and Staff benefits the public interest and ratepayers.

3. DOES THE SETTLEMENT PACKAGE VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE OR PRACTICE?

{¶ 38} The third prong of the Commission's test is satisfied, according to Duke and Staff, as the stipulation does not violate any important regulatory principle or practice. (Duke Ex. 2 at 5; Staff Ex.1 at 5.)

{¶ 39} The intervening parties aver that the stipulation violates several regulatory principles and practices and thus does not meet the third portion of the test. Kroger, OEG, OMA, and OPAE argue the stipulation contradicts previous Commission orders. Specifically, they state the orders in this case, the *Rider Case*, and the *Recovery Extension Case* do not permit Duke to use banked savings towards the incentive and, by allowing Duke to recover $19.75 million, the stipulation violates those orders. (OMA Br. at 13-17; OPAE Br. at 8-9.) Additionally, OMA states that by accepting Duke's recovery rates as filed, without an audit, the stipulation violates principles and practices that ensure accountability (OMA Br. at 13). OCC contends only parties to a case may enter into stipulations and that Staff, by rule, is not a party and was not an active participant in these proceedings (OCC Br. at 13-14). OEG avers that the stipulation contradicts state policies espoused in R.C. 4929.02(A) and (N) to ensure the availably of reasonably priced retail service and to facilitate the state's effectiveness in the global economy, respectively. According to OEG, by rewarding a Company that underperformed, consumers and large businesses are unfairly punished. (OEG Br. at 7-8.) Finally, according to Kroger and OCC, because parties were excluded from settlement discussions (as discussed above in their arguments for the first prong), the stipulation violates established principles regarding settlements (OCC Br. at 14-15).

{¶ 40} Duke and Staff reply that the stipulation does not violate previous Commission orders. As to the order on this case, they aver that the case is still on rehearing. They also note the *Recovery Extension Case* is still pending. As to Kroger and OMA's argument regarding the audit, Staff contends the audit was completed and that neither OMA nor Kroger identified any errors in Duke's application. Duke submits that OCC is incorrect in stating Staff cannot enter into a stipulation, noting that Ohio Adm.Code 4901-1-10 expressly permits Staff to operate as a party for purposes of a stipulation. Regarding Kroger and OCC's argument that parties were intentionally excluded from negotiations, Staff reiterates its position that the intervening parties were invited to participate in discussions, but ultimately chose not to. (Duke Reply Br. at 10-11; Staff Reply Br. at 11-13.)

{¶ 41} The Commission finds the stipulation does not violate any important regulatory principles or practices. The argument of Kroger, OMA, and OPAE that the stipulation violates previous Commission orders is without merit. The disagreements in the *Recovery Extension* Case, the *2013 Recovery* Case, and others over Duke's use of banked savings originates from a lack of clarity in the stipulation in the *Rider Case* (Tr. Vol. I at 261). Further, as noted by the signatory parties, the *Recovery Extension Case* is still pending before the Commission. The stipulation purports to resolve the main issues, in all of these cases, by addressing the still-pending matters on rehearing from the Order in the *2013 Recovery Case* (Jt. Ex. 1 at 5-7). Thus, the stipulation does not violate any previous Commission order.

{¶ 42} We also find no merit in OCC's argument that Staff cannot serve as a signatory party to a stipulation. Staff has been an active participant in this case and others with similar issues; further, Ohio Adm.Code 4901-1-10 specifically permits Staff to be a signatory party to stipulation. As to OCC and Kroger's claim that the stipulation violates principles regarding settlements, as discussed above, we do not find that Duke or Staff excluded any intervening party from settlement negotiations.

{¶ 43} In sum, the Commission determines that the stipulation satisfies the three-part standard of review and thus should be adopted and approved. In doing so, we are conscious that parties representing consumers, large manufacturers, and commercial businesses did not sign the stipulation. However, the stipulation was negotiated fairly, fully litigated, and offers a reasonable compromise of the issues in the case. As noted by Staff witness Donlon, the original stipulations authorizing Duke to recover shared savings were approved in 2011 and 2013 (Tr. Vol. I at 260). In those stipulations, Duke's use of banked savings, and any limitations, was not expressly defined. Further, clarity on that issue was not necessary until these pending cases, which was too late for Duke to amend it portfolio plan under SB 310 (Tr. Vol. I at 192, 260-261). Conscious of these concerns, the Commission finds the stipulation successfully finds a middle ground that benefits all parties and allows Duke's EE/PDR programs to continue to operate towards their purpose. Therefore, we find the stipulation should be approved and adopted.

B. Program costs and lost distribution revenue

{¶ 44} Upon review, the Commission finds Staff's recommendations should be adopted. Specifically, we find that the $409,096 in operations and maintenance costs identified by Staff as inappropriately expensed should be deducted from Duke's request. Further, as Duke's claimed energy saving are still subject to approval through the Commission EM&V process, we find that, in future proceedings, Duke's EE/PDR rate may be subject to further review. As to Staff's concerns regarding Duke's accounting practices, we note that the Company has the burden of proof in demonstrating that its expenses were appropriate. If, upon review, Staff believes Duke is not meeting its burden, Staff's audit should reflect that.

{¶ 45} In sum, the Commission finds that Duke's application for recovery of program costs, lost distribution revenue and performance incentives should be approved subject to both the stipulation and to the specified recommendations found in Staff's audit. As discussed by Staff, 2015 shared savings included in the Company's filing should not be included for reconciliation in future rate adjustments.

VII. Findings of Fact and Conclusions of Law

{¶ 46} Duke is an EDU as defined in R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.

{¶ 47} On March 30, 2015, Duke filed an application for recovery of program costs, lost distribution revenue, and performance incentives related to its energy efficiency and demand response programs for 2014.

{¶ 48} On June 17, 2015, comments were filed by OPAE, OEG, Kroger, Staff, and OMA. Reply comments were filed by OMA, Kroger, and Duke on July 1, 2015.

{¶ 49} On January 6, 2016, Duke and Staff filed stipulation regarding the *2013 Recovery Case* and the *2014 Recovery Case.*

{¶ 50} A hearing on the stipulation was held on March 10, 2016.

{¶ 51} On April 28, 2016, Duke, Staff, OEG, OPAE, OMA, OCC, and Kroger filed initial briefs. Reply briefs were filed by Duke, Staff, OEG, OPAE, OMA, OCC, and Kroger on May 13, 2016.

{¶ 52} On June 23, 2016, Staff filed a review and recommendations.

{¶ 53} The stipulation is reasonable, meets the criteria used by the Commission to evaluate stipulations, and should be adopted. The Commission also finds Duke's application should be adopted and approved, subject to the stipulation and the Commission's modifications.

VIII. ORDER

{¶ 54} It is, therefore,

{¶ 55} ORDERED, That the motions to intervene by ELPC, Kroger, OEG, OMA, and OPAE be granted. It is, further,

{¶ 56} ORDERED, that motion to practice pro hac vice filed by Justin Vickers be granted. It is, further,

{¶ 57} ORDERED, That the stipulation filed by Duke and Staff be approved and adopted. It is, further,

{¶ 58} ORDERED, That Duke's application for recovery of program costs, lost distribution revenue and performance incentives be approved, subject to the modifications and clarifications set forth in paragraph 45. It is, further,

{¶ 59} ORDERED, That nothing in this Opinion and Order shall be binding upon this Commission in any future investigation or proceeding involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

{¶ 60} ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

Lynn Slaby

M. Beth Trombold

Thomas W. Johnson

M. Howard Petricoff

NW/vrm

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OCT 2 6 2018

Barcy F. McNeal
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