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,	:	**Case No. 15-534-EL-RDR**
And Performance Incentives Related To Its Energy Efficiency	:	
And Demand Response Programs.	:	

APPLICATION FOR REHEARING OF THE OHIO ENERGY GROUP

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Ohio Energy Group ("OEG") submits this Application for Rehearing of the October 26, 2016 Opinion and Order ("Order") of the Public Utilities Commission of Ohio ("Commission"). OEG submits that the Order is unreasonable and unlawful because:

1) The Commission erred by approving a settlement between Duke Energy Ohio, Inc. ("Duke" or "Company") and Staff that failed to satisfy the Commission's three-prong test for reasonableness; and

2) The Commission erred by allowing Duke to recover $19.75 million in energy efficiency/peak demand reduction ("EE/PDR") shareholder incentive payments when Duke failed to meet its burden of proof to demonstrate that those payments were reasonable.

A memorandum in support of this Application for Rehearing is attached.

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MEMORANDUM IN SUPPORT

I. The Commission Erred By Approving A Settlement Between Duke and Staff That Failed To Satisfy The Commission's Three-Prong Test For Reasonableness.

In its Order, the Commission approved a Stipulation and Recommendation between Duke and Staff ("Stipulation") that allows Duke to recover $19.75 million in EE/PDR shareholder incentive payments for 2013 and 2014 despite the fact that the Company's EE/PDR efforts in those years were insufficient to meet its statutory requirements.[1] The Commission found that the Stipulation satisfied its three-prong test for determining the reasonableness of settlements, under which the following questions must be addressed:

(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?[2]

The Commission's finding was in error. The Stipulation fails to satisfy even one of the three prongs involved in the Commission's test. Consequently, the Stipulation should have been rejected.

A. The Stipulation Is Not A Product Of Serious Bargaining Among Capable, Knowledgeable Parties.

The first prong of the Commission's reasonableness test examines the settlement process itself, questioning its scope and integrity. On just this first prong alone, the Stipulation failed.

Contrary to the settlement process used in many other Commission cases,[3] where representatives of various customer groups are invited to participate and help shape a settlement in its early stages, the Stipulation in

[1] Order at 16.
[2] Id.

this case resulted from negotiations between only Duke and Staff from which representatives of affected customer groups were excluded.[4] While the Commission correctly notes that a final draft of the Stipulation was circulated to customer representatives prior to its filing,[5] the Commission fails to recognize that the timing of that circulation deprived intervenors of any meaningful opportunity to participate in settlement discussions. Customer representatives received the draft Stipulation (without prior notice that settlement talks between Staff and Duke were taking place) on December 30, 2015 at 3:19 p.m. with a requested response deadline of noon on January 6, 2016. This essentially gave customer representatives two and a half business days (during a holiday period) to inform their clients and prepare a response to a proposed settlement document which they played no part in crafting and which would permit an outcome contrary to Commission precedent.[6]

The Commission also ignores or unduly disregards the fact that the draft Stipulation was circulated to customer representatives along with the caveat that the most important term in the Stipulation – the provision granting Duke $19.75 million in incentive payments for years when the Company failed to meet its benchmarks without the use of "*banked*" savings from prior years – was essentially inflexible.[7] Hence, customer representatives were completely excluded from participating in settlement discussions regarding the most central feature of the Stipulation.

Such an exclusionary settlement process is not only contrary to Commission precedent, it is also contrary to the Supreme Court of Ohio's admonitions. In *Time Warner AxS vs. Pub. Util. Comm'n*, the Supreme Court

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[3] Opinion and Order, Case No. 12-1682-EL-AIR (May 1, 2013) at 11 (*"According to Mr. Wathen, negotiations in these proceedings occurred via in-person meetings, telephone conferences, and email exchanges,* ***with all parties being invited to attend these meetings and all issues raised by the parties being addressed in reaching the Stipulation.****")*(emphasis added); Opinion and Order, Case No. 14-1693-EL-RDR (March 31, 2016) at 52 (*"****All of the parties...were invited to attend multiple meetings to discuss settlement proposals, and were offered an opportunity to discuss the terms to be included in the stipulation.****")*(emphasis added); Opinion and Order, Case No. 11-3549-EL-SSO (November 22, 2011) at 42 (*"Upon review of the stipulation, the Commission observes that, based upon the wide-range of issues addressed and resolved in the stipulation, which affect a very diverse and experienced group of parties that signed the stipulation, it is evident that the parties expended a great deal of time and effort to resolve the issues in these proceedings. The signatory parties represent interests including the company, municipalities, competitive suppliers, industrial consumers, commercial consumers, advocates for low- and moderate income customers, environmental advocates, and Staff.")*; Opinion and Order, Case No. 12-1230-EL-SSO (July 18, 2012) at 26 (*"The signatory parties represent diverse interests including the Companies, a municipality, competitive suppliers, commercial customers, industrial consumers, advocates for low and moderate-income customers, and Staff.")*.

[4] OCC Ex. 3 (Direct Testimony of Wilson Gonzalez), WG-4; OMA Exs. 15 (OCC-INT-03-017) and 18 (OCC-INT-02-11; OCC-INT-02-011 Supplemental).

[5] Order at 11.

[6] OMA Ex. 21 and OMA Ex. 4 (Finding and Order in Case No. 14-457-EL-RDR (May 20, 2015)) at 5.

[7] Tr. Vol. II (March 15, 2016) at 411:4-10; OCC Ex. 3 at 8:3-7 and 9:8-21; OMA Ex. 21 and OMA Ex. 4 (Finding and Order in Case No. 14-457-EL-RDR (May 20, 2015)) at 5.

strongly cautioned against settlements stemming from a process in which potentially opposing interests were excluded:

> *...in the interest of judicial economy and given the extensive briefing and arguments of the parties, we feel compelled to note our grave concern regarding the partial stipulation adopted in the case at bar.* ***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****...Ameritech managed either to settle its competitive issues or defer them until a later date, all without having its competitors at the settlement table. Under these circumstances, we question whether the stipulation, even assuming the commission's authority to approve it, promotes competition in the telephone industry as intended by the General Assembly.* ***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.***[8]

The Commission itself recently cited this precedent in Case No. 14-1693-EL-RDR, finding that *"no particular customer class may be intentionally excluded from negotiations."*[9]

Given that representatives of entire customer classes were left out of the negotiations leading to the Stipulation until those negotiations were essentially complete, the settlement process that took place in this case falls into precisely the kind of exclusionary settlement process that the Supreme Court of Ohio rejects. In fact, the settlement process used in this case is even more egregious than the one previously considered by the Court since in this case, *all* customer classes were excluded from the formative negotiations leading to the proposed Stipulation.

Contrary to the Commission's conclusion,[10] Staff's participation in the negotiations leading to the Stipulation does nothing to alter the exclusionary nature of the settlement process. Staff itself conceded that its responsibility is to represent the interests of a multitude of entities, *including* the utility.[11] The Commission also noted that Staff is responsible for balancing multiple interests.[12] But Staff does not and cannot singularly represent the interest of any one customer class. That is precisely why it is so critical that customer

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[8] *Time Warner AxS vs. Pub. Util. Comm'n*, 75 Ohio St.3d 229, fn. 2 (1996)(emphasis added).

[9] Opinion and Order, Case Nos. 14-1693-EL-RDR (March 31, 2016) at 53.

[10] Order at 11-12.

[11] Tr. Vol. I (March 10, 2016) at 246:16-20 (*"Staff represents the entire state of Ohio. We represent the lowest of the low income, the highest of the high income, every single company that exists in Ohio, no matter how big, how small,* ***the utilities.****")* Emphasis added.

[12] Order at 11.

representatives are invited to participate in the early stages of a settlement process. Otherwise, hard-line positions that customer representatives would have taken in settlement discussions may be compromised or even absent from negotiations. Because it is the customers who ultimately pay the costs resulting from the Stipulation, customer representatives should have had a voice in the early stages of its formation. But the exclusionary settlement process used to develop the Stipulation robbed customers of a meaningful opportunity to participate in the negotiations. The Stipulation therefore failed to satisfy the Commission's first criterion and should have been rejected.

B. The Stipulation Package Does Not Benefit Customers And The Public Interest.

The second prong of the Commission's reasonableness test focuses on the impacts of a proposed settlement on customers as well as the general public. Here again, the Stipulation failed. The Stipulation allows Duke to collect $19.75 million in shareholder incentive payments from customers as a reward for its EE/PDR efforts in 2013 and 2014 even though those efforts failed to achieve energy savings sufficient to satisfy the Company's statutory benchmarks in both years.[13] Forcing customers to reward Duke's shareholders with substantial bonuses for the Company's underperformance is unreasonable and harmful to the public interest.

As Duke's own filings reflect, the energy savings resulting from the Company's EE/PDR efforts in 2013 and 2014 were well below those required by R.C. 4928.66. Setting aside *"banked"* energy savings, in 2013, Duke achieved only 125,226 MWh of its required 181,369 MWh in energy savings, or 69% of its statutory mandate.[14] And in 2014, Duke achieved only 144,060 MWh of its required 192,113 MWh of energy savings, or 75% of its statutory mandate.[15] Hence, absent the use of *"banked"* savings, the Company would not have qualified for any incentive payments in 2013 and 2014. Nevertheless, the Stipulation handsomely rewards Duke's shareholders for the Company's EE/PDR efforts in 2013 and 2014. Such an approach is bad policy.[16]

The purpose of an EE/PDR incentive mechanism is to induce a utility to achieve energy savings over and above what is required by the mandatory benchmark. Simply giving away large incentive payments to

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[13] Joint Ex. 1 at 6.

[14] OEG Ex. 2 at 5:8-9 (citing Direct Testimony of James E. Ziolkowski, Case No. 14-457-EL-RDR (March 28, 2014), Attachment JEZ-1 at 1).

[15] OEG Ex. 2 at 5:9-11 (citing 2014 Ziolkowski Testimony, Attachment JEZ-1 at 1).

[16] OEG Ex. 2 at 4:4-5; OPAE Ex. 3 (Direct Testimony of David C. Rinebolt) at 11:16-12:3.

shareholders in years where the utility underperformed is contrary to that purpose. If the Company could not obtain any incentive for the years 2013 and 2014 absent the use of previously "*banked*" energy savings, then the Company did not qualify for shareholder incentive payments for these years. The Stipulation sets a bad policy under which utilities that fail entirely at meeting the EE/PDR mandated benchmark receive substantial incentive payments anyway. While the Stipulation would not provide Duke with all of its requested $24.6 million in incentive payments for 2013 and 2014, the $19.5 million in incentive payments provided by the Stipulation would still result in a significant windfall to Duke's shareholders, without any offsetting benefit to customers.[17]

The Commission claims that the Stipulation benefits customers by resolving ongoing issues related to Duke's use of *"banked"* savings to recover shareholder incentive payments from customers.[18] But settling a case merely for resolution's sake is not inherently beneficial to customers. Customer representatives have already incurred considerable cost litigating these issues. There is little benefit to settling the case in a manner that harms both customers and the public interest merely to prevent additional litigation. Given that any claimed benefits of the Stipulation are vastly outweighed by its resulting harm to customers, the Stipulation failed the second prong of the Commission's reasonableness test and should have been rejected.

C. The Stipulation Violates Important Regulatory Principles and Practices.

The third prong of the Commission's reasonableness test evaluates the legality of a proposed settlement and its accordance with fundamental regulatory tenets. Not surprisingly, the Stipulation failed this final prong as well.

The Commission's own precedent states that Duke cannot use *"banked"* energy savings to trigger shareholder incentive payments. In its May 20, 2015 Finding and Order in Case No. 14-457-EL-RDR, the Commission found:

> *... Duke's use of banked savings to claim an incentive is improper. We note the tiered incentive structure is designed to motivate and reward the utility 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*

[17] OEG Ex. 2 at 6:14-7:1; OCC Ex. 3 at 11:7-8.

[18] Order at 13.

Commission finds the banked saving cannot be used to determine the annual shared savings achievement level. Duke's use of the banked savings to reach the mandated benchmark, however, is permissible. Accordingly, with this modification, the Commission concludes that Duke's application should be approved as modified by the Commission in this Finding and Order.[19]

The Commission now seeks to distance itself from its prior ruling, citing a lack of clarity and the adoption of the Stipulation in this case.[20] But the Commission had it right the first time. Its decision to disallow the use of "*banked*" savings to receive EE/PDR incentive payments was reasonable and should not have been changed as a result of the Stipulation.

Duke's attempt to use *"banked"* energy savings to trigger shareholder incentive payments runs counter to guidance provided by Staff as early as 2012. During the hearing in Case No. 11-4393-EL-RDR (the case where Duke's incentive mechanism was initially established), Staff witness Gregory C. Scheck testified that the Company should not use *"banked"* energy savings for purposes of triggering its shareholder incentive mechanism:

Q: Mr. Boehm also asked you a couple of questions about the amount that Duke is allowed to bank and using that in relation to meeting its threshold one year as opposed to actually getting an incentive mechanism off of bank amounts. Could you explain your – what is your understanding of what can Duke do to meet the threshold and then what exactly – what incentives will Duke get off of that banked portion from year to year?

Mr. Scheck: Well, if they bank something and they move to the future year, subsequent year, then if they already used it in the prior year towards reaching their benchmark and going above that amount, then they wouldn't get to earn twice on that. They only get to earn once. So essentially they can count it towards meeting their benchmark in the subsequent year, but it wouldn't be used for the incentive payment.[21]

More recently, Staff reiterated that Duke should not use "*banked*" savings to receive EE/PDR incentive payments, 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, is 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

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[19] OMA Ex. 4 at 5.

[20] Order at 15.

[21] Tr., Case No. 11-4393-EL-RDR (June 7, 2012) at 126:6-22.

only be able to use banked savings to satisfy energy efficiency mandates, not to achieve additional recovery under the shared savings mechanism.[22]

While Staff was a signatory party to the Stipulation, the policy that it initially espoused with respect to the use of *"banked"* savings also remains valid.

Not only is the Stipulation directly contrary to Commission precedent and policies previously endorsed by Staff, the Stipulation violates at least two important state policies outlined in Ohio law as well. Under R.C. 4928.02(A), the policy of the state is to *"[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."* Forcing customers to pay Duke's shareholders substantial unwarranted incentive payments results in unreasonably priced retail electric service in violation of R.C. 4928.02(A). Additionally, R.C. 4928.02(N) provides that it is the policy of the state to *"[f]acilitate the state's effectiveness in the global economy."* Adversely impacting large business interests by unnecessarily increasing their energy costs in order to reward Duke's shareholders for the Company's underperformance hinders Ohio's effectiveness in the global economy. Thus, the Stipulation violated the Commission's third criterion for reasonableness and should have been rejected.

II. The Commission Erred By Allowing Duke To Recover $19.75 Million In Shareholder Incentive Payments When Duke Failed To Meet Its Burden Of Proof To Demonstrate That Those Payments Were Reasonable.

The burden of proof to show that the Stipulation proposal to significantly raise customer rates in order to fund unwarranted bonus payments to the Company's shareholders is merited fell squarely on Duke, the applicant in this proceeding. Duke failed to meet that burden in Case No. 14-457-EL-RDR, when the Commission flatly rejected the Company's use of *"banked"* savings to trigger shareholder incentive payments.[23] Presumably in response to that Commission decision, Duke attempted to lessen its burden of proof in this proceeding by submitting a Stipulation derived from exclusionary settlement meetings in order to change the standard of review in this proceeding to one more easily satisfiable. As Commissioner Haque recently explained, the standard of review in a given Commission proceeding changes once a stipulation is filed:

[22] OCC Ex. 2 at 6.

[23] OMA Ex. 4 at 5.

> *...while the legal standard of review still requires that the utilities bear the burden of proof, the true test for legality in these cases is the three-part stipulation test established by this Commission and upheld by the Supreme Court of Ohio.*[24]

Yet, as discussed above, even under the easier to satisfy standard of review used to consider proposed stipulations, Duke failed to meet its burden of proof in this proceeding. Moreover, if Duke's request is considered outside of the context of the three-prong stipulation test, the record was devoid of any valid support warranting its approval. Duke failed to provide any explanation or analysis demonstrating that forcing customers to pay a $19.75 million bonus payment to its shareholders for years when the Company underachieved is reasonable. Indeed, the Company conceded that the $19.75 million was merely a *"blackbox"* number arrived at without any specific calculation, stating:

> *Q: You believe that the $19.75 million does represent shared savings for 2013 and '14?*
>
> *A. It's an amount designed to resolve the shared savings incentive for 2013 and '14. It was not a calculated shared savings number.*
>
> *Q. Right. But the shared savings mechanism was used to develop the 19.75 number.*
>
> *A. No, it was not.*[25]

Beyond Duke's mere request for $19.75 million in incentive payments, there is no additional evidence explaining why that specific amount is justified or setting forth the bill impacts of approving that request on customers. Accordingly, there was no valid record support for charging customers $19.75 million to fund unwarranted bonus payments to Duke's shareholders. Duke's attempt to unfairly lessen its burden of proof in this proceeding by engaging in exclusionary settlement meetings with Staff should have been flatly rejected.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Commission should reject the Stipulation and adopt OEG's recommendations on rehearing in this proceeding.

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[24] Concurring Opinion of Commissioner Asim Z. Haque, Case Nos. 14-1297-EL-SSO and 14-1693-EL-RDR (March 31, 2016) at 1-2.

[25] Tr. Vol. I (March 10, 2016) at 199:13-21.

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