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 Case No.15-534-EL-RDR

DUKE ENERGY OHIO'S MEMORANDUM CONTRA APPLICATIONS FOR REHEARING

I. INTRODUCTION

This case concerns two applications that were filed with the Public Utilities Commission of Ohio (Commission) on March 28, 2014, and March 30, 2015. Both cases address Duke Energy Ohio, Inc.'s (Duke Energy or Company) recovery of program costs, lost distribution revenue and performance incentive for energy efficiency and peak demand response programs managed by the Company in compliance with the requirements of Revised Code (R.C.) 4928.66, et seq. Both of these cases were resolved through a stipulated settlement that was submitted to the Commission for approval on January 6, 2016. After a hearing held on March 10, 2016, the Commission approved the Stipulation and Recommendation (Stipulation) that was submitted. The Ohio Energy Group (OEG), the Ohio Manufacturers' Association (OMA), The Kroger Company (Kroger), and the Office of the Ohio Consumers' Counsel (OCC) and hereinafter

collectively, (Intervenors), seek rehearing.[1] For reasons set forth below, the Commission should deny the applications for rehearing.

II. ARGUMENT

All of the Intervenors argue that the Commission erred in approving the Stipulation because the Stipulation itself did not meet the three-prong test established by the Commission for approving stipulations. Under that test, the Stipulation must be approved where: (i) it is the product of serious bargaining among capable, knowledgeable parties; (ii) as a package, the settlement benefits ratepayers and the public interest; and (iii) the settlement does not violate any important regulatory principle or practice.[2] Indeed, the Commission has recently affirmed that it repeatedly has found value in the parties' resolution of pending matters through a stipulation package, as an efficient and cost-effective means of bringing issues before the Commission while also, often times, avoiding the considerable time and expense associated with the litigation of a fully contested case.[3] The Commission recently affirmed, "[t]he three-prong tested utilized by the Commission and recognized by the Ohio Supreme Court does not incorporate [a] diversity of interest component... ."[4] Further, "[t]he Commission has repeatedly determined that [it] will not require any single party...to agree to a stipulation, in order to meet the first prong of the three-prong test."[5] Indeed, "it is the *quality* of the parties that is determinative, not quantity."[6] As

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[1] The OCC and OMA seek rehearing in both cases captioned above. The Kroger Company and OEG seek rehearing only with respect to Case No.15-534-EL-RDR.
[2] *Id.*, Opinion and Order, at p.39 (March 31, 2016).
[3] *Id.*, at p.79.
[4] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order, at p.52 (March 31, 2016).
[5] *Id.*
[6] *Id.*, Concurring Opinion of Commissioner Haque, at p.2 (emphasis in original).

demonstrated herein, the Commission's Second Entry on Rehearing finds that the Stipulation satisfies this controlling three-part test and therefore must be approved.

A. The Stipulation is the Result of Serious Bargaining Among Capable, Knowledgeable Parties.

The Intervenors argue that the Commission erred in approving the Stipulation because it did not meet this first prong of the three-prong test. Mainly, the Intervenors claim that the Stipulation could not be the result of serious bargaining because it did not, in their view, include all of the interested parties. Each of the Intervenors views the facts of the case through their respective unique lenses without recognizing and giving the Commission credit for reviewing the facts and making a decision based on the record. The arguments are all repeats of arguments already raised subsequent to the hearing and addressed in initial and reply briefs. They were failed arguments then, and continue to be so.

Intervenors recast the facts of the case to argue that they were excluded from negotiations leading to the Stipulation. Intervenors again cite the *Time Warner* case to argue that certain parties were excluded and therefore the Stipulation is not the product of serious bargaining.[7] As explained in the Commission's Second Entry on Rehearing, "A proposed settlement was offered to the intervening parties and they were given an opportunity to respond before the stipulation was ultimately filed." While Intervenors variously claim that they had insufficient time to respond, or had inadequate opportunity for meaningful or substantive input, the facts demonstrate that all parties were advised of a potential stipulation and had an opportunity to participate and offer their respective views and assist with shaping the Stipulation. Indeed, as noted by the Commission in its Second Entry on Rehearing, the settlement discussions were even

[7] *Time Warner AxS v. Public Utilities Commission of Ohio* (1996), 75 Ohio St. 3d 229.

rescheduled to accommodate the parties and allow continuation of the negotiations.[8] The fact that the Staff of the Public Utilities Commission of Ohio (Staff) and the Company may have met on previous occasions to discuss a settlement should not come as a surprise to any of the parties, as this is typical of the way in which settlements are accomplished before the Commission. Indeed OCC, OMA, OEG and Kroger have all engaged in individual settlement discussions with parties in other cases. These facts are not in dispute and undeniably establish that parties were given an opportunity to participate. They chose not to do so.

OMA is particularly strident and misconstrues the facts so as to mislead and obfuscate. Among its arguments is the assertion that the Stipulation did not change between the time it was first offered to the parties to consider and the time it was filed with the Commission.[9] OMA claims this is proof that the settlement was already final. But of course, this is an intentionally misleading argument. It is quite obvious that the Stipulation did not change because no party opted to suggest any changes during this interval despite being given an opportunity to do so. Thus, this fact establishes nothing other than that the parties opted out of participation when the opportunity was offered. Further, it should be noted that OMA members and Kroger will not have any interest in this matter beginning on January 1, 2017 when SB310 becomes affective and these entities will have the right to opt-out of paying the rider in its entirety.

The Commission explicitly established that sufficient diverse interests were involved. The Commission stated that the intervening parties represent diverse interest since Staff, as explained at hearing, has an interest in balancing the concerns of all of Ohio's ratepayers and ensuring reliable service and fair rates.[10] As both the Ohio Supreme Court and the Commission have found, the important consideration is whether any particular customer class was excluded

[8] Motion for Extension of Time, (January 29, 2016).
[9] OMA Application for Rehearing at 11.
[10] Decision at 11.

from negotiations. Here, no party was excluded from settlement negotiations. Indeed, all parties were invited to settlement meetings, with Staff repeatedly seeking input from them.[11] The Stipulation was submitted to all parties prior to its filing in the docket, and the procedural schedule was delayed at the *joint request* of all the parties in order to allow additional time to discuss settlement.[12] The fact that some chose not to join the Stipulation after considering the content is not the determinative fact. All parties were given an *opportunity to join* the discussion.

Kroger argues that Duke Energy Ohio should not be permitted to receive any shared savings and cites an irrelevant and misleading finding from a FirstEnergy proceeding.[13] The First Energy decision, from an electric security plan case, deals with matters completely different from those involved in this case. And the savings at issue in the FirstEnergy case related to programs unique and individual to FirstEnergy's energy efficiency portfolio. Indeed, FirstEnergy has instituted a new portfolio since Senate Bill 310 was enacted, while Duke Energy Ohio has continued with its approved portfolio through 2016. More importantly, a decision with respect to FirstEnergy's portfolio in an electric security plan case is irrelevant to this proceeding.

The three-pronged test adopted by the Commission does not require that all parties agree to a stipulation, but rather that all parties *have an opportunity* to participate in discussions. In this case, the facts establish that all parties were given such an opportunity.[14] The Commission has recently reiterated its policy that no one class of customers may effectively "veto" a stipulation. The Commission stated that it would not require any signatory party, including

[11] OMA Exhibit 21; Transcript, at p.249-250.
[12] Joint Motion for Extension of Time, to Clarify Scope of Hearing on Stipulation, Request for Expedited Treatment and Memorandum in Support, (January 29, 2016).
[13] Application for Rehearing of The Kroger Company at 6.
[14] OCC Exhibit 1.

OCC, to agree to a stipulation in order to meet the first prong of the three-prong test.[15] The Commission may weigh the evidence as it deems appropriate within its discretion, giving it substantial weight, as is required, and after careful consideration it has correctly done so.

The Commission has acknowledged all of these facts and found them sufficient to support a finding that serious bargaining among capable and knowledgeable parties had taken place and that the Stipulation met the first portion of the three-pronged test. The Commission's decision is firmly on solid ground and supported by the record.

B. As a Package, the Stipulation Benefits Ratepayers and the Public Interest.

The Commission's decision in this case explains, *inter alia*, that the Company's use of banked savings has been heavily litigated and that future recovery filings are yet to be initiated.[16] The Commission further explained that the Stipulation represents a compromise that included the recovery of $19.75 million, combined with the Company's agreement not to pursue future shared savings, resolved the Company's issues on rehearing, and prevented protracted litigation, while also allowing the utility and its ratepayers to efficiently plan for the future.[17]

Additionally, and apparently a point that was lost to the Intervenors, the Commission recognized that the Stipulation provided that the Company would retire 150,000MWh of banked energy savings, thus eliminating the ability of the Company to rely upon its bank and cease to provide ongoing energy efficiency programs to customers. The Commission correctly

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[15] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide a Standard Service Offer Pursuant to R.C.4928.143 in the Form of an Electric Security Plan*, Case No.14-1297-EL-SSO, *et al.*, Opinion and Order (March 31, 2016) at p.43.
[16] Decision at 12.
[17] Id.

recognized that this would spur the Company onward and cause the Company to continue to promote its energy efficiency programs.[18]

While the Intervenors may not assign the same value to these benefits individually or collectively, nonetheless, they provide ample cause for the Commission to find that the settlement benefits the public interest and ratepayers. Indeed, the Company established that it was entitled to as much as $55 million at hearing.[19] Thus, the resulting settlement represented a very significant compromise of claims and the Commission was well within its discretion to weigh this benefit and assign value accordingly. The Company and Staff established at hearing that the Stipulation represented value to ratepayers and the public, and the Commission set forth its findings explicitly noting those points with which it agreed. The Stipulation as a package provides meaningful and valuable benefits to customers in that it avoids ongoing litigation related to multiple cases and provides certainty for both customers and the Company in regard to shared savings. For these reasons the Commission's decision is fair, just and reasonable.

C. The Stipulation Does Not Violate any Important Regulatory Principle or Practice.

Arguments on rehearing by the Intervenors again represent a repeat of the same issues raised in the hearing and on brief after the hearing. For example, the parties argue again that the settlement process excluded customer classes and claim that the Commission neglected to address this argument.[20] But the Commission did explicitly recognize and address this argument. The Commission cited OCC's argument that parties were intentionally excluded and responded by reference to Staff's position that intervening parties were invited to participate but chose not

[18] Id.
[19] Tr. Vol. I at 329 and Decision at 12.
[20]

to do so.[21] Again, as noted above, it is not necessary that all parties agree to a stipulation, but rather that all parties *have an opportunity* to participate in discussions. In this case, the facts establish that all parties were given such an opportunity.[22]

Likewise, OMA argues that the Stipulation is inconsistent with the Commission's May 20, 2015 Order. But this is precisely the reason the Commission's rules allow for rehearing and an opportunity to reconsider a previous decision. In this instance, the Commission has found cause to amend its previous ruling, and has stated ample cause for doing so. The Commission explained its reasoning with respect to evidence supporting the three-pronged test for Stipulations and explained the value that had been established by the Stipulation. The fact of a Stipulated agreement that resolved multiple proceedings, compromised the significant claims of the Company, provided certainty, and created good policy in terms of pursuing energy efficiency, were all factors cited by the Commission in its decision. The Commission's decision is fair just and reasonable and amply supported by the record.

D. The settlement represents a fair and reasonable resolution of all of the issues in these proceedings.

The Intervenors complain that the Commission erred in its decision by approving the Stipulation, finding fault with the actual number that represents a settlement of the shared savings to which the Company was entitled. OMA argues that the "true" potential cost to customers during the 2013 and 2014 calendar years was $0. But this contention only serves to demonstrate the value inherent in the Stipulation. The Company was entitled to earn $55 million dollars for those two years. The Company has not yet exhausted its legal remedies. A compromise of its claims under the circumstances was deemed of value despite OMA's views to the contrary. Additionally, the Company agreed to forgo seeking recovery of shared savings in

[21] Decision at 14.
[22] OCC Exhibit 1.

the future, all of which adds additional value to the Stipulation. And although the parties repeatedly and erroneously point to the fact that the Company did not meet the mandated benchmarks for these years, the parties have not and cannot point to any law or regulation that requires that the Company meet the benchmarks without including banked energy savings in order to be entitled to shared savings. Thus, the ongoing dispute with the parties demonstrates the value in the approved Stipulation. The Commission understood this and opted to resolve the controversy and to permit the parties to move into the future with clear policy. The Commission's Second Entry on Rehearing is supported by the record, well-reasoned, and well with the Commission's discretion.

III. Conclusion

For the reasons set forth above, Duke Energy Ohio respectfully requests that the Commission deny the Intervenors' Applications for Rehearing.

Respectfully submitted,
Duke Energy Ohio, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal delivery, or electronic mail on this 5th day of December, 2016, to the following parties.

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Summary: Memorandum Duke Energy Ohio's Memorandum Contra Applications for Rehearing electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B. and Watts, Elizabeth H.