BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan.	))))	Case No. 16-0576-EL-POR

REPLY BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, ENVIRONMENTAL LAW & POLICY CENTER, OHIO ENVIRONMENTAL COUNCIL, AND ENVIRONMENTAL DEFENSE FUND

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Dated: April 7, 2017

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I. INTRODUCTION

Natural Resources Defense Council, Environmental Law and Policy Center, Ohio Environmental Council, and Environmental Defense Fund ("Environmental Intervenors") continue to support the Energy Efficiency & Peak Demand Reduction Program Plan (the "Plan"), as modified by the January 27, 2017 Amended Stipulation and Recommendation (the "Stipulation"), proposed by Duke Energy Ohio ("Duke" or the "Company"). The initial briefs of the Staff of the Public Utilities Commission ("Staff") and the Office of the Ohio Consumers' Counsel ("OCC") argue for modification of the Plan to add a cost cap. However, neither party resolves the fundamental flaw in their argument—that they have presented no substantive analysis on the cap proposal. Rather, Staff and OCC focus their attention primarily on rider costs, with little to no discussion of benefits. This focus is misplaced. While many utility bill riders pay for services that provide no direct financial benefit to customers, because the efficiency rider (Rider EE-PDR) pays for programs that drive down costs for all customers, it is the only rider with the potential to lower bills. The Commission should not arbitrarily limit these customer benefits.

Ohio law requires that stipulations meet three 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?; and (3) Does the settlement package violate any important regulatory principle or practice? *In re Columbus S. Power Co.*, Case Nos. 11-346-EL-SSO *et al.*, Opinion and Order, at 27 (Dec. 14, 2011). Environmental Intervenors fully addressed these criteria in our Initial Brief, and will focus on the benefits to customers and the public interest in this Reply.

The Plan and the proposed cost cap must be analyzed holistically. While the energy efficiency programs will lower bills and benefit customers, imposing a cost cap will deprive customers of value. It will force arbitrary program changes leading to poor results and less effective use of customer money. In their initial briefs, Staff and OCC do not provide credible evidence that would rebut these concerns. They simply have not met their burden of establishing that imposing a cost cap on the Plan would benefit ratepayers and the public interest.

II. ARGUMENT

The Plan and Stipulation represent a collaboration of diverse stakeholders who worked together to create a comprehensive portfolio that benefits all customers. While the Commission is not bound by a stipulation, it may place substantial weight on its terms. *In re Columbia Gas of Ohio*, Case Nos. 16-1309 *et al.*, Opinion and Order, ¶40 (Dec. 21, 2016). In reviewing such a proposed stipulation, the Commission has explained that "[t]he 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." *Id.* Finally, as Staff noted in its initial brief, the requirement of evidentiary support remains operative when reviewing a stipulation. Staff Initial Brief at 5-6 (citing *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992)).

OCC and Staff oppose the Stipulation because it does not include a cap on energy efficiency spending. Yet, as discussed in Environmental Intervenors' Initial Brief and further below, neither party provides a reasoned argument that can be supported by the record. Instead, they offer conclusory statements with no substantive analysis. In lieu of providing evidentiary support, OCC cites to a Commission statement in the recent AEP Ohio energy efficiency portfolio docket concerning cost caps, and requests the Commission issue a decision here consistent with that statement. OCC Initial Brief at 1-2 (citing *In re Ohio Power Co.*, Case No. 16-574-EL-POR, Opinion and Order, at 32, (Jan.18, 2017)). Curiously, OCC previously pointed to this same Commission language as nothing more than "dicta" with no precedential value. *In re Ohio Power Co.*, Case No. 16-574-EL-POR, OCC Memo Contra, at 4-5 (Jan. 30, 2017). Additionally, the Commission stated that the appropriateness of a cost cap is something to be decided based on the record in each individual case. *In re Ohio Power Co.*, Case No. 16-574-EL-POR, Entry on Rehearing, ¶ 8 (February 8, 2017). Thus, OCC's reliance on the AEP Ohio order as precedent is simply not appropriate and does not substitute for a robust analysis of the cap, its rationale, design, and impact.

In contrast with Staff and OCC's lack of evidentiary support, the Company has satisfied its burden of proof that the Stipulation is reasonable and in the public interest. The proposal for a cost cap should be rejected and the Plan, as modified by the Stipulation, should be approved.

A. A Cost Cap is Unnecessary Because the Commission's Process for Approving Efficiency Plans Already Controls Costs While Ensuring Program Quality.

Both Staff and OCC claim that the Plan lacks a provision controlling costs. Staff Initial Brief at 1; OCC Initial Brief at 1, 4-5. This is incorrect. The Commission has previously established a careful and detailed planning process designed to ensure that costs are reasonable and that programs are both cost-effective and provide substantial benefits. As discussed in Environmental Intervenors' Initial Brief, the Commission has stated that, "[t]he planning process provides for transparency and meaningful participation by stakeholders in determining the appropriate program mix and whether an electric utility is doing all that it can." *In the Matter of Rules,* Case No. 08-888-EL-ORD, Entry on Rehearing, ¶ 13 (June 17, 2009).

This process includes at least three tiers of review, allowing for the level of detailed program analysis necessary to identify whether Duke's expenditures are delivering value to customers. The first is the stakeholder collaborative in which the utility and interested parties work together to refine the portfolio proposal. Once a proposal is complete, the docketed Commission review process is then triggered, giving the Commission the final word on approval, and thus control over costs. In reviewing the portfolio, the Commission also takes into account thirteen criteria to ensure successful efficiency programs over the long-term, including cost-effectiveness and benefits to all customers (including non-participants), as well as qualitative factors such as the degree to which programs promote market transformation and otherwise address barriers to innovative efficiency measures. *See* Ohio Admin. Code 4901:1-39-03(B). Once the portfolio is approved, there is a third tier of scrutiny that occurs annually in each utility's cost-recovery rider filing. This process subjects program expenditures to an annual prudency review by Staff before they can be recovered, thus inoculating against cost concerns in the event a utility alters its program mix or spends money above its approved budget. Staff Initial Brief at 16 n.67. At each of these stages, Staff, parties, and the Commission have the opportunity to delve into program spending and results to determine whether the benefits of a plan are commensurate with its costs. Thus, contrary to Staff's and OCC's assertions, not only does the current system control costs, it does so at multiple levels.

This process has worked for Ohio's consumers since its inception and with full stakeholder participation. Utilities are not entitled to unlimited spending with guaranteed recovery as OCC would lead the Commission to believe. OCC Initial Brief at 1. Theoretically, Duke could spend above its budget—but each and every one of those expenditures would be subject to a prudency review by Staff *before* they could be recovered. The current process provides the Commission and Staff with the ability to limit recoverable costs.

The Commission should reject the hyperbolic assertions to the contrary, and look to the evidence in this case to determine the need for a cost cap. Cost control should be driven by a coherent rationale; an actual assessment of the overall costs and the overall benefits. OCC admits in its initial brief that the "[f]ocus of energy efficiency spending should be the benefits that the programs provide to customers" (OCC Initial Brief at 12), yet OCC and Staff decline to provide any analysis or acknowledgment of the impact of the cap on these very benefits.

B. Staff and OCC Fail to Meet their Burden of Establishing the Need, Rationale and Impact of the Cost Cap, While the Record Demonstrates a Cost Cap Will Only Harm Customers.

Essential to any measure of cost control is an analysis of the benefits provided by the programs, whether those benefits outweigh the costs, and the impact of any cost control mechanism on program quality and customer bills. But while Staff and OCC's arguments focus on the size of Rider EE-PDR, neither provide any analysis showing that reducing the rider cost will actually save customers money overall—particularly where a cost cap deprives customers of cost-effective efficiency programs. This is a fatal flaw in their proposal. The record evidence shows that Duke's Plan will lower bills and benefit customers, and that imposing a cost cap that will only reduce this value and ultimately harm customers.

As discussed further below, Staff and OCC's focus on the size of Rider EE-PDR is perplexing given that the entire concept of energy efficiency is to help customers use less energy and lower their bills. The Commission has stated:

> To the extent the Companies accelerate the delivery of cost-effective energy savings opportunities to their customers, they will also accelerate the net savings which customers enjoy. Thus, every kWh of energy that can be displaced through cost-effective energy efficiency programs is a savings, not a cost to the Companies' customer.

In re FirstEnergy ESP IV, Case No. 14-1297 EL-SSO, Opinion and Order, at 95 (Mar. 31, 2016) (citing Case No. 09-1947, Entry on Rehearing, at 6 (Sept. 7, 2011)). In addition to directly lowering the cost of generation on customer bills, energy efficiency also benefits non-participants by suppressing the market price of electricity. Energy efficiency also helps delay the need for both new power plants and investment in delivery infrastructure. Yet Staff and OCC decline to analyze these benefits alongside the costs, despite the Commission's own finding that efficiency saves consumers money on their energy bills.

As discussed in Environmental Intervenors' Initial Brief, the Commission must decide each case on the record before it. Env. Int.'s Initial Brief at 6-7 (citing *In the Matter of Duke Energy*, Case No. 14-841-EL-SSO *et al.*, Opinion and Order, at 46 (Apr. 2, 2015) (*citing Tongren v. Pub. Util. Comm.,* 85 Ohio St.3d 87, 90, 706 N.E.2d 1255 (1999)). Further, the Commission routinely requires analysis supporting modifications to a reasonable proposal. *See e.g., In re Columbia Gas of Ohio*, Case Nos. 16-1309 *et al.*, Opinion and Order, ¶ 71 (Dec. 21, 2016) ("the record does not include sufficient information of the cost-effectiveness of the Simple Energy Solutions program if revised as opposing intervenors recommend"); *In re FirstEnergy ESP IV*, Case No. 14-1297-EL-SSO, Opinion and Order, at 81 (Mar. 31, 2016) ("Although we are mindful of the fact that FirstEnergy has the burden of proof in this proceeding, no other party has presented a full projection of energy prices and the net revenues under Rider RRS.").

In this case, Staff and OCC make a series of assertions about the need for and impacts of a cap, without supporting analysis, and in direct conflict with the record evidence. Contrary to their claims: 1) no evidence is provided that a cap is necessary to control costs (*see* Staff Initial Brief at 1; OCC Initial Brief at 1, 4-5); 2) Staff and OCC present no compelling analysis that Duke can meet its efficiency targets under the proposed cap (*see* Staff Initial Brief at 9-11; OCC

Initial Brief at 6); 3) record evidence suggests that program quality will suffer as a result of the imposition of a cost cap (*see* Staff Initial Brief at 16; OCC Initial Brief at 7); and 4) OCC's references to other states provide no useful support for the cost cap proposal (*see* OCC Initial Brief at 6).

1. <u>No evidence is provided to support the claim that a cap is necessary to control costs.</u>

Both OCC and Staff's witness testimony suffer from a glaring lack of analysis or other evidentiary support. Staff witness Patrick Donlon indicates that a key factor in selecting the cap was "price security for all ratepayers" (as he defines it, "a limit to how much the customers can be charged in any given year"). Staff Ex. 1, Donlon Test., at 6; Tr. at 158:8-13. To establish that price security is a relevant concern, Staff would need to evaluate (at a minimum) the individual programs proposed in the portfolio, their budgets, the nature and magnitude of their system-wide benefits (including avoided capacity costs, avoided T&D costs, price suppression effects and other benefits that accrue to all customers, including non-participants), the additional bill reduction benefits for participants, and program participation rates over time. Yet Staff has explored none of these areas. Tr. at 158:4-19; 148:11-22, 189:1-12. And despite their keen focus on the purportedly escalating rider costs, Staff did not even run the numbers to determine what the magnitude of the rider would be with a cap in place. Tr. at 184-185.

Similarly, OCC provides little more than conclusory statements in recommending a cost cap. OCC state in its initial brief that "Duke's proposed utility-administered energy efficiency programs are unnecessarily expensive for customers." OCC Initial Brief at 1; *see also* OCC Ex. 13, Shutrump Test. at 5 (stating that "[c]ustomers are not adequately protected from overpaying for Duke's energy efficiency programs."). To substantiate this claim, OCC would need to (again, at a minimum) evaluate individual program costs, benefits and cost-effectiveness. But OCC witness Colleen Shutrump testifies to having done no such evaluation, nor has OCC presented any other evidence that customers are overpaying for programs or identified a single program with unreasonable costs. Tr. at 90:13-16, 118:20-25, 119:1-3. And while acknowledging that energy efficiency provides direct benefits to program participants and indirect benefits to non-participants through suppressed energy prices, Ms. Shutrump failed to reconcile those facts with her testimony expressing concern for cost impacts on non-participating customers. OCC Ex. 13, Shutrump Test. at 8. Again, she testifies to having done none of the analysis one might expect to substantiate this concern, such as an evaluation of the number of Duke's customers that do not participate in energy efficiency programs, or the rate impacts of the Plan on these customers. Tr. at 139:21-25, 140:1-5.

In addition to this lack of analysis, Staff and OCC's singular focus on the cost of energy efficiency is conceptually misguided and detrimental to customers. The upfront cost of an energy efficiency program is not the same as the actual cost to the customer. Energy efficiency programs provide direct benefits to participants, as well as indirect benefits to non-participants through both wholesale price suppression and reduced investment in generating capacity and T&D system capacity. Further, as Staff has acknowledged, the rider reflects upfront costs *only* and is not adjusted after-the-fact to account for any savings delivered back to customers through program participation or reduced rates. Tr. at 188:5-18. Thus, focusing on reducing the size of the rider would not provide any assurance as to the overall impact on customer bills of either participants or non-participants, and neither Staff nor OCC provide any analysis establishing those impacts. Since Rider EE-PDR is the only rider with the ability to lower customers' bills, placing a cap on it without any parallel consideration for program value will only reduce customers' abilities to lower their bills.

Finally, in lieu of evidence supporting the rationale for a cost cap, Staff asserts that a cost cap is appropriate because "other options to mitigate the risks of increasing costs could be misinterpreted, confusing, and hard to explain to the general public." Staff Initial Brief at 15. In addition to lacking evidentiary support, this focus is inexplicable and reflects a confusion of priorities. The question of the appropriate design of a cost cap should come only *after* a determination that program costs are unreasonably high and are not being controlled through existing review mechanisms. Staff never addresses this foundational question. Moreover, the evidence in the record suggests that Duke's proposed programs are, collectively, highly beneficial to its customers, with portfolio-wide benefits exceeding costs by a ratio of more than 2 to 1.[1] Duke Ex. 3, Amended Application at 8, Table 1 (based on Total Resource Cost Test). Put simply, Staff's concern here is truly a solution in search of a problem.

Further, while transparency is a desirable goal, Staff's proposal would not achieve that objective. The mechanism by which costs are controlled—whether through the existing collaborative and Commission review process, through a limit on program spending per unit of energy savings, or through a percentage-based cost cap—is not specifically reflected on customer bills. If upfront costs go down as a result of any of these controlling mechanisms, customers will only see it reflected as a change in their monthly energy efficiency rider. But while the details of the cost control mechanism will never be immediately evident to the average customer, the *impacts* of a cost cap on program quality and a customer's ability to reduce their energy bills through efficiency programs will be very clear. As explained further below, the Commission should not sacrifice program quality and customer benefits for a simplistic result of dubious value.

[1] Utility Cost Test scores are even higher, showing portfolio-wide benefits of over 3 to 1. Duke Ex. 3, Amended Application at 8, Table.

2. Staff and OCC present no compelling evidence that Duke can meet its efficiency targets under the proposed cap.

Staff and OCC also claim that Duke will still be able to meet its statutory efficiency benchmarks under the cost cap. Staff Initial Brief at 9-11; OCC Initial Brief at 6-7. To substantiate such a claim, however, an analysis would need to be done examining the individual programs offered in the Plan and their anticipated costs. Neither OCC nor Staff provide any such analysis. Instead, they rely on historical data, specifically their belief that Duke will be able to meet its 2017-2019 benchmarks because it has historically underspent its budget and overachieved its projections. Tr. at 170:16-25, 171:1-7; OCC Initial Brief at 7.

But this reliance is misleading. Staff Initial Brief at 9; OCC Initial Brief at 8. Duke's projections for prior years, specifically 2013-2015, were not designed to achieve the statutory benchmark—and they in fact did not. Tr. at 52:17-19; 55:5-8. Instead, as Mr. Donlon notes, Duke set its projections below the benchmarks and then used savings banked from prior years to achieve the annual targets. Tr. at 171:2-5. Staff's reliance on those prior years as a predictor of future performance would presume that Duke continues using banked savings in 2017-2019 where it encounters difficulty under the cap constraint. However, as Duke notes in its initial brief (at 6-7), the Commission has recently signaled a shift away from this practice. In a 2016 proceeding in which Duke had initially proposed using its energy efficiency bank to meet the annual benchmarks and trigger shared savings, the Commission made clear that portfolios relying on the bank to the exclusion of new savings defeat the purpose of energy efficiency. *In the Matter of Duke*, Case No. 14-457-EL-RDR, Second Entry on Rehearing, ¶ 37 (Oct. 26, 2016). This is consistent with prior Commission orders encouraging utilities to accelerate their energy efficiency offerings and seek out every possible kWh of cost-effective savings. *In re FirstEnergy ESP IV*, Case No. 14-1297-EL-SSO, Opinion and Order, at 95 (Mar. 31, 2016).

Thus, Staff's reliance on historical years, in which banked savings were emphasized, and its implication that Duke should continue that practice for the forthcoming program years, conflicts with Commission precedent.

Finally, in claiming that Duke can still meet its benchmarks under the cap, Staff and OCC offer directly competing rationales. Mr. Donlon asserts that, according to his understanding of the economic theory of a product life cycle, the cost of energy efficiency measures will go down over time, thereby making it cheaper for Duke to achieve its required savings. Staff Ex. 1, Donlon Test. at 7:128-129. He uses televisions as an example to explain that as demand increases, more competition enters the market, which drives down costs. Tr. at 165:12-18. OCC, on the other hand, states that energy efficiency costs are *increasing*, and that is why a cap is needed. OCC Initial Brief at 5. Neither party offers more than conclusory statements to support these claims.

Again, Staff has presented no analysis of currently available energy efficiency products, including which are increasing or decreasing in price, that could be offered to support their theory. *Id.* at 169:4. With respect to OCC, its statement that energy efficiency costs are increasing is inconsistent with the claim that Duke could still meet its benchmarks while spending less money. Either way, while energy efficiency is still very cost-effective compared to alternative supply resources, the record evidence shows that it is unreasonable to expect energy savings to remain at the same or lower cost over time. As Duke witness Tim Duff notes, there appears to be an upward trend in energy efficiency costs even while the Company's overall portfolio remains cost-effective. Duke Ex. 13, Duff Rebuttal at 4 (TJD-Attachment 1); Tr. at 62:24-25.

With neither OCC nor Staff proffering any further analysis or discussion to illuminate their claims, the Commission is left with no choice but to disregard them. The Commission must base its decision on the record before it. The record here demands the cost cap proposal be denied for lack of evidentiary support.

3. Record evidence suggests that program quality will suffer with a cost cap in place.

Throughout their initial briefs and testimony, Staff and OCC base their cost cap recommendation on an unrealistic assumption that Duke will not (or should not) attempt to earn its maximum allowed shared savings. But a more likely scenario is that Duke will endeavor to achieve both its annual targets and shared savings. The record strongly suggests that with a cap in place, Duke will be forced to choose between meeting these two objectives and program quality; and ultimately, program quality will suffer. Env. Int. Initial Brief at 19-20.

Staff and OCC assert, again without any evidence or basis other than historical trends, that with a cost cap in place Duke will be motivated to strike a balance between picking the most effective and efficient measures to achieve their benchmarks while also reducing program costs. Staff Initial Brief at 15-16; OCC Initial Brief at 6-7. To support this, OCC estimates that with a cap in place Duke would be able to run programs that save energy at a first-year cost of 16 cents per kWh. However, this estimate accounts for program spending only, and assumes zero shared savings—even though the proposed cap covers both. While Environmental Intervenors agree with OCC that the focus of energy efficiency spending should be on benefits and not shared savings (OCC Initial Brief at 12), not taking *any* incentive into account under a cost cap—as Staff and OCC have done here—is simply unrealistic. The Company will undoubtedly seek to exceed its annual targets and receive at least some incentive level, constraining its program spending under the cap. The result is likely to be a diminished, less balanced portfolio that sacrifices much larger, longer-term benefits in favor of programs with savings that are cheaper in the short run.

As explained in Environmental Intervenors' Initial Brief, a simple review of Duke's program portfolio and its first-year acquisition costs strongly suggests that if subjected to a cost cap, program quality will drop. Env. Int. Initial Brief at 19-23. When shared savings are taken into account, the first-year per kWh cost Duke would need to achieve under a cap drops to 10.6 cents, considerably lower than OCC's estimate of 16 cents per kWh. OCC Initial Brief at 7. As a result, program quality will likely suffer, as the cap will incentivize a singular focus on programs with low first-year kWh savings, with less regard for programs that provide long-term benefits. Env. Int. Initial Brief at 21. Table 1 in Environmental Intervenors' Initial Brief demonstrates that the vast majority of programs would not clear the 10.6 cents hurdle. The first to go would be those with higher up-front costs but longer-term savings (like LEDs), even though they are more cost-effective for customers in the long run. Neither Staff nor OCC offer any analysis that would rebut this evidence. In fact, this record undermines Staff's assertion that a cap would require Duke to pick "the most cost effective and efficient means of achieving their benchmarks, thus avoiding unnecessary charges to customers." Staff Ex. 1, Donlon Test. at 9.

Finally, despite this evidence, Staff argues that program quality will not suffer under a cap because there is no requirement that Duke use the most advanced and cutting edge technology in its portfolio. Staff Initial Brief at 16. But because Staff did not provide any analysis of the impacts of a cost cap on program quality or which programs may need to be cut to meet the cap constraint, the Commission does not have the record to determine that Duke could achieve its benchmarks, even if it relied on less advanced measures to get there. When Mr. Donlon was questioned as to what he thought could be eliminated, he refrained from providing a direct answer, instead characterizing those determinations as "management decisions." Staff Ex. 1, Donlon Test. at 8; Tr. at 199-200. Again, without a substantive analysis of which less expensive or less advanced measures Staff would support, the Commission has little guidance to evaluate whether a reduction in program quality and breadth would be worth the short-term cost savings of a cap.

Absent evidence on the record, the Commission should reject the cost cap proposal and adhere to prior precedent and rules that emphasize energy efficiency as good public policy.

4. <u>OCC's references to other states provide no useful support for the cost cap proposal.</u>

OCC states that, "Staff's proposal is consistent with at least four other states that have imposed similar cost caps." OCC Initial Brief at 6. But this statement is disingenuous at best. As pointed out in Environmental Intervenors' Initial Brief, the cited states provide no meaningful guidance to Ohio. Ms. Shutrump testified to having little to no knowledge of the distinguishing factors between the cost caps ordered in those states and the cap proposed in this case. Env. Int.'s Initial Brief at 18; Tr. at 132-135. For example, Ms. Shutrump indicated she was not previously aware of the critical difference in design and impact of Pennsylvania's cost cap, which is based on total overall revenue (including shopping customers), as compared with Staff's proposal to base the Ohio cap on operating revenues that *exclude* shopping customers. *Id.*

Further, OCC's argument that the Commission should rely on the cited states is of little value, as no analysis was done comparing the cost cap structures in those states with the structure that Staff proposes, the statutory mandates in place for each state, or the impacts on programs. Ms. Shutrump also admitted that OCC did no analysis comparing the programs available in the states OCC cites to the 2017-2019 programs in Duke's Plan. OCC Ex. 13, Shutrump Test. at 9-

11; Tr. at 119:11-20, 125:23-25, 126:1-2. Thus, OCC's claim that Staff's proposal is in any way "consistent" with the four states cited in Ms. Shutrump' s testimony has no basis in fact and should be rejected.

C. It is Unreasonable to Expect Duke to Rely on Customer Opt-Outs to Comply with the Proposed Cap.

Finally, both Staff and OCC claim it is unreasonable for Duke to not include potential customer opt-outs in its Plan, asserting that they could lower the annual benchmarks. Staff Initial Brief at 12; OCC Initial Brief at 11. However, this suggestion again lacks any credible supporting analysis. Neither party offered a witness to analyze the potential for opt-outs, nor any estimate of what the magnitude of these opt-outs may ultimately be.

This argument also fails to address the fact that, as its larger customers opt out, Duke may simultaneously lose some of its most cost-effective savings. This harms all customers. The opt-out provisions under R.C. 4928.66(A)(2)(c) and Section 8 of S.B. 310 apply in large part to "mercantile" customers that are significant energy users, and therefore have many potential savings opportunities. *See* R.C. 4928.6610; R.C. 4928.66(A)(2)(c). Illustrating this concept, Table 1 of Environmental Intervenors' brief lists the first-year savings, proposed budget and estimated costs per first-year kWh saved for every program proposed in Duke's Plan. Env. Int.'s Initial Brief at 20-21, Table 1. The program that is most likely to attract industrial participants is the Smart $aver Custom. This program also happens to be one of the cheapest in Duke's entire portfolio (exceeded only by the "My Home Energy Report" residential behavioral program). If the industrial customers eligible for this program instead opt out, Duke's required savings baseline will indeed go down, but its program costs may rise disproportionately as the Company is forced to seek replacement savings from less cost-effective programs. In fact, the Smart $aver Custom program, and *all* of Duke's commercial and industrial offerings, would not make the cut for first-year acquisition costs if a cap were put in place and Duke sought to achieve its maximum shared savings.

Since neither party offered any analysis of this issue, the Commission cannot know what the overall effect of opt-outs will be on Duke's ability to comply with the proposed cost cap.

D. The Record Supports Approval of the Smart Thermostat and Space Heating Provisions of the Stipulation.

In addition to its cost cap argument, OCC contends that the Commission should not approve two elements of the proposed plan: a smart thermostat program and space heating efficiency program that Duke commits to implementing under the Stipulation if they are projected to be cost-effective. Joint Ex. 2, Stipulation at 8-11. OCC asserts that these proposals lack accompanying information required under Ohio Admin. Code 4901:1-39-03 and 4901:1-39-04, such as projected savings and participation rates. OCC Initial Brief at 14-16. But this argument is disingenuous given that OCC has itself failed to offer any analysis of the effects of a cost cap on these and many other aspects of Duke's programs.

Regardless, the Commission has made clear on multiple occasions that these regulatory provisions do not prevent a utility from agreeing to implement specific, cost-effective efficiency programs through a collaborative process. Most recently, the Commission approved a stipulation in which FirstEnergy committed to funding efficiency measures for small businesses, colleges, universities, and low income customers with only limited details regarding funding amounts and measures for implementation. *In re FirstEnergy*, Case No 14-1297-EL-SSO, Opinion and Order at 15-16, 111 (Mar. 31, 2016). Even more analogous, the Commission has previously approved a number of stipulated portfolio plans in which the parties agreed to develop additional programs through the collaborative process. *See, e.g.*, *In re Ohio Power Company*, Case No. 16-574-EL-POR, Opinion and Order ¶ 24 (Jan. 18, 2017) (local government program); *In re Duke Energy*

Ohio, Case No. 13-431-EL-POR, Opinion and Order (Dec. 4, 2013) (information technology efficiency, large building, and outdoor lighting programs).

If anything, the Stipulation here offers more detail than these past examples since smart thermostats and space heating efficiency measures were already included in Duke's underlying application, with accompanying information regarding projected costs and savings. *See, e.g.*, Duke Ex. 1, Application at 19 (describing inclusion of smart thermostats, heat pumps, and insulation as measures in Smart $aver Residential program); *Id.* at App. A, p. 1 (insulation, heat pump, smart thermostat savings projections); Duke Ex. 2, Market Potential Study at App. B, B-2 (space heating efficiency and smart thermostat measures among those analyzed). Thus, approving these provisions of the Stipulation would be entirely consistent with the Commission's past practice of allowing parties to work out program implementation details in the collaborative process, while still holding utilities to the overall requirement that the portfolio be cost-effective.

III. CONCLUSION

Environmental Intervenors and other parties to the Stipulation worked collaboratively to design Duke's Plan and to optimize customer benefits. The Plan offers a balanced portfolio of programs providing real savings for both participants and non-participants. As Environmental Intervenors and Duke clearly established through testimony and briefing, OCC and Staff's recommendation for a cost cap is poorly conceived and unsupported by any real analysis. Environmental Intervenors respectfully request that the Commission approve Duke's Plan as proposed, including the smart thermostat and space heating efficiency programs.

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Dated: April 7, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Reply Brief* submitted on behalf of the Natural Resource Defense Council, Environmental Law & Policy Center, the Ohio Environmental Council, and the Environmental Defense Fund was served by electronic mail upon the following Parties of Record on April 7, 2017.

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