BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	)	
Duke Energy Ohio, Inc. for Recovery	)	Case No. 13-753-EL-RDR
of Program Costs, Lost Distribution	)	
Revenue and Performance Incentives	)	
Related to its Energy Efficiency and	)	
Demand Response Programs.	)	

INITIAL POST-HEARING BRIEF BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

In this proceeding, Duke Energy Ohio, Inc. seeks to increase the charges it collects from customers related to its energy efficiency and peak demand response ("EE/PDR") program, through Rider EE-PDRR. For residential customers, the amount Duke seeks to collect under Rider EE-PDRR would increase 49.97%, from the present charge of $0.002317 per kWh to $0.003475 per kWh.[1] This would add $1.16 to the monthly bill of a residential customer using 1,000 kWh per month.[2] As discussed herein, such a result is unjust and unreasonable.

The main issue in this case is whether Duke has properly calculated the shared savings incentive for its EE/PDR program that was agreed to in the Stipulation approved by the Public Utilities Commission of Ohio ("PUCO") in Case No. 11-4393-EL-RDR.[3] Based on the evidence presented in this case, Duke's calculations are in error.

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[1] See Duke Ex. 2, Attachment JEZ-2.

[2] Under the present rate, a residential customer using 1,000 kWh per month is charged $2.32 ($0.002317 x 1,000) under the Rider. That would increase to $3.48 ($0.003475 x 1,000) if the application is approved without modification.

[3] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Energy Efficiency Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in Its Existing Portfolio*, Case No. 11-4393-EL-RDR, Stipulation and Recommendation (November 18, 2011).

The Office of the Ohio Consumers' Counsel ("OCC"), the PUCO Staff and Ohio Partners for Affordable Energy ("OPAE") have shown that Duke's calculation of the shared savings incentive does not conform to the Stipulation. While all parties agree that program costs should be netted against program benefits in order to calculate the shared savings incentive, there is disagreement about what should be included in program costs. And Duke's view of "program costs" – and thus its calculation of the shared savings incentive – is wrong. Duke's methodology would result in customers paying too much money for the shared savings incentive.[4] Accordingly, the PUCO should reduce Duke's Shared Savings Revenue request by $238,027 for 2012 and by $199,963 for 2013,[5] with additional reductions for 2014 and 2015, when the shared savings mechanism expires.[6]

The Stipulation provides that "Duke Energy Ohio's rates shall also be subject to an incentive mechanism that includes shared savings as proposed by members of the Ohio Consumer and Environmental Advocates (OCEA) in Comments submitted to the Commission in this proceeding on September 21, 2011."[7] Duke incorrectly argues that the Stipulation's reference to OCEA's comments means that the parties agreed to calculate the shared savings incentive by using the methodology proposed by Mr. Ziolkowski in Case No. 11-4393, but with four adjustments specified in OCEA's comments.[8] The evidence in this proceeding, however, shows that Duke is wrong.

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[4] See OCC Ex. 3 at 6.

[5] Id.

[6] See OCC Ex. 4 at 5.

[7] See OCC Ex. 1 at 4; OCC Ex. 2 at 2. See also OPAE Ex. 1 at 7.

[8] See Tr. at 15-16.

Mr. Ziolkowski's proposed methodology would exclude measurement and verification ("M&V") costs as part of the program costs used for calculating shared savings.[9] But as OCC witness Wilson Gonzalez testified, the "program costs," referenced in OCEA's comments for purposes of calculating shared savings, include M&V costs.[10] Mr. Gonzalez explained that M&V costs are generally included in program costs, and thus OCEA's reference to program costs included M&V costs.[11]

If, as Duke contends, the parties to the Stipulation had agreed to Mr. Ziolkowski's methodology for calculating shared savings, that agreement would have been specified in the Stipulation. But Mr. Ziolkowski's methodology is not even mentioned in the Stipulation. Duke acknowledged this at the hearing.[12] Instead, the Stipulation refers to "shared savings as proposed" by OCEA. This phrase does not mean what Duke now alleges it means. Instead, OCEA's proposal included M&V costs in the program costs to be used in calculating shared savings, as Mr. Gonzalez testified.

Duke attempts to support its argument by pointing to workpapers associated with its compliance tariff filing in Case No. 11-4393. Duke claims that the workpapers show that M&V costs would be excluded from the shared savings calculation used in setting its rates.[13] But the tariff language directly contradicts this assertion.

The Supreme Court of Ohio has established the standard for reviewing tariff language. As the PUCO has recognized, "When considering the language of any tariff,

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[9] See Duke Ex. 3A at 3-4.

[10] OCC Ex. 3 at 8-9; Tr. at 66. See also OPAE Ex. 1 at 4-5; PUCO Staff Ex. 2 at 2-3.

[11] See OCC Ex. 3 at 10-12; Tr. at 66.

[12] Id. at 16.

[13] See Tr. at 24.

the Ohio Supreme Court has held that 'the meaning and effect of particular provisions are to be ascertained from the words employed and the connection in which they are used, the subject matter, and the evident purpose of such provisions.'"[14] A review of the words of the tariff, the connection in which they are used, the subject matter and the evident purpose of the tariff provision shows that Duke is wrong.

Duke's EE/PDR rider tariff refers to program costs in two places. First, the tariff uses the term "PC" when referring to "Program Cost Recovery." There, the tariff states: "For each twelve month period, the PC shall include all expected costs for the energy efficiency and peak demand response programs. Such program costs shall include the cost of planning, developing, implementing, **monitoring and evaluating** the EE-PDR programs."[15]

Second, program costs are also discussed in the section concerning the EE-PDR Program Incentive. Here, the tariff states:

> The EE-PDR Program Incentive (PI) amount shall be computed by multiplying the net resource savings expected from the approved programs which are to be installed during the upcoming twelve-month period times the allowed share savings percentage. The allowed shared savings percentages are as follows: 0% for achievement level of 100% or less, 7.5% for achievement level greater than 100% and less than or equal to 110%, 10% for achievement level greater than 110% and less than or equal to 115%, and 15% for achievement level greater than 115%. **Net resource savings are defined as program benefits less the costs of the program**, where program benefits will be calculated on the basis of the present value of the Company's avoided costs over the expected life of the program, and will include both capacity and energy savings. The amount related to programs for each rate class

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[14] *Nancy M. Cole v. The Cincinnati Gas & Electric Company*, Case No. 98-821-EL-CSS, Opinion and Order (September 23, 1999) at 13, citing *Saafield Publishing Co. v. Pub. Util. Comm.,* 149 Ohio St. 113 (1948).

[15] See Staff Ex. 2, Attachment GCS-1 (Duke P.U.C.O. Electric No. 19, Sheet No. 120), Page 1 of 3 (emphasis added).

> shall be divided by the expected kilowatt-hour sales for the upcoming twelve-month period to determine the PI for that rate class. EE-PDR incentive amounts will be assigned for recovery purposes to the rate classes whose programs created the incentive.[16]

The tariff does not have separate definitions for program costs for "Program Cost Recovery" purposes and the program costs discussed in the calculation of the EE-PDR Program Incentive. This is important because it directly contradicts Duke's assertions that the program costs for recovery purposes are different from the program costs used in calculating the program incentive.

Although Mr. Ziolkowski admitted at hearing that the language "could have been written a little bit tighter,"[17] <u>the fact remains that the tariff language – language Duke itself wrote – does not distinguish between the program costs for recovery by Duke and the program costs for purposes of the incentive</u>. Thus, the plain language of the tariff mandates that "program costs" for purposes of Program Cost Recovery are the same as "costs of the program" for purposes of the Program Incentive.

The plain language of the tariff represents the bargain sought by the parties to the Stipulation, with benefits flowing to both Duke and its customers. The tariff language benefits Duke because it authorizes Duke to collect program costs (including M&V) from customers as part of Program Cost Recovery. And the tariff language benefits customers because the shared savings incentive is calculated by netting program costs (including

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[16] Id., Page 2 of 3 (emphasis added).

[17] Tr. at 50.

M&V) against program benefits. This is consistent with OCEA's comments in regard to how program costs would be treated in calculating the amount of shared savings, as explained by the witnesses for OCC, OPAE and the PUCO Staff in this proceeding.[18] Duke's result-oriented misinterpretation of the Stipulation, however, would achieve an unfair result that the other signatory parties to the Stipulation had not bargained for.

For Duke to get all of the money that it seeks from customers, the PUCO must find that the signatory parties agreed to treat "program costs" for recovery purposes and "program costs" for purposes of the incentive differently. And the PUCO must construe the tariff language to include M&V costs for recovery purposes and to exclude M&V costs for incentive purposes. But such findings are not supported by the evidence. OCC, and others, did ***not*** settle the case below so that Duke could benefit twice through the M&V costs – first by collecting the M&V costs from customers as part of Program Cost Recovery, and second by lowering the amount of its costs that are netted against program benefits in the shared savings calculation – both at the expense of Duke's customers. This "win-win" situation for Duke was not the bargain agreed upon in the Stipulation.

Furthermore, Duke's proposed method of calculating the shared savings incentive is inconsistent with the shared savings incentives of the other electric distribution utilities in Ohio.[19] And it is not the methodology that the PUCO Staff and the intervenors in this proceeding – signatory parties to the Stipulation – had agreed to include in the Stipulation.

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[18] See OCC Ex. 3 at 12; OPAE Ex. 1 at 6; PUCO Staff Ex. 2 at 6-7.

[19] See OCC Ex. 3 at 14; OPAE Ex. 1 at 6-7; PUCO Staff Ex. 2 at 4.

The PUCO should reject Duke's method of calculating the shared savings incentive. Instead, the PUCO should require Duke, consistent with the terms of the Stipulation, to include M&V costs in program costs used to calculate the shared savings incentive of Rider EE-PDRR.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Terry L. Etter
Terry L. Etter, Counsel of Record
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (614) 466-7964 (Etter direct)
etter@occ.ohio.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of OCC's Initial Post-Hearing Brief was served on the persons stated below electronically and via regular United States Mail, postage prepaid, this 7th day of November 2013.

/s/ Terry L. Etter
Terry L. Etter
Assistant Consumers' Counsel

SERVICE LIST

Devin Parram
Ryan O'Rourke
Assistant Attorney General
Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, Ohio 43215
devin.parram@puc.state.oh.us
ryan.orourke@puc.state.oh.us

Amy B. Spiller
Elizabeth H. Watts
Duke Energy Ohio
139 E. Fourth Street, 1303-Main
P.O. Box 960
Cincinnati, Ohio 45201-0960
Amy.Spiller@duke-energy.com
Elizabeth.Watts@duke-energy.com

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45840
cmooney@ohiopartners.org