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. 13-753-EL-RDR

REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

Staff explained in its initial brief why it is important to include measurement and verification costs ("M&V") in program costs when calculating shared savings. Duke, on the other hand, failed to provide any sound rationale for excluding M&V costs from the shared savings calculation in its initial brief. Duke simply asserts that it should be allowed to apply an incorrect methodology when calculating shared savings because it slipped one by the parties in Case No. 11-4393. This is not a justifiable reason for excluding M&V costs from program costs. Therefore, Staff's recommendation should be adopted by the Commission.

LAW AND ARGUMENT

1. Duke's EE-PDR Tariff requires Duke to include M&V costs in program costs when calculating shared savings.

In its initial brief, Duke states that the "only question relevant in this proceeding is whether or not the Company's costs are consistent with … the [EE-PDR Tariff][1] that was approved in accordance with the Stipulation and the Commission's Order in [Case 11-4393]."[2] Here is the answer to this question: *Duke's costs are not consistent with the EE-PDR Tariff.* Two undisputed facts about the EE-PDR Tariff prove this point: (1) the EE-PDR Tariff states that program costs *include* M&V costs and (2) the EE-PDR Tariff *does not* state that there is a separate definition of program costs as it relates to shared savings.[3] These facts show that Duke is obligated under the EE-PDR Tariff to include M&V costs in program costs when calculating shared savings.

Although Duke repeatedly points to Attachment JEZ-1 to support its current methodology of calculating shared savings, the language of the EE-PDR Tariff should control. Under R.C. 4905.30, Duke is legally obligated comply with the terms of its EE-PDR Tariff, which currently has *only one* definition of program costs. Although Mr.

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1 *Duke Portfolio Case* (Prefiled Direct Testimony of Jim Ziolkowski at Attachment JEZ-5) (Nov. 22, 2011) ("Ziolkowski, Case No. 11-4393") (Staff Ex. 1).

2 Duke Initial Brief at 3.

3 Ziolkowski, Case No. 11-4393 at JEZ Attachment 5, pg. 1-2 (Staff Ex. 1); Tr. at 44-45 and 50.

Ziolkowski wishes that the EE-PDR Tariff was drafted more clearly,[4] any ambiguity in the EE-PDR Tariff should be construed against Duke. [5]

2. Nothing in Case No. 11-4393 indicates that the Commission approved Duke's current method of excluding M&V costs.

In its initial brief, Duke claims that the Commission approved Duke's current method of calculating shared savings by approving the EE-PDR Tariff.[6] This is not true. Nothing in the Opinion and Order or Stipulation from Case 11-4393 indicates that the Commission approved Duke's method of excluding M&V costs from program costs. Nothing in the Duke's EE-PDR Tariff indicates that M&V costs are excluded from program costs when calculating shared savings. In fact, as Mr. Ziolkowski acknowledged, the EE-PDR Tariff suggest just the opposite.[7]

Duke focuses much of its initial brief on the fact that Staff and OCC had an opportunity to review the EE-PDR Tariff that was filed with the Commission. Although Staff and OCC reviewed the EE-PDR Tariff and its attachments, witnesses from Staff and

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4 Duke witness Ziolkowski essentially admitted that the EE-PDR Tariff was ambiguous. He admitted that the EE-PDR Tariff "could have been written a little bit tighter." Tr. at 50. He also admitted that page 2 of the EE-PDR Tariff, which addresses how shared savings should be calculated, contains "just a general term of 'costs of the program'" and does not state that explicitly state that M&V should be excluded from the shared savings calculation. *Id.*

5 *Saalfield Pub. Co. v. Pub. Util. Comm.*, 149 Ohio St. 113, 119, 77 N.E.2d 914, 917 (1948); *In the Matter of the Complaint of Ralph Horning*, Case No. 82-1209-EL-CSS (Opinion and Order) (Jan. 31, 1984).

6 Duke Initial Brief at 3.

7 Tr. at 49-50.

OCC testified that their review of EE-PDR Tariff and attachments was primarily related to the issue of lost distribution revenue.[8] In addition, Staff witness Scheck testified that the EE-PDR Tariff indicated that *M&V costs were included in program costs,* which was inconsistent with the attachments.[9] OCC witness Gonzalez agreed. He testified that the EE-PDR Tariff indicated that M&V costs were included in program costs when he reviewed it and, therefore, he had no reason to question why the attachment to the EE-PDR Tariff indicated that M&V should be excluded from program costs.[10]

3. Duke should not be allowed to benefit from the ambiguous language in a tariff it drafted.

Although Duke claims that "there is nothing in the procedural record related to [Case No. 11-4393] that would justify using an alternative methodology", Staff believes the EE-PDR Tariff itself justifies using an "alternative" (and also more accurate) methodology.[11] This "alternative" methodology is to include M&V costs in program costs consistent with the requirements of the Utility Cost Test ("UCT"). While the language of the EE-PDR Tariff may be somewhat unclear regarding what methodology Duke should apply, Duke should not be allowed to benefit from a problem of its own creation.

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8 Tr. at 68.

9 Tr. at 88.

10 Tr. at 68-69; Tr. at 87.

11 Duke Initial Brief at 4.

Staff recommends that the Commission clarify this issue. Duke does not dispute that the Commission has authority to address Duke's methodology of calculating shared savings in this case. Duke witness Duff acknowledges this fact.[12] As explained in Staff's initial brief, Staff believes that Duke should be ordered to include M&V costs in program costs when calculating shared savings. This method is consistent with the UCT, which the Commission has endorsed and results in a more accurate performance-based shared savings incentive.

CONCLUSION

The record supports Staff's recommendation in this case. The Commission should adjust Duke's proposed EE-PDR rider as recommended by Staff and order Duke to include M&V costs in program costs when calculating shared savings going forward.

Respectfully submitted,

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[12] Tr. at 19.

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Reply Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following Parties of Record, this 14th day of November, 2013.

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