

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	)	
Duke Energy Ohio, Inc. for Approval to	)	
Continue its Cost Recovery Mechanism	)	Case No. 14-1580-EL-RDR
for Energy Efficiency Programs	)	
Through 2016.	)	

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**INITIAL COMMENTS AND OBJECTION OF  
INDUSTRIAL ENERGY USERS-OHIO**

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**DECEMBER 5, 2014**

**ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO**

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**I.     INTRODUCTION**

The Public Utilities Commission of Ohio (“Commission”) approved an energy efficiency and peak demand reduction portfolio compliance plan (“portfolio plan”) for Duke Energy Ohio (“Duke”) on December 4, 2013 that includes a recovery mechanism. Through the recovery mechanism, Duke bills and collects program costs, lost distribution revenue, and “shared savings.” Although the term of the portfolio plan’s provisions to achieve state energy efficiency and peak demand portfolio requirements expires at the end of 2016, the authorization of the plan’s recovery mechanism terminates on December 31, 2015.

In an Application filed on September 9, 2014,<sup>1</sup> Duke has sought to amend its current portfolio plan to extend the term of the authorization of the recovery mechanism to December 31, 2016. As provided by Substitute Senate Bill 310 (“SB 310”), the Commission should deny the Application since the Commission has no authority to

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<sup>1</sup> Application of Duke Energy Ohio, Inc. for Approval to Continue Cost Recovery Mechanism for Energy Efficiency Programs Through 2016 (Sept. 9, 2014) (“Application”).

modify a portfolio plan unless an electric distribution company is seeking an amendment of its current portfolio plan. If the Commission deems the Application as one seeking to amend the current portfolio plan, however, the Commission should approve a modified recovery mechanism that does not permit Duke to bill and collect shared savings. If the Commission does modify and approve an amended portfolio plan, the Commission also should find that the energy-intensive customers of Duke may elect to opt out of the benefits and costs of Duke's amended portfolio plan on January 1, 2015.

**II. OBJECTION: THE COMMISSION SHOULD DENY DUKE'S REQUEST TO INCLUDE A SHARED SAVINGS PROVISION IN ITS RECOVERY MECHANISM BECAUSE DUKE HAS FAILED TO DEMONSTRATE THAT THE COMMISSION MAY AMEND DUKE'S CURRENT PORTFOLIO PLAN OR THAT A SHARED SAVINGS PROVISION IS REASONABLE<sup>2</sup>**

The Commission authorized Duke's initial energy efficiency program recovery mechanism as part of Duke's first electric security plan in 2008.<sup>3</sup> On August 15, 2012, the Commission issued an order authorizing a new recovery mechanism, the Energy Efficiency and Peak Demand Reduction ("EE/PDR") Rider, and approved terms of a stipulation that permitted Duke to recover "shared savings" through the rider.<sup>4</sup> The authorization of the shared savings provision of the recovery mechanism was to expire

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<sup>2</sup> By an Entry filed on October 22, 2014, an Attorney Examiner set this matter for comments. Commission rules provide for a party to file objections to an application for approval of a portfolio plan. Rule 4901:1-39-04(D), Ohio Administrative Code ("OAC").

<sup>3</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan*, Case Nos. 08-920 EL-SSO, *et al.*, Opinion and Order at 18-19 (Dec. 17, 2008) (authorizing Rider DR-SAW).

<sup>4</sup> *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, Opinion and Order at 8 (Aug. 15, 2012) ("4393 Order").

at the end of 2015.<sup>5</sup> Parties, however, agreed to reevaluate the provision no sooner than the third quarter of 2014.<sup>6</sup>

The terms of the recovery mechanism were addressed again when Duke sought approval of its current portfolio plan.<sup>7</sup> The approved portfolio plan expires at the end of 2016, but the recovery mechanism, including the shared savings provision, expires at the end of 2015.<sup>8</sup>

Duke filed the Application in this case on September 9, 2014. According to the Application, Duke and other interested parties have not been able to reach an agreement on an extension of a recovery mechanism that includes a shared savings provision, and Duke is seeking Commission approval to extend its current collection mechanism to the end of 2016.<sup>9</sup>

Because Duke is seeking to change provisions of its current portfolio plan, this Application is governed by the requirements of SB 310. Under Section 7(A) of SB 310, the Commission may neither review nor approve an application for a portfolio plan if the application is pending on September 12, 2014. Under Section 7(B) of SB 310, the Commission, prior to January 1, 2017, is prohibited from taking any action with regard to any portfolio plan or application regarding a portfolio plan with two exceptions.

Under the first exception contained in Section 7(B), the Commission may approve, or modify and approve, an application to amend a portfolio plan if the

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Energy Efficiency and Peak-Demand Reduction Portfolio Programs*, Case No. 13-431-EL-POR, Opinion and Order (Dec. 4, 2013) (“431 Order”).

<sup>8</sup> *Id.* at 6 & 14.

<sup>9</sup> Application at 3-4.

application is to amend an existing portfolio plan under Section 6(B) (“plan exception”).<sup>10</sup>

Under the second exception, the Commission may take those actions necessary to administer the implementation of the existing portfolio plan (“implementation exception”).

The implementation exception does not provide the Commission authority to act on Duke’s Application. Duke’s authorization for a recovery mechanism ends on December 31, 2015. Through this Application, Duke is seeking to add a new provision to its plan to extend the authorization through December 31, 2016. Because Duke is seeking to add a provision rather than implement an existing one, the implementation exception to the prohibition in Section 7(B) does not apply and Section 7 requires that the Application be dismissed.<sup>11</sup>

Because Duke is seeking to amend its current portfolio plan to extend the recovery mechanism,<sup>12</sup> however, the plan exception may require the Commission to approve, or modify and approve, the Application.<sup>13</sup> The amended plan or amended plan

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<sup>10</sup> See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015*, Case No. 12-2190-EL-POR, *et al.*, Finding and Order (Nov. 20, 2014) (approving modification to current portfolio plan).

<sup>11</sup> The Motion to Dismiss and supporting memorandum by Ohio Partners for Affordable Energy takes a similar position. Ohio Partners for Affordable Energy’s Motion to Intervene and Memorandum in Support and Motion to Dismiss and Memorandum in Support (Sept. 30, 2014).

<sup>12</sup> By filing its application to amend the portfolio plan on September 9, 2014, Duke has created a potential procedural problem because the provisions allowing for an amendment of the current portfolio plan were not effective until September 12, 2014. As a matter of efficiency, the Commission should address the Application as if Duke had properly sought an amendment to the current portfolio plan. As a factual matter, the Application was filed before October 12, 2014, thus meeting the filing deadline established by SB 310. The alternative is a dismissal as required by Section 7(A) of SB 310, in which case Duke will apparently seek to file a new application seeking authority for a recovery mechanism. Application at 4 (requesting waiver of requirement of Section 6(B) concerning the time by which an application must be filed). Whether the waiver of the filing deadline is lawful is not addressed in these comments since the issue is not currently before the Commission.

<sup>13</sup> SB 310, Section 6(B)

as modified then will be effective January 1, 2015 and will expire on December 31, 2016.<sup>14</sup>

If the plan exception applies, the Commission may, and in this case, should modify the mechanism requested by Duke to remove the provision that would permit Duke to recover shared savings. In the Application, the only claim that Duke makes to support the continuation of the shared savings provision is that the net present value of the avoided costs associated with the energy and capacity achievements has been over 3.5 times the costs incurred to achieve those results.<sup>15</sup> By law, however, Duke is required to provide a cost-effective program.<sup>16</sup> The requirement to demonstrate prudent management of the compliance obligations should be an adequate “incentive” for Duke to reduce its portfolio compliance costs. There is no reason for the Commission to find that a shared savings provision is necessary when Duke has demonstrated only that it is doing what the law requires it to do. Because Duke has failed to provide a reasoned basis for extending the shared savings provision, the Commission should remove the requested shared savings provision Duke requested and approve the portfolio plan as modified.

### **III. THE COMMISSION SHOULD FIND THAT DUKE’S ENERGY-INTENSIVE CUSTOMERS MAY OPT OUT OF THE AMENDED PLAN**

Section 8 of SB 310 provides, “[b]eginning January 1, 2015, a customer of an electric distribution utility may opt out of the opportunity and ability to obtain direct benefits from the utility’s portfolio plan that is amended under division (B) of Section 6.”

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<sup>14</sup> *Id.*

<sup>15</sup> Application at 3.

<sup>16</sup> Rule 4901:1-39-04(A), OAC.

If the Commission deems the Application in this proceeding as one seeking an amendment to the current portfolio plan (and it must if Duke is to secure authorization to bill and collect any compliance costs from customers after December 31, 2015), a customer of Duke that takes service above primary voltage levels or a commercial or industrial customer that has made a written request for registration as a self-assessing purchaser pursuant to R.C. 5727.81 (*i.e.*, the customer may self-assess the kilowatt-hour tax) may elect to opt out of the portfolio plan on January 1, 2015 (rather than January 1, 2017).<sup>17</sup> So that it is clear that the effect of this Application triggers the customer's right to accelerate the opportunity to opt out of the portfolio plan, the Commission should make an affirmative finding that the Commission is approving an amended portfolio plan and that eligible customers may opt out as provided by Section 8 of SB 310.

#### **IV. CONCLUSION**

Unless the Commission finds that Duke is seeking an amended portfolio plan, the Commission must deny the Application. If the Commission deems the Application as one seeking an amended portfolio plan, however, the Commission must either approve, or modify and approve, the Application. In this instance, the Commission should modify and approve the Application by removing authorization for Duke to bill and collect shared savings because Duke has failed to provide any reasoned basis for that provision. If the Commission modifies and approves the amended portfolio plan, the Commission also should find that Duke's energy-intensive customers may opt out of the amended plan.

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<sup>17</sup> All customers meeting certain voltage or usage levels will have the right to opt out beginning January 1, 2017. R.C. 4928.6611.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Initial Comments and Objection of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 5<sup>th</sup> day of December 2014, via electronic transmission.

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