

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**COMMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

A key opportunity for consumer protection—that was negotiated in a November 2011 settlement—will be resolved in this case where millions of dollars in potential utility charges to customers are at stake for the year 2016.¹ The Public Utilities Commission of Ohio (“PUCO”) will determine how little or much customers might pay to Duke Energy Ohio (“Duke” or “Utility”) for energy efficiency in 2016. The Office of the Ohio Consumers’ Counsel (“OCC”), one of the parties that negotiated the 2011 settlement at issue, welcomes the opportunity to file comments on behalf of Duke’s 618,000 residential utility customers.

The PUCO should limit payments by customers for shared savings (i.e., Duke’s profit on energy efficiency) to no more than 13% of Duke’s prudent program spending for 2016, if the PUCO allows Duke to charge customers for any shared savings for 2016. Further, the PUCO should protect customers from paying for shared savings that are

¹ *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 at 6 (December 4, 2013).

based on Duke's mere compliance with the statutory benchmark. Instead, shared savings payments should only be charged to customers for energy efficiency undertaken by the Utility that exceeds (not meets) the statutory benchmark. In this way, customers would not be required to reward the Utility for merely complying with the law; instead the Utility would be rewarded if it *exceeds* the energy efficiency savings required by the law. Moreover, the Utility should not be allowed to use banked savings (savings earned in past years) to charge customers for shared savings for 2016.

II. BACKGROUND

Duke's application stems from Case No. 11-4393-EL-RDR ("11-4393"). There Duke filed an application for approval of an "energy efficiency cost recovery mechanism." As part of its application in that case, Duke included a request for a shared savings incentive.² Generally, a shared savings incentive is a tool that can be used by regulators to encourage energy efficiency and reward exemplary Utility performance, to provide benefits to customers.

Duke's Application in 11-4393 was resolved through a Stipulation, filed at the PUCO on November 18, 2011. The stipulating parties agreed that Duke's incentive mechanism would be in place from 2012 through 2015, and would expire at the end of 2015.³ The shared savings incentive for Duke lacked a hard dollar cap (for limiting customers' payments) for 2012 through 2015. But the parties agreed that for purposes of 2016, the incentive mechanism would be:

² *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, Application at 4 (July 20, 2011).

³ Case No. 11-4393-EL-RDR, Stipulation at 5 (November 18, 2011).

reevaluated by all interested parties no sooner than third quarter of 2014 to allow interested parties to assess the reasonableness and effectiveness of the incentive mechanism and to consider whether or not they support its further use (as structured or as modified) for the remaining year of the five year portfolio....⁴

In its Opinion and Order, the PUCO acknowledged that the incentive mechanism would expire in 2015, and that interested parties would have the opportunity to assess the reasonableness and effectiveness of the incentive mechanism in 2014.⁵

The carving out of 2016 for evaluation of customers' payments to Duke is further evidenced in Case No. 13-431-EL-POR. There the parties reiterated their agreement to assess the incentive mechanism and to consider whether or not they supported its further use for 2016.⁶ The PUCO acknowledged the parties' agreement in its Opinion and Order for 13-431-EL-POR, stating:

The mechanism for recovering costs from Duke's customers, including recovery of prudent program costs incurred, lost distribution revenues and an incentive mechanism, shall expire at the end of 2015, as controlled by the stipulation in the 2011 Portfolio Case.⁷

Meanwhile, in legislation (Senate Bill 310) this year, the General Assembly allowed for two different options for energy efficiency programs and charges to consumers for the next two years (2015 and 2016). In this regard, uncodified Section 6 of Senate Bill 310 states:

- (A) If an electric distribution utility has a portfolio plan that is in effect on the effective date of this section, the utility shall do either of the following, at its sole discretion:

⁴ Id. at 5.

⁵ Case No. 11-4393-EL-POR, Opinion and Order at 8 (August 15, 2012).

⁶ Case No. 13-431-EL-POR, Stipulation at 5 (September 6, 2013).

⁷ Case No. 13-431-EL-POR, Opinion and Order at 6 (December 4, 2013).

- (1) Continue to implement the portfolio plan with no amendments to the plan, for the duration that the Public Utilities Commission originally approved, subject to divisions (D) and (E) of this section;
- (2) Seek an amendment of the portfolio plan under division (B) of this section.

The Utility held discussions with interested parties in August of 2014 regarding the appropriateness of its incentive mechanism for charging customers in 2016, and whether or not customers should continue to pay, which OCC appreciated. But, as Duke has acknowledged, the interested parties did not reach an agreement as to the appropriateness or continuation of an incentive mechanism for Duke to charge customers in 2016.⁸

On September 9, 2014, Duke filed an Application in this docket seeking the PUCO's approval to keep its "cost recovery mechanism in place" through 2016.⁹ The Utility also asked that the PUCO find that the "continuation of the existing cost recovery and incentive mechanism continue through the end of 2016, in alignment with the approved term or the portfolio approval."¹⁰ Duke is also apparently asking to continue using past "banked" savings to charge customers more money in 2016.

Duke claims in its Application that "the majority of signatory parties are in agreement with continuing the cost recovery mechanism."¹¹ Duke did not identify which

⁸ *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Continue Cost Recovery Mechanism for Energy Efficiency Programs Through 2016*, Application at 3 (September 9, 2014).

⁹ *Id.*

¹⁰ *Id.* at 4.

¹¹ *Id.* at 3.

parties are in agreement with continued payments from customers. OCC is not in agreement, for the reasons explained below.

III. COMMENTS

A. If the PUCO chooses to extend the shared savings mechanism (profit for Duke) to 2016, then the PUCO should impose an annual cap on shared savings of no more than 13% of actual prudent program spending, to protect consumers.

Ohio law does not require that Duke be permitted to charge customers for shared savings. Rather, the PUCO's rules state that with the filing of its Portfolio Plan, an electric utility *may* submit a request to charge customers for an approved rate mechanism. Such a mechanism can commence after the PUCO approves the electric utility's program portfolio plan. The utility may be authorized to charge customers for costs due to electric utility peak-demand reduction, demand response, energy efficiency program costs, appropriate lost distribution revenues, and shared savings.¹²

If the PUCO allows Duke to continue charging customers for shared savings in 2016, the PUCO should limit what customers pay to no more than 13% of actual prudent program spending. This would be a "hard dollar cap." A hard dollar cap means that no matter what the Utility's shared savings are, they cannot exceed a pre-determined dollar amount. A hard cap protects consumers from paying for excessive profits for energy efficiency.

Duke was permitted to collect uncapped shared savings from customers from 2012 through 2015. Duke is currently the only Ohio electric utility without a cap to

¹² Ohio Admin. Code 4901:1-39-07.

protect customers on its shared savings mechanism.¹³ And both of the PUCO Staff's Proposals for Incentivizing Utility Energy Efficiency Performance contained a hard cap.¹⁴ An uncapped shared savings incentive could allow Duke to charge customers millions of dollars for shared savings that could exceed the estimates represented by Duke in the 11-4393 case.

In the 11-4393 case, Utility witness Timothy Duff estimated that Duke would receive \$4.5 million in shared savings but no more than \$8.2 million.¹⁵ However, in its 2013 filing, Duke requested \$12.5 million in shared savings incentives after spending \$23.5 million on energy efficiency and peak demand reduction programs in 2012 alone.¹⁶ A hard dollar cap is warranted to protect customers for 2016.

OCC recommends that if the PUCO extends the shared savings mechanism through 2016, it should limit the amount customers pay for shared saving to no more than 13% of program spending beginning in 2016. This recommendation is derived by examining the nationwide average of incentive caps from around the country. In this regard, a study by American Council for an Energy Efficient Economy states that "most states have a cap on the incentive. The cap is most frequently based on a percentage of

¹³ Ohio Power Company (Case Nos. 11-5568-EL-POR, 11-5569-EL-POR, Opinion and Order at 8), The Dayton Power and Light Company (Case No. 13-0833-EL-POR at 8) and FirstEnergy (Case No. 12-2190-EL-POR, Opinion and Order at 16) all currently have hard dollar caps on their shared savings incentive mechanisms.

¹⁴ See *In the Matter of the Application of the [Companies] for Approval of Three Year Energy Efficiency and Peak Demand Reduction Plans and Initial Benchmark Report*, Case Nos. 09-1947-EL-POR, 09-1948-EL-POR, and 09-1949-EL-POR, Proposal for Incentivizing Utility Energy Efficiency Performance Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (October 24, 2011) at 4-5.

¹⁵ Second Supplemental Direct Testimony of Timothy J. Duff, in Case No. 11-4393-EL-RDR, at 8 (May 31, 2012); See also, Transcript of June 7, 2012, in Case No. 11-4393-EL-RDR at 37.

¹⁶ Direct Testimony of James E. Ziolkowski, Case No. 13-753-EL-RDR, Attachment JEZ-1, page 3 of 10. Duke is also collecting an incentive of \$14 million from its Save a Watt cost recovery mechanism. See the Direct Testimony of James E. Ziolkowski, Attachment JEZ-2, page 2 of 6 in Case No. 12-1857-EL-RDR.

program spending and ranges from 5% to 20% of program spending with an average of 12% to 13%.”¹⁷

Duke’s current uncapped shared savings mechanism structure for 2012 through 2015 is as follows:¹⁸

Achievement of Annual Target	Shared Savings
≤100	0.0%
100-105	5.0%
≥105-110	7.5%
≥110-115	10.0%
≥115	13.0%

Under Duke’s incentive structure through 2015, Duke can charge customers up to 13% of the avoided energy and capacity costs for savings (minus utility program costs) if they save 115% of the statutory benchmark. But the structure has no hard dollar cap.

Under OCC’s recommendation, the maximum shared savings customers would pay to the Utility would be 13% of Duke’s prudent program spending. For example, in Duke’s last rider filing, the Utility projected that 2014 program costs would be \$31.3 million.¹⁹ Under OCC’s recommendation, the maximum amount Duke could charge customers for shared savings would be \$4.1 million (\$31.3 million x 13%). Similarly, Duke projected in Case No. 13-341-EL-POR that its program costs for 2016 will be

¹⁷American Council for an Energy-Efficient Economy, “Carrots for Utilities: Providing Financial Returns for Utility Investments in Energy Efficiency,” January 2011, at 10. <http://www.aceee.org/research-report/u111>

¹⁸ Case No. 11-4393-EL-RDR, Stipulation at 5 (November 18, 2011).

¹⁹ Case No. 14-457-EL-RDR, Attachment JEZ-1, at 5 of 10.

approximately \$36 million. Thus, the hard dollar cap would be approximately \$4.7 million (\$36 million x 13%).²⁰

Duke touts its success with its current energy efficiency portfolio as support for its energy efficiency mechanism continuing without a cap in 2016.²¹ But in 2013, Duke only met the annual mandates for energy efficiency because it used prior years' banked energy efficiency reductions.²² Using banked savings means that Duke uses energy efficiency reductions from past years to charge its customers on a going forward basis for shared savings. After using the banked savings for 2013, the Utility "calculated an annual achievement of 116%," which allowed Duke to charge customers for a 13% after tax shared savings incentive.²³ But for using "banked savings" the Utility would not have been able to charge customers for shared savings in 2013.

OCC's recommended cap will serve as a necessary consumer protection against excessive Utility incentive payments. It is on par with nationwide precedent (explained above) and should be implemented.

B. The Significantly Excessive Earnings Test produces a cap that is too expensive for customers with a shared savings mechanism.

Duke supports the continued use of its potential for unlimited earnings in 2016 by pointing out that "[i]n the two years that [Duke] has been operating its approved shared savings incentive, [Duke]'s earnings have not been found to be excessive [under the

²⁰ Case No. 13-431-EL-POR, Application (April 15, 2013).

²¹ Case No. 14-1580-EL-POR, Application at 3 (September 9, 2014).

²² *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, Hammerle Direct at 7 (March 28, 2014).

²³ *Id.*, Hammerle Direct at 8.

Significantly Excessive Earnings Test].”²⁴ The Significantly Excessive Earnings Test (“SEET”) is one of the primary consumer protection mechanisms built into the law. In Senate Bill 221 (“S.B. 221”) the General Assembly determined that the PUCO must protect Ohio customers by requiring electric distribution utilities to return to customers earnings that are significantly excessive (unfortunately, the law allows the utilities to collect excessive profits from customers). Excessive earnings by a utility may be retained by the utility.²⁵

The fact that Duke’s total earnings were not significantly excessive in 2012 and 2013 does not justify using the SEET as a cap for an energy efficiency shared savings mechanism. An uncapped shared savings award could yield excessive charges to customers for energy efficiency even if Duke’s total earnings are not significantly excessive. No Ohio utility uses the SEET as a cap for shared savings. Duke should not be the first.

C. Duke should be limited to charging customers for shared savings on only the efficiency savings that exceed the statutory benchmark.

Duke should not be permitted to charge customers for shared savings when energy efficiency reductions are below the statutory benchmark. Incentives (payments from customers) should only be made available for actual utility performance that is demonstrated to have exceeded the statutory benchmarks. Incentive mechanisms should encourage innovation and motivate utilities to exceed statutory benchmarks. A utility should not be provided an incentive to comply with the law. Duke should only be allowed

²⁴ Case No. 14-1580-EL-RDR, Application at 3 (September 9, 2014).

²⁵ See R.C. 4928.143(F).

to charge customers for shared savings on the portions of energy efficiency reductions that are above the statutory benchmark.

D. Duke should not be permitted to use “banked” savings from previous years to make customers pay more in 2016.

Again, a shared savings incentive mechanism is a tool used by regulators to reward exemplary utility performance in delivering energy efficiency and peak demand reduction programs to its customers. It usually takes the form of a utility sharing in a portion of the net benefits created by the utility program. The net benefits are typically the avoided energy and capacity dollar savings minus the utility and individual customer costs of the programs implemented. But Duke is currently using past (i.e., “banked”) energy efficiency reductions to charge its customers on a going forward basis for shared savings.²⁶ Using banked savings to comply with the statutory benchmarks is one thing (even if not necessarily a good thing for customers). But utility use of banked savings from past years to charge customers for shared savings on a going forward basis is contrary to the purpose of an incentive. Shared savings incentives are performance incentives awarded for exceeding a meaningful annual savings benchmark.

The PUCO has previously held that for shared savings purposes, savings could only be counted in the year in which the savings were generated. Specifically, the PUCO found that Ohio Power Company could:

[o]nly count savings for shared savings one time (meaning there is no double counting of shared savings) and **in the year in which the savings were generated**. In a year in which previous years’ over-compliance is used to comply with the benchmarks, shared

²⁶ See Duke’s Application in Case No. 14-457-EL-RDR. Duke filed an application to modify Rider EE-PDR, which recovers the costs of its energy efficiency portfolio. It is evident from the filing that Duke failed to meet the required energy efficiency benchmark in 2013, but complied with the requirement through the use of banked savings.

savings shall be based only on impacts generated in the current year.²⁷ (Emphasis added).

This requirement should apply to Duke as well.

E. Duke should not be permitted to charge customers for a share of resource savings that did not occur.

Duke calculates shared savings as a percentage of the total resource cost savings, and states that the “...net present value of the system avoided costs associated with the energy and capacity achievements has been over 3.5 times the cost incurred to achieve the impacts.”²⁸

But not all of these system avoided costs have occurred. Specifically, the system avoided costs associated with capacity have not occurred. For example, the cost of capacity for Ohio consumers, and thus any cost savings, is established in the Base Residual Auctions (“BRA”) and Incremental Auctions as part of PJM’s Reliability Pricing Model (“RPM”). In order for the system-avoided costs to accrue to Ohio consumers, the full capacity value of Duke’s energy-efficiency and peak-demand reduction portfolio would need to have been offered into the auctions.

Duke did not offer the full capacity reduction from their programs into the PJM auctions. As a result, some of the system-avoided costs will not occur. Because the system avoided costs for capacity did not fully occur, Duke should be prohibited from “sharing” in these non-existent system savings. The Ohio

²⁷ *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Case No. 11-5568-EL-POR, et al., Opinion and Order at 8.

²⁸ Case No. 14-1580-EL-RDR, Application at 3 (September 9, 2014).

Manufacturers' Association has estimated that the forgone avoided costs are \$4.8 million for Duke's customers. This is because Duke did not fully make available its energy efficiency/peak demand reduction as capacity resources in the BRA, with additional forgone avoided costs for non-Duke customers in PJM.²⁹

This further supports instituting a hard cap on shared savings to protect consumers. The existing shared savings mechanism is not properly incenting Duke to actually create the avoided system costs for its customers.

F. Duke is charging customers for shared savings before the savings accrue to customers.

Duke calculates shared savings as a percentage of the net present value of the resource cost savings it calculates, suggesting that Duke is considering the lifetime avoided costs of its energy efficiency and peak demand reduction programs.³⁰ Thus, Duke is collecting its "share" of savings prior to the savings occurring. Collecting the full lifetime of shared savings in one year will create unwarranted additional high costs, which are detrimental to customers. This further supports the OCC's recommendation for a hard dollar cap on the amount of shared savings Duke can collect in a given year.

IV. CONCLUSION

Energy efficiency portfolios should not be a profit center for utilities at the expense of customers. Customers should benefit from energy efficiency programs. Charges to customers for portfolios, including incentive mechanisms, should be

²⁹ OMA Reply Comments in 14-0457, see Attachment 1.

³⁰ Page 3 of Revised Attachment JEZ-1 to the Direct Testimony of Ziolkowski, Case 14-0457.

minimized. Consumer protections are critical. The policy of this State includes ensuring that consumers have adequate, reliable, and reasonably priced retail electric service. *See*, R.C. 4928.02(A).

In this regard, a hard dollar cap on Duke's shared savings mechanism for 2016 is appropriate. The cap will ensure that customers are paying reasonable and not excessive rates.

And the Utility should not be permitted to use banked savings from previous years to charge customers for shared savings in 2016. Finally, Duke should be limited to charging customers for shared savings on only the efficiency savings that exceed the statutory benchmark.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Comments was served on the persons stated below via electronic transmission, this 5th day of December 2014.

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