

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

COMMENTS OF OHIO PARTNERS FOR AFFORDABLE ENERGY

Duke seeks permission of the Public Utilities Commission of Ohio (“Commission”) to modify its previously approved demand side management (“DSM”) portfolio to permit it to recover incentives in 2016. Substitute Senate Bill 310 (“SB 310”) forbids the Commission from taking any action on this application because it would modify a previously approved DSM plan. SB 310 prohibits any modifications of existing DSM portfolios. The only way Duke can recover shared savings in 2016 is to file a revised portfolio plan with the Commission for its review and approval. The provisions of the current DSM portfolio are clearly defined and have already been reviewed in litigated proceedings before this Commission. The provisions of SB 310 are clear. The Commission should dismiss this application.

I. INTRODUCTION

Duke has offered energy efficiency programs to its customers since 1992, consistent with integrated resource planning concepts of the time. Its initial DSM portfolio developed to comply with Senate Bill 221 benchmarks was reviewed during the consideration of Case No. 08-920-EL-SSO, Duke’s first Standard Service Offer (“SSO”) filing. OPAE was a signatory party to the stipulation in the SSO case, which included the DSM portfolio. The plan approved by the Commission included Rider DR-SAW, Duke’s unique approach to cost recovery, along with an incentive mechanism that permitted

Duke to recover an escalating return on investment for exceeding the savings mandates. Case No. 08-920-EL-SSO, Stipulation at 24. Under the terms of the provision, Duke was permitted a 6% return on investment for achieving between 101 and 110% of the required savings; 11% if savings were between 111% and 115%; 13% if savings were between 116% and 125%; and, 15% if savings exceeded the required benchmark by more than 125%. This approach to funding and shared savings was considered unique. Under Rider DR-SAW, Duke received a percentage of the costs of energy and capacity avoided due to the impacts of demand side management programs. The incentive percentages outlined above were applied to the value of the avoided cost. Duke was not directly reimbursed for the cost of the programs themselves; the costs were defrayed by the value of the avoided generation cost. Duke was also authorized to recover lost distribution revenues.

During 2008 and 2009, the Commission was charged with implementing SB 221. This required the Commission to consider four distribution utility SSO cases, along with several separate DSM portfolio applications. That jumble of cases failed to provide clarity on what constituted an appropriate DSM portfolio. A review of subsequent DSM portfolio cases makes clear the Commission has gradually fine-tuned its approach to the various elements of these applications. A steady series of evolving settlements ultimately led to the Commission decision in the only litigated DSM portfolio application, *In the Matter of the Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Programs Plans for 2013 through 2015*. Case No. 12-2190-EL-POR, et.al.

The 12-2190 case established a template for the structure of a DSM portfolio that is compliant with Ohio law:

- 1) Shared Savings –incentives can be awarded based on a tiered-scale when annual savings exceed the mandate; the savings are grossed up for taxes;

banked savings can only be counted toward shared savings in the year they are banked; the Utility Cost Test (“UTC”) is to be used when calculating the incentives; and, the incentive should be capped. Case No. 12-2190-EL-POR at 15-17.

- 2) Lost Distribution Revenues – lost revenues are recoverable via either a decoupling rider or based on the calculated number of kilowatt hours (“kWh”) saved. Id.
- 3) PJM Bidding – distribution utilities are required to bid in 75 percent of the eligible capacity savings produced by the DSM portfolio into the PJM Base Residual Auction, the so-called capacity market. Id at 20.
- 4) Counting Savings – savings will be counted on an annualized basis. Id. at 22.

This evolution equally affected the Duke DSM portfolio. The DR-SAW mechanism was called into question in Case No. 09-1999-EL-POR, the annual report filed by Duke on its energy efficiency program. The approval of Duke’s 08-920 SSO had come before the Commission’s rules in Chapter 4901:1-39 were finalized, and the 08-920 SSO stipulation required that Duke “conform to the Commission’s ESP rules.” Case No. 09-1999, Opinion and Order at 8. After a thorough review of the arguments, the Commission found that Duke must “remove the recovery of lost generation revenues...from its Rider DR-SAW beginning on December 10, 2009.” Id. at 15. The Commission noted that the order would not bar recovery of shared savings “should Duke meet or exceed its benchmarks.” Id. The Commission ordered Duke to refund any over-recovery to customers. Id. at 16.

The question of recovery of Duke’s energy efficiency portfolio costs was next raised in Case No. 11-4393-EL-RDR. Because approval of the DR-SAW mechanism expired in December 2011, Duke sought a new recovery mechanism. Application at 2. Duke proposed Rider EE-PDR, which would “recover program costs and an incentive in

the form of the percentage of the avoided cost benefits realized.” Id. at 3. The Stipulation in Case No. 11-4393-EL-RDR ultimately defined the cost recovery mechanism to be used by Duke. Stipulation at 4. Duke accepted the shared savings incentive proposal of the Ohio Consumer and Environmental Advocates as a part of their comments on September 21, 2014. Under this shared savings mechanism, Duke receives a percentage of the value of the avoided generation costs as an incentive if the savings achieved during the year exceed certain levels. The agreement also provides for recovery of projected program costs, subject to true up. Case No. 11-4393-EL-RDR, Comments by Members of the Ohio Consumer and Environmental Advocates at 3. The agreement also included a decoupling mechanism, which ensures recovery of lost distribution revenues. Id. at 7; Case No. 11-4393-EL-RDR Stipulation at 5.

The stipulation in Case No. 11-4393-EL-RDR makes clear, that “[t]he incentive mechanism shall expire at the end of 2015”. Stipulation at 5; see also Case No. 11-4393-EL-RDR, Opinion and Order at 8. Duke witness Duff characterized the shared savings mechanism as being “identical in structure” to the stipulated shared savings mechanism established by many of the same parties and Columbus Southern Power Company and Ohio Power Company, approved by the Commission in Case Nos. 11-5568-EL-POR and 11-5569-EL-POR, with one exception-- there would be no cap on the incentive. Second Supplemental Direct Testimony of Timothy J. Duff, Case No. 11-4393-EL-RDR, at 11-13.

The next case that is relevant to this matter is Duke’s Case No. 13-431-EL-POR. The case was filed because the Commission in the 2011 Duke case required that Duke comply with Rule 4901:1-39-04 O.A.C. by filing a three-year portfolio plan. The 2013 Duke application requested authority to continue the programs included in the portfolio plan approved in the Duke 2011 case, along with two new additional programs. Duke also requested authority for a one-year extension of the cost recovery mechanism approved in the 2011 case -- the issue being raised once again in this application.

In the 2013 case, the Staff of the Commission (“Staff”), the Office of the Ohio Consumers’ Counsel (“OCC”), Kroger, and OPAE all objected to the extension of the shared savings mechanism. A stipulation ultimately resolved all issues in Case No. 13-431-EL-POR, with the stipulating parties agreeing not to extend the shared savings mechanism as requested by Duke, specifically restating that the mechanism “shall expire at the end of 2015.” Case No. 13-431, Stipulation at 5; Opinion and Order at 6. The stipulation also stated that, consistent with the agreement in Case No. 11-4393-EL-RDR, the parties, no sooner than the third quarter of 2014, would assess whether the existing shared savings mechanism expiring at the end of 2015 would be extended for the year 2016. If no agreement was reached, interested parties were permitted to seek the Commission’s determination “of whether an incentive mechanism should be implemented...(for the year 2016).” Stipulation at 5; Opinion and Order at 6.¹

A final case that is relevant to this proceeding is Case No. 14-457-EL-RDR wherein Duke filed an application to modify Rider EE-PDR which recovers the cost of its energy efficiency and demand side management portfolio plan. The filing makes clear that Duke failed to meet the required energy efficiency benchmark in 2013, but complied with the benchmark through the use of ‘banked’ savings; i.e., savings achieved in earlier years in excess of the amount of savings required by statute; a position that runs directly afoul of the Commission’s ruling in the FirstEnergy case for the calculation of the shared savings incentive: “[a]dditionally, the Commission finds that banked savings shall only be counted toward shared savings in the year it is banked.” *Opinion and Order*, Case No. 12-2190-EL-POR at 16 (March 20, 2013).

¹The Opinion and Order also noted in Footnote 1 that “Staff, OCC, and OPAE contest the calculation of allowable program costs in the calculation of shared savings, and have filed comments to the effect in *In re Duke Energy Ohio, Inc.*, Case No. 13-753-EL-RDR, and incorporate those comments in the Stipulation.” Opinion and Order at 6.

OCC, OP&E, and The Ohio Manufacturers Association Energy Group (“OMAEG”) all intervened and offered comments on the Duke 14-457 application. The shared savings mechanism was the focus of several comments: the lack of a cap; the treatment of certain program costs; and, Duke’s use of ‘banked’ savings to trigger the shared savings incentive provisions. The latter was not contemplated by the initial stipulation – Case No. 11-4393-EL-RDR (the 2011 case), though that is now disputed by Duke. There is a clear disagreement among the parties to the stipulation in Case No. 11-4393-EL-RDR as to how the current shared savings provision operates and whether it should continue.

This line of cases brings us to the current application. However, one other action has occurred that is relevant to – in fact bars – this application and the Commission’s consideration of the application. The General Assembly passed, and Governor Kasich signed into law, Senate Bill 310, which is now in effect. In addition to the stipulations, the new law is controlling in this case.

II. COMMENTS

A. The Application Should Be Dismissed Because Substitute Senate Bill 310 Prohibits the Modification of an Existing Energy Efficiency and Demand Reduction Portfolio Plan.

SB 310 became effective on September 12, 2014, three days after this application was filed. SB 310 requires, in pertinent part:

SECTION 6. (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:

(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.

SECTION 7. (A) The Public Utilities Commission shall neither review nor approve an application for a portfolio plan if the application is pending on the effective date of this section.

(B) Prior to January 1, 2017, the Commission shall not take any action with regard to any portfolio plan or application regarding a portfolio plan, except those actions expressly authorized or required by Section 6 of this act and actions necessary to administer the implementation of existing portfolio plans. [Emphasis added.]

This instant application was filed on September 9, 2014. Under the plain language of SB 310, the Commission is prohibited by Section 7 from taking any action regarding an existing portfolio plan other than in response to an application from a utility to amend its plan under Sec. 6(B). The stipulations and the Commission decisions in Case Nos. 11-4393-EL-RDR and 13-341-EL-POR make clear that the shared savings mechanism in Duke's portfolio plan expires at the end of 2015.

This application does not comply with Sec. 6(B) and must be dismissed. That this Application was filed prior to the effective date of SB 310 is irrelevant. The statute clearly states that the Commission "shall neither review nor approve an application for a portfolio plan if the application is pending on the effective date of this section." Section 7(A), Senate Bill 310. Moreover, "the Commission shall not take any action...regarding a portfolio plan, except those expressly authorized or required by Section 6 of this act.... Section 7(B), Senate Bill 310. Under Ohio law, the Commission lacks any authority to act on this application.

Finally, the shared savings mechanism that expires at the end of 2015 was to be reviewed by interested parties to "assess the reasonableness and effectiveness of the incentive mechanism" to determine whether it should be used or modified and used in 2016 per the terms of the stipulations in Case Nos. 11-4393-EL-RDR and 13-341-EL-

POR. The consultation was to take place “no sooner than the third quarter of 2014”. If the parties did not agree, any party could seek the Commission’s determination “of whether an incentive mechanism should be implemented for the remainder of the portfolio plan period (for the year 2016).” Stipulation Case No. 13-431 at 5. The parties did not agree. Given that modifications to the existing mechanism are now unlawful and outside the Commission’s authority to approve, the only issue is whether the existing mechanism without modification continues. This issue is entirely governed by the stipulations approved by the Commission that state that the existing mechanism will expire at the end of 2015. No agreement has been reached among the parties for implementing an incentive mechanism for 2016.

The stipulations in Case Nos. 11-4393-EL-RDR and 13-341-EL-POR clearly contemplated a review of the efficacy of the shared savings mechanism. They provided an opportunity for parties to agree to extend the existing mechanism, but the parties did not so agree. The stipulated language to extend the mechanism with modifications or substitute another incentive mechanism is now inapplicable. The Commission is not authorized to take any action to modify an existing portfolio other than to consider applications filed by a utility to amend its portfolio plan in a manner that complies with SB 310. The Commission is not authorized to take the action Duke requests. The application must be dismissed.

B. This Application Fails to Request an Act or Action Necessary to Administer the Implementation of an Existing Portfolio Plan.

SB 310 eliminates any authority of the Commission to modify current DSM plans, but does authorize actions that relate to the administration of existing portfolio plans. SB 221,

Section 7(B) (“except...actions necessary to administer the implementation of existing portfolio plans.”) This provision provides a limited authorization to the Commission to continue oversight of the portfolio operation and to modify cost recovery riders as necessary to compensate a utility for eligible expenditures. A request to extend an incentive mechanism is none of these.

The prior stipulations make clear that the incentive mechanism is the only element of Duke’s portfolio plan that expires at the end of 2015. Case No. 13-431, Stipulation at 5; Opinion and Order at 6. The plan that was in place on the effective date of SB 310 has no incentive mechanism for 2016. Creating a new incentive mechanism is beyond the purview of the term ‘administer’. Changing a substantive provision of a plan, a provision that specifically expires, is not an administrative matter.

There was no agreement of the parties to continue an incentive mechanism in 2016. A schedule for discussing whether an incentive mechanism could be added in 2016 was included in the 2011 and 2013 cases, but there was no agreement that one would be. It was not be a simple administrative act to impose an incentive where none exists.

II. Conclusion

Duke has repeatedly attempted to extend the shared savings approach agreed to by parties in Case No. 11-4393-EL-RDR beyond the date it expires – December 31, 2015. Consumer parties and environmental organizations have demurred. No agreement has been reached to continue the existing shared savings mechanism. Meanwhile, the Commission’s authority to modify the existing portfolio and shared savings mechanism has been trumped by an intervening act: the passage of SB 310. If a utility wishes to continue to implement its existing energy efficiency and demand side management

portfolio plan, it cannot modify it in any way except through an amendment process that complies with Section 6(B). The Commission now lacks the authority to act on this application. Duke's current shared savings provision expires at the end of 2015 and cannot be extended through this application. The instant application does not comply with current law or the stipulations and must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments was served electronically upon the persons identified below in this case on this 5th day of December, 2014.

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Summary: Comments Comments of Ohio Partners for Affordable Energy electronically filed by Mr. David C Rinebolt on behalf of Ohio Partners for Affordable Energy