

**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.     )

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**POST-HEARING BRIEF  
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.<sup>1</sup> The Public Utilities Commission of Ohio (“PUCO”) will determine how little or how much customers might pay to Duke Energy Ohio (“Duke” or “Utility”) for energy efficiency in 2016. The PUCO has the opportunity to reign in Duke’s exorbitant incentive awards, and set a more balanced framework for 2016 and beyond. The Office of the Ohio Consumers’ Counsel (“OCC”), recommends that the PUCO reject the Utility’s request to continue the existing shared savings incentive mechanism into 2016 without significant modifications. Incentive awards, like shared savings, should be provided to utilities for exemplary performance - but Duke has failed to meet Ohio’s energy efficiency compliance benchmarks since 2012 without the use of banked savings (or savings earned in past

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<sup>1</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 at 6 (December 4, 2013).

years).<sup>2</sup> An energy efficiency incentive should motivate a utility to go above the required compliance levels. But the shared savings mechanism previously approved for Duke is not accomplishing this goal.

OCC made several recommendations in this proceeding to protect consumers from exorbitant incentive charges. OCC recommends that an annual, hard-dollar cap on shared savings of no more than five percent of actual prudent program spending, be imposed to protect consumers.<sup>3</sup> And, any incentive awarded to the Utility should also use the Total Resource Cost Test (“TRC”) net benefits rather than the Utility Cost Test (“UCT”) net benefits;<sup>4</sup> use net, rather than gross program savings;<sup>5</sup> and should be calculated on a pretax basis.<sup>6</sup> The PUCO should also prohibit Duke from using banked savings from previous years to attain higher incentive levels that will make customers pay more in 2016.<sup>7</sup> Finally, OCC supports the Ohio Energy Group’s recommendation that no savings below the energy efficiency benchmark should count towards a shared savings incentive.<sup>8</sup>

## **II. BACKGROUND**

Duke’s application in this proceeding stems from Case No. 11-4393-EL-RDR (“11-4393”). In that case, Duke filed an application for approval of an “energy efficiency

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<sup>2</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Continue Cost Recovery Mechanism for Energy Efficiency Programs Through 2016*, Case No. 14-1580-EL-RDR, Direct Testimony of Wilson Gonzalez at 28 (June 30, 2015) (hereinafter, “Gonzalez Direct”).

<sup>3</sup> Gonzalez Direct at 17.

<sup>4</sup> Gonzalez Direct at 21.

<sup>5</sup> Gonzalez Direct at 21.

<sup>6</sup> Gonzalez Direct at 21.

<sup>7</sup> Gonzalez Direct at 27.

<sup>8</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Continue Cost Recovery Mechanism for Energy Efficiency Programs Through 2016*, Case No. 14-1580-EL-RDR, Direct Testimony of Stephen Baron at 3 (June 30, 2015) (hereinafter, “Baron Direct”).

cost recovery mechanism.” As part of its application in that case, Duke included a request for a shared savings incentive.<sup>9</sup> Generally, a shared savings incentive is a tool that can be used by regulators to encourage utilities to invest in energy efficiency and reward exemplary utility performance, to provide benefits to customers.<sup>10</sup>

Duke’s Application in 11-4393 was resolved through a Stipulation, filed at the PUCO on November 18, 2011.<sup>11</sup> OCC was a signatory party to that Stipulation. As established in that case, Duke was granted the ability to institute a shared savings incentive mechanism with the following tiered structure:

Incentive Tier	Compliance Percentage	Incentive Percentage
1	< 100%	0.0%
2	>100-105%	5.0%
3	>105-110%	7.5%
4	> 110-115%	10.0%
5	> 115%	13.0%

Under this arrangement Duke could receive a maximum of 13 % of the avoided energy and capacity costs of EE/PDR (minus utility program costs) if Duke achieves more than 115 % of the statutory benchmark.<sup>12</sup> If Duke does not meet the annual benchmark, it receives no incentive (shared savings) and is subject to a penalty.<sup>13</sup> But the Utility receives an incentive on the entire amount of energy efficiency compliance (including that part which the Utility is statutorily required to perform up to the benchmark) if it

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<sup>9</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, Application at 4 (July 20, 2011).

<sup>10</sup> Gonzalez Direct at 27.

<sup>11</sup> Case No. 11-4393-EL-RDR, Stipulation and Recommendation at 5 (November 18, 2011).

<sup>12</sup> Gonzalez Direct Gonzalez at 7.

<sup>13</sup> R.C. 4928.66 (C).

exceeds the benchmark.<sup>14</sup> Once Duke exceeds the statutory benchmarks, Duke can also charge customers for its energy savings below the statutory benchmark.<sup>15</sup> And, as OCC witness Wilson Gonzalez pointed out, Duke has been using banked savings (savings from past years) to maximize the charge its customers pay on a going forward basis for shared savings.<sup>16</sup>

The stipulating parties agreed that the incentive mechanism would be in place from 2012 through 2015, and would expire at the end of 2015.<sup>17</sup> 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:

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....<sup>18</sup>

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.<sup>19</sup>

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 they supported its further use for

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<sup>14</sup> Gonzalez Direct at 7.

<sup>15</sup> Gonzalez Direct at 8.

<sup>16</sup> Gonzalez Direct at 8.

<sup>17</sup> Case No. 11-4393-EL-RDR, Stipulation at 5 (November 18, 2011).

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

<sup>19</sup> Case No. 11-4393-EL-POR, Opinion and Order at 8 (August 15, 2012).

2016.<sup>20</sup> The PUCO again 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.<sup>21</sup>

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:
  - (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.

In accordance with the Stipulations in 11-4393-EL-RDR and 13-431-EL-POR, Duke held discussions with interested parties in August of 2014 regarding the appropriateness of its incentive mechanism for charging customers in 2016. But, as Duke has acknowledged, the interested parties did not reach an agreement as to the

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<sup>20</sup> Case No. 13-431-EL-POR, Stipulation at 5 (September 6, 2013).

<sup>21</sup> Case No. 13-431-EL-POR, Opinion and Order at 6 (December 4, 2013).

appropriateness or continuation of an incentive mechanism for Duke to charge customers in 2016.<sup>22</sup>

On September 9, 2014, one day before the new laws set forth in Senate Bill 310 took effect, Duke filed an Application in this docket seeking the PUCO's approval to keep its "cost recovery mechanism in place" through 2016.<sup>23</sup> 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."<sup>24</sup> Duke also asked to continue using past "banked" savings to charge customers more money in 2016. In that filing, Duke indicated that "[t]he majority of signatory parties are in agreement with continuing the existing cost recovery mechanism (cost recover [sic] or prudent costs, lost distribution revenues, and its shared savings mechanism)."<sup>25</sup> But out of the fourteen parties (other than Duke) that signed the 11-4393-EL-RDR and 13-431-EL-POR Stipulations<sup>26</sup> only three filed Comments in support of Duke's Application in this matter,<sup>27</sup> none of which filed supporting testimony. Conversely, six parties that were involved in those cases (three of which signed the

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<sup>22</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Continue Cost Recovery Mechanism for Energy Efficiency Programs Through 2016*, Case No. 14-1580-EL-RDR, Application at 3 (September 9, 2014).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 4.

<sup>25</sup> Application at 3-4 (September 9, 2014).

<sup>26</sup> The Stipulation was signed by the EMC Development Company, Environmental Law & Policy Center ("ELPC"), Greater Cincinnati Energy Alliance, the Kroger Company ("Kroger"), Natural Resources Defense Council ("NRDC"), Ohio Advanced Energy Economy, OCC, Ohio Partners for Affordable Energy ("OPAE"), Ohio Environmental Council ("OEC"), People Working Cooperatively, Inc., the PUCO, Staff, Sierra Club, and Vectren Retail, LLC.

<sup>27</sup> Supporting Comments were filed by ELPC, NRDC, and OEC.



Stipulations) filed Comments opposing Duke's Application in this case.<sup>28</sup> Three of those parties, in addition to the PUCO Staff, filed testimony opposing the Utility's Application.<sup>29</sup>

### **III. ARGUMENT**

As noted above, whether there would be an incentive mechanism for Duke in 2016 was left completely open by the parties in both the 11-4393 case and the 13-431 case.<sup>30</sup> There is no legal requirement that the incentive mechanism continue.

In fact, Duke's witness, Tim Duff, acknowledges that Ohio law does not require that Duke be permitted to charge customers for shared savings (or any performance incentive for that matter).<sup>31</sup> 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<sup>32</sup>.

There was no evidence put forth by any party (other than Duke) at the evidentiary hearing for this case supporting the continuation of Duke's incentive mechanism as it currently exists. But if the PUCO allows Duke to continue charging customers for shared savings, it should adopt consumer protections to limit what customers pay. As OCC witness Gonzalez explained, "[a]n incentive mechanism is a tool used by regulators to reward exemplary utility performance in delivering energy efficiency and peak demand

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<sup>28</sup> Industrial Energy Users-Ohio, Kroger, Ohio Energy Group ("OEG"), OCC, the Ohio Manufacturers' Association ("OMA"), and OPAE.

<sup>29</sup> Direct Testimony opposing the Application in this case was filed by the OCC, OEG, OMA, and the PUCO Staff.

<sup>30</sup> Case No. 14-1580-EL-RDR, Hearing Transcript at pp. 119, 122 (For purposes of 2016, "[w]e are starting with a clean page, you know").

<sup>31</sup> Case No. 14-1580-EL-RDR, Hearing Transcript at p. 11.

<sup>32</sup> Ohio Admin. Code 4901:1-39-07 (emphasis added).

reduction programs to its customers.”<sup>33</sup> Duke’s energy efficiency performance in 2013, 2014, and 2015 has not been enough to satisfy the compliance benchmarks (without reliance on banked savings), let alone qualify it for an incentive reward.<sup>34</sup> The Utility admits that it uses banked savings, (savings from past years) to charge customers on a going forward basis for shared savings.<sup>35</sup> The PUCO should use discretion when determining whether the Utility should be permitted to earn an incentive in 2016 and the components of that incentive structure. Performance incentives are not required by law and should only be provided for superior performance.

For the reasons explained below, Duke’s request that its incentive mechanism continue into 2016 without modifications should be rejected.

**A. Duke’s should not be permitted to continue to collect from customers uncapped shared savings into 2016.**

Duke was permitted to collect uncapped shared savings from customers from 2012 through 2015.<sup>36</sup> The four year uncapped shared savings experiment proved very costly to its customers and should be jettisoned in any future incentive mechanism. Energy efficiency is supposed to save consumers money—not be a utility profit center. Customers need protection from these unfettered shared savings charges for 2016. The

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<sup>33</sup> Gonzalez Direct at 27.

<sup>34</sup> Gonzalez Direct at 28.

<sup>35</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Continue Cost Recovery Mechanism for Energy Efficiency Programs Through 2016*, Case No. 14-1580-EL-RDR, Direct Testimony of Timothy J. Duff at 9 (June 30, 2015) (“Duff Direct”); Gonzalez Direct at 28. Duke only met the annual mandates for energy efficiency because it used prior years’ banked energy efficiency reductions. 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. But for using “banked savings” the Utility would not have been able to charge customers for shared savings in 2013.

<sup>36</sup> Gonzalez Direct at 12.

PUCO should not approve an incentive mechanism for Duke for 2016 without the critical consumer protection of a hard dollar cap.

A hard dollar cap means that no matter what the Utility's compliance performance, shared savings cannot exceed a pre-determined dollar amount. A hard-dollar cap would protect Duke's customers from undetermined and excessive incentive charges that have greatly exceeded projections and expectations.<sup>37</sup>

As discussed in more detail below, OCC recommends a hard-dollar cap of no more than five % of prudent program spending. Other intervenors also recommended hard-dollar cap amounts for the Utility. Ohio Manufacturers' Association witness John Seryak recommended a hard dollar cap on shared savings, without specifying any specific dollar value.<sup>38</sup> Ohio Energy Group witness, Stephen Baron recommended a cap of \$1 million,<sup>39</sup> and PUCO Staff witness Gregory Scheck recommended a cap of \$6.5 million per year after tax.<sup>40</sup>

According to witness Gonzalez, the projected and actual incentive levels that Duke seeks to collect from customers are, "exorbitant relative to the program size, and relative to other Ohio utilities."<sup>41</sup> To this end, Witness Gonzalez explained, and the

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<sup>37</sup> Gonzalez Direct at 12.

<sup>38</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Continue Cost Recovery Mechanism for Energy Efficiency Programs Through 2016*, Case No. 14-1590-EL-RDR, Seryak Direct at 3 (hereinafter "Seryak Direct").

<sup>39</sup> Baron Direct at 3.

<sup>40</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Continue Cost Recovery Mechanism for Energy Efficiency Programs Through 2016*, Case No. 14-1590-EL-RDR, Prefiled Testimony of Gregory C. Scheck at 3 (June 30, 2015) (hereinafter "Scheck Direct").

<sup>41</sup> Gonzalez Direct at 14.

Table below demonstrates, that Duke's recent incentive awards for 2012, 2013 and 2014 were 49%, 51 % and 42% of the Utility's program spending, respectively.<sup>42</sup>

Year	Actual and Projected Annual Dollar Incentives	EE/PDR Program Spending	Incentive as a % of Program Spending
2012	\$12,289,563	\$25,147,118	49%
2013	\$11,364,692 (projected)	\$22,130,677	51%
2014	\$12,975,188 (projected)	\$30,608,344	42%
2015	\$8,718,468 (projected)		
Total	\$45,347,911		

Duke's shared savings mechanism also significantly exceeds utility energy efficiency incentive awards nationwide as a percentage of program cost.<sup>43</sup>

Imposing a hard dollar cap is also consistent with how the PUCO has treated this issue in the past. The other three Ohio EDUs currently have hard-dollar caps as a component of their incentive mechanisms. The PUCO approved Stipulation Agreements whereby the Dayton Power and Light Company is subject to a hard-dollar cap of \$4.5 million dollars per year and Ohio Power Company is subject to a cap of \$20 million per year.<sup>44</sup>

The PUCO has indicated that it is wary of an uncapped shared savings incentive mechanism. FirstEnergy filed an Application for their EE/PDR Portfolio in 2012, which

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<sup>42</sup> Incentive information is from Company Responses to OCC-INT-01-002 (Attachment 2) and OCC-INT-01-005 (Attachment 3). The EE/PDR program spending is from Company Response to OCC-INT-01-001 (Attachment 4).

<sup>43</sup> Gonzalez Direct at 14.

<sup>44</sup> Id.

included an uncapped shared savings incentive mechanism similar to Duke's.<sup>45</sup> Despite FirstEnergy's resistance, the PUCO instituted a \$10 million annual cap on the amount of shared savings that could be collected under the incentive mechanism.<sup>46</sup>

A hard dollar cap protects consumers from paying the Utility excessive incentives for EE/PDR results, or other unintended negative consequences of a shared savings-type mechanism.<sup>47</sup> For example, an unexpected and unprecedented increase in avoided costs, or the introduction of a revolutionary technology may lead to large increases in charges related to the shared savings incentive, which could result in unreasonably priced retail electric service in violation of R.C. 4928.02(A).<sup>48</sup> Also, a legislative redefinition of "savings," broadening what a utility can count towards its energy efficiency compliance can also present a risk of greater utility shared savings incentive payments by customers (without any additional effort by the utility).<sup>49</sup>

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<sup>45</sup> *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015*, Case Nos. 12-2190-EL-POR, 12-12191-EL-POR, and 12-2192-EL-POR, Application at 12-13 (Jan. 31, 2012).

<sup>46</sup> *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015*, Case Nos. 12-2190-EL-POR, 12-12191-EL-POR, and 12-2192-EL-POR, Opinion and Order at 16 (Mar. 20, 2013).

<sup>47</sup> In their filed comments in this case the consumer groups, (OPAE at 6; OEG Comments at 4; OMA Comments at 6; Kroger Comments at 4; and OCC Comments at 5) and Staff (Comments at 6) have recommended a hard cap on Duke's incentive.

<sup>48</sup> Gonzalez Direct at 15.

<sup>49</sup> See, for example, R.C. 4928.662 (B).

In fact, in its 2013 Energy Efficiency Rider filing, Duke requested \$12.5 million in shared savings incentives after spending \$23.5 million on EE/PDR programs in 2012.<sup>50</sup> The \$12.5 million incentive that Duke requested be collected from its customers for 2012 is 178% above Duke witness Duff's estimated projection and 52% over his projected maximum shared savings award.<sup>51</sup> The incentive represents 53% of Duke's total expenditures on EE/PDR (expenditures that Duke seeks to charge to customers). Similarly, Duke sought more than \$11.6 million in shared savings incentives for the 2013 program year after spending \$22.13 million on EE/PDR programs.<sup>52</sup> This represents a shared savings incentive of over 52% of program costs. Duke is now requesting another \$12,975,188 in shared savings charges in their 2014 true-up proceeding – 43% of the \$30.3 million spent on EE/PDR programs for that year.<sup>53</sup> That means that over a three year period (2012-2014) Duke is seeking to collect approximately \$37.08 million in shared savings on programs that are projected to have cost \$75.93 million. And Duke's projection for 2015 shared savings charges has increased from \$7,256,153 (as filed in Case No. 13-431-EL-POR) to \$8,718,468.<sup>54</sup>

OCC witness Gonzalez testified that “such exorbitant charges that Duke seeks to collect from customers are a direct result of the fact that Duke's shared savings incentive

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<sup>50</sup> *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 Peak Demand Response Programs*, Case No. 13-753-EL-RDR (“13-753 filing”), Direct Testimony of James E. Ziolkowski, Attachment JEZ-1, page 3 of 10 13-753 filing. Duke is also collecting an incentive of \$14 million from its Save a Watt cost recovery mechanism. See, *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 Peak Demand Response Programs*, Case No. 12-1857-EL-RDR (“12-1857 filing”), Direct Testimony of James E. Ziolkowski, Attachment JEZ-2, page 2 of 6.

<sup>51</sup> Transcript of June 7, 2012, in Case No. 11-4393-EL-RDR at 37 (Attachment 5).

<sup>52</sup> Duke Energy Ohio Case No. 14-457-EL-RDR, Attachment JEZ-1.

<sup>53</sup> Duke Energy Ohio Case 15-534-EL-RDR, Attachment JEZ-1.

<sup>54</sup> *Id.*

*does not have a cap.*”<sup>55</sup> Mr. Gonzalez further explained that a cap on shared savings is most frequently based on a percentage of program spending.<sup>56</sup> To this end, OCC witness Gonzalez recommends that the maximum shared savings customer would pay to the Utility should be five percent of Duke’s prudent program spending.<sup>57</sup> OCC’s recommendation for a hard dollar cap for Duke in 2016 would be approximately \$1.8 million (\$36 million x 5%).<sup>58</sup> To support his recommendation, Mr. Gonzalez cited to a study conducted by the American Council for an Energy-Efficient Economy (“ACEEE”) profiling 18 states<sup>59</sup> documenting shared savings incentive mechanisms that ranged from 5% to 20% of program spending with an average cap of 12% to 13%.<sup>60</sup>

Mr. Gonzalez explained that it is appropriate to cap Duke at an amount that is at the lower end of the “hard dollar” cap range reported in the ACEEE study “because of the change in the status of generation assets, the evolution of a competitively bid Standard Service Offer (“SSO”), and the increase in CRES offers across all of Ohio.”<sup>61</sup> Mr. Gonzalez also indicated that an updated ACEEE study on the same subject corroborates that the incentive awards in deregulated states (like Ohio where utility companies do not directly own generation) are much lower than awards in regulated vertically integrated states.<sup>62</sup> This is because if generation is deregulated, the remaining electric distribution

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<sup>55</sup> Gonzalez Direct at 16.

<sup>56</sup> Gonzalez Direct at 15.

<sup>57</sup> Gonzalez Direct at 6, 10, 17.

<sup>58</sup> Gonzalez Direct at 17.

<sup>59</sup> The 18 states profiled on average exceeded the national average of utility efficiency spending per person.

<sup>60</sup> Gonzalez at 15, citing to American 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/researchreport/u11>.

<sup>61</sup> Gonzalez Direct at 18.

<sup>62</sup> Transcript at pp. 136, 148.

companies should not have a profit interest in generation. Therefore, they are not forgoing a profitability opportunity like a vertically integrated company that undertakes energy efficiency. So the need to incentivize the utility to undertake energy efficiency is diminished.

After the signing of Senate Bill 221 in 2008 and the implementation of utility EE/PDR programs shortly thereafter, three of the four Ohio utilities<sup>63</sup> had not corporately separated their generation assets and used their generation to meet their customers' power requirements.<sup>64</sup> CRES offers were virtually non-existent in three of the four service territories.<sup>65</sup> The early shared savings incentive mechanisms approved in Ohio implicitly took into account that the EE/PDR programs were saving Ohio utilities' avoided energy and capacity costs.<sup>66</sup> Accordingly, Mr. Gonzalez pointed out that the "incentive was structured to reflect the total level of avoided costs of the utility."<sup>67</sup>

At present however, all of Ohio's utilities, including Duke, have or are in the process of corporately separating their generation assets. That means the Ohio utilities generation assets now fully operate in deregulated competitive markets, and are profitable or not, depending on changing power market conditions.<sup>68</sup> Because the total avoided generation costs of the utility are no longer in the mix, a lower incentive is appropriate.

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<sup>63</sup> Only the FirstEnergy companies had corporately separated their generation assets. The FirstEnergy companies did not get approval for an incentive mechanism during their first portfolio application in Case No. 09-1947-EL-POR et al.

<sup>64</sup> Gonzalez Direct at 18.

<sup>65</sup> Gonzalez Direct at 18.

<sup>66</sup> Gonzalez Direct at 18.

<sup>67</sup> Gonzalez Direct at 19.

<sup>68</sup> Gonzalez Direct at 19.



Therefore, the above arguments and the fact that Duke is made whole on lost distribution revenues through its decoupling mechanism<sup>69</sup> justifies a hard cap at the lower end of the ACEEE Report range.<sup>70</sup>

**B. OCC's recommendations to the methodology to be used for calculating shared savings should be adopted to protect consumers.**

OCC witness, Wilson Gonzalez, provided three recommendations to the methodology used for calculating Duke's shared savings incentive for 2016 in order to protect consumers.<sup>71</sup> Mr. Gonzalez suggested that the TRC be used to calculate the net benefits associated with the shared savings incentive, rather than the UCT.<sup>72</sup> Second Mr. Gonzalez recommended that the energy savings used should be net savings, not gross savings (net to gross issue). And finally, Mr. Gonzalez advised that the calculation of Duke's shared savings incentive should be on a pre-tax basis.<sup>73</sup> These recommendations should be adopted if the PUCO permits Duke to charge customers for shared savings in 2016.

**1. If Duke has a shared savings incentive for 2016, the PUCO should protect consumers from excessive charges by using the TRC to Calculate Net Benefits.**

The Utility proposes to use the UCT to determine the shared savings collected from customers. The UCT is a partial benefit-cost analysis and only captures the benefits of the programs to the utility and not costs to utility customers as a whole.<sup>74</sup> The UCT

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<sup>69</sup> A "decoupling mechanism" is a rate adjustment mechanism that separates (decouples) an electric utility's fixed cost recovery from the amount of electricity it sells.

<sup>70</sup> Transcript at pp. 142-143.

<sup>71</sup> Direct Testimony of Wilson Gonzalez at 21.

<sup>72</sup> Gonzalez Direct at 21.

<sup>73</sup> Gonzalez Direct at 21.

<sup>74</sup> Gonzalez Direct at 22.

fails to take into account significant participant (customer) costs and therefore cannot be used to determine the complete net benefit of the program.<sup>75</sup> The Utility's use of the UCT negatively impacts customers because it leads to a higher net benefit to the utility. That higher net benefit is the basis for deriving shared savings and correspondingly higher costs to customers.<sup>76</sup>

The PUCO should use the TRC for purposes of calculating incentive awards to utilities because it is the only analytical tool that accounts for *all* costs and benefits of the utility programs, and in doing so reduces what customers pay.<sup>77</sup> To this end, the TRC is a benefit-cost test that measures the net avoided costs of a program based on considering the total costs of the program, including both the participants' and the utility's costs. As Mr. Gonzalez testified, "of all the tests, the TRC is the broadest measure of program cost effectiveness from the standpoint of energy acquisition."<sup>78</sup> This makes the TRC useful for comparing supply and demand side resources.<sup>79</sup>

Using the TRC would result in utility incentives taking the total net benefit that the programs provide into consideration, not just the net benefits provided only to the utility. A complete test is better than a partial test, like the UCT. For this reason, Mr. Gonzalez explained that "the TRC is the litmus test used by most states (including Ohio) to determine the overall efficiency of their energy efficiency programs."<sup>80</sup>

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<sup>75</sup> Id.

<sup>76</sup> Id.

<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> "Understanding Cost-Effectiveness of Energy Efficiency Programs: Best Practices, Technical Methods, and Emerging Issues for Policy-Makers," National Action Plan For Energy Efficiency, November 2008. Page 1-2.

Mr. Gonzalez included an example to illustrate the impact of using the TRC over the UCT for consumers in his testimony. In this regard, Mr. Gonzalez explained:

Using the TRC over the UCT is not a trivial theoretical matter for customers. As an example, Duke's net benefits using the UCT are \$220 million -- 18 percent greater than the \$186 million calculated by using the TRC.<sup>81</sup>

Use of the UCT instead of the TRC would force Duke's customers to pay a larger shared savings award to Duke due to the failure of the incentive mechanism calculation to take into consideration all of the program costs. This is wrong. The TRC should be used instead to protect consumers.

**2. The energy savings used should be net savings, not gross savings in order to protect consumers from being charged for over-stated shared savings awards.**

Mr. Gonzalez explained that gross energy savings may be appropriate for determining utility compliance with the Ohio energy efficiency requirements, but there should be a net to gross savings adjustment that accounts for free riders and spillover effects when it comes to determining Duke's incentive payment.<sup>82</sup> And the PUCO has stated that "... where an energy efficiency program is implemented by a utility, and customers have already taken the steps promoted by the program, the net savings methodology may be more appropriate."<sup>83</sup> As an example, Mr. Gonzalez pointed out that in California a 0.8 ratio default net-to-gross figure is used until such time as a new, more appropriate, value is determined in the course of program evaluation.<sup>84</sup> Using the above

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<sup>81</sup> Duke Responses to OCC INT -02-016 (Attachment 6) and 02-017 (Attachment 7) in Case No. 13-431-EL-POR.

<sup>82</sup> Gonzalez Direct at 25-26.

<sup>83</sup> October 15, 2009 Finding and Order in Case No. 09-512-GE-UNC, page 5.

<sup>84</sup> [http://docs.cpuc.ca.gov/published/Final\\_decision/11474-13.htm](http://docs.cpuc.ca.gov/published/Final_decision/11474-13.htm)

value as an example, an energy efficiency program that is projected to save 10,000 kWh is credited with only 8,000 kWh saved for incentive purposes.<sup>85</sup>

**3. A shared savings incentive should be calculated on a pre-tax basis to protect customers from overpaying.**

The calculation of the shared savings incentive should be on a pre-tax basis. Using an after tax calculation is a concern for customers because customers will not only pay the Utility an incentive on their shared savings, but will also be asked to pay for Duke's tax liability. Grossing up for taxes effectively grants Duke a top-tier shared savings of over 20% of the net benefits. Duke's approach thereby forces its customers to pay an additional 7% of the net benefits. While grossing up for taxes is common in distribution rate cases where utilities are given the opportunity to earn an authorized rate of return, it is not appropriate for a discretionary energy efficiency shared savings mechanism.<sup>86</sup>

**C. Duke should be prohibited from using banked savings from previous years to collect higher incentive payments from customers.**

Duke claims that its current EE/PDR portfolio is not designed in a way to allow the Utility to meet the annual benchmarks of former R.C. 4928.66 for the year 2016.<sup>87</sup> It also complains that it cannot earn a shared savings incentive if it cannot use savings generated from EE/PDR efforts in previous years (also referred to as "banked savings").<sup>88</sup>

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<sup>85</sup> Gonzalez Direct at 26.

<sup>86</sup> Under OAC 4901:1-39-07(A), a utility incentive is permissive.

<sup>87</sup> By failing to seek an amendment to its EE/PDR portfolio in accordance with Section 6(B) of S.B. 310, Duke effectively chose to continue its current portfolio plan with no amendments through December 31, 2016, which would be subject to "the provisions of section 4928.66 of the Revised Code, as it existed *prior to the effective date of [SB 310]*."; *see also*, Transcript at p. 41.

<sup>88</sup> Duff Direct at 9-10.

While this fact in and of itself is contested,<sup>89</sup> Duke should not be permitted to use banked savings for purposes of calculating the shared savings incentive when it has not demonstrated exemplary performance. Neither Ohio law nor PUCO precedent permit the use of banked savings for purposes of calculating the shared savings incentive. Nor is it good policy to allow Duke to rely on banked EE/PDR savings from previous years because it undermines the entire concept of a yearly *incentive*.

**1. Ohio law and PUCO precedent do not permit, authorize, or support the use of banked savings in calculating the shared savings mechanism.**

After the passage of Senate Bill 310, Ohio law expressly permits utilities to bank “energy efficiency savings or peak demand reduction amount achieved in excess of the requirements,” and apply them “toward achieving the energy efficiency or peak demand reduction requirements in future years.”<sup>90</sup> At no point, however, do the provisions of Senate Bill 310 permit banking for purposes of calculating the shared savings incentive. In fact, Duke’s only witness, Tim Duff, conceded that very point.<sup>91</sup> Beyond the text itself, the statutory canons of construction also lend themselves to that same conclusion.

As the Supreme Court of Ohio has held, “under the general rule of statutory construction, *expressio unius est exclusio alterius*, ‘the expression of one or more items of a class implies that those not identified are to be excluded.’”<sup>92</sup> The Supreme Court also cited to Black’s Law Dictionary for the example that “the rule that each citizen is

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<sup>89</sup> Transcript at p. 205 (opining that Duke could still earn a shared savings incentive mechanism without the use of banked savings “if it applied itself”).

<sup>90</sup> R.C. 4928.662(G).

<sup>91</sup> Transcript at p. 41.

<sup>92</sup> *State ex rel. Salim. v. Ayed*, 141 Ohio St.3d 129, 134, 2014-Ohio-4736, 22 N.E.3d 1054, quoting *State v. Droste*, 83 Ohio St.3d 36, 39, 1998 Ohio 182, 697 N.E.2d 620 (1998).

entitled to vote implies that noncitizens are not entitled to vote.”<sup>93</sup> The Ohio General Assembly expressly acknowledged and permitted the use of banked savings for purpose of compliance with the mandates set forth in R.C. 4928.66. By not expressing or permitting the use of banked savings for purposes of shared savings, however, the *expressio unius* canon of statutory construction indicates that banked savings may not be used in such a way.

Prior to Senate Bill 310, however, shared savings was strictly a PUCO-created incentive mechanism.<sup>94</sup> Even then, the PUCO did not permit utilities to use banked savings for purposes of calculating the shared savings incentive. It was most clearly stated in FirstEnergy’s<sup>95</sup> 2012 portfolio case, which was the only portfolio case that was not resolved by stipulation. In that case, the PUCO held that “banked savings shall only be counted toward shared savings *in the year that it was banked*.”<sup>96</sup>

While Duke’s witness Timothy Duff claims that Ohio Power (“AEP Ohio”) and Dayton Power and Light (“DP&L”) also have an ability to use banked savings for purposes of calculating their shared savings incentive,<sup>97</sup> the language of the Stipulations tell a different story. The Stipulation in the AEP Ohio’s portfolio plan established that “AEP Ohio will only be eligible for shared savings if it exceeds the benchmarks of Sections 4928.66(A)(1)(A) and (A)(1)(b), Revised Code, *for a particular calendar*

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<sup>93</sup> *Schussheim v. Schussheim*, 137 Ohio St.3d 133, 139, 2013-Ohio-4529, 998 N.E.2d 446.

<sup>94</sup> *See*, Ohio Adm. Code 4901:1-39-07(A).

<sup>95</sup> FirstEnergy is comprised of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company.

<sup>96</sup> *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 Through 2015*, 12-2190-EL-POR, Opinion and Order at p. 16 (March 20, 2013) (emphasis added); *see also*, Transcript at p. 188 (“I know for sure that FirstEnergy would not use any historical bank for shared savings”).

<sup>97</sup> Transcript at pp. 45, 82-83.

*year.*”<sup>98</sup> And employing language that is also found in the AEP Ohio stipulation, the Opinion and Order approving the Stipulation in DP&L’s 2013 portfolio plan acknowledged that “[i]n a year in which previous years’ over-compliance is used to comply with the benchmarks, shared savings shall be based only on impacts generated *in the current year.*”<sup>99</sup> The language in both stipulations removes the complication of having two accounts, a compliance bank and an incentive bank, and eliminates the opportunity for AEP and DP&L to game the system for their benefit.

Duke even acknowledges that the Stipulations controlling its shared savings mechanism as it currently exists do not expressly allow it to use banked savings to trigger the shared savings incentive.<sup>100</sup> In fact, the PUCO recently rejected Duke’s request to update its EE/PDR rider that calculated a shared savings incentive of \$11,635,152 based upon the use of 85,122 mWh of banked savings.<sup>101</sup> In the 14-457-EL-RDR case, Duke claimed to “overachieve[] utilizing banked energy efficiency impacts versus its annual

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<sup>98</sup> *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, 11-5568-EL-POR, Stipulation at p. 6 (November 29, 2011).

<sup>99</sup> *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan for 2013 through 2015*, 13-833-EL-POR, Opinion and Order at 9 (December 4, 2013); *see also*, *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan for 2013 through 2015*, 13-833-EL-POR Stipulation at 12 (October 2, 2013).

<sup>100</sup> Transcript at pp. 84-85; *See generally*, *In the Matter of the Application of Duke Energy Ohio, for an Energy Efficiency Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in the Existing Portfolio*, Case No. 11-4393-EL-RDR, Stipulation and Recommendation (November 18, 2011); *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Energy Efficiency and Peak Demand Reduction Portfolio of Programs*, Case No. 13-431-EL-POR, Amended Stipulation and Recommendation (September 9, 2013).

<sup>101</sup> *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 (“Duke 2013 True-Up”)*, Case No. 14-457-EL-RDR, Direct Testimony of James E. Ziolkowski, at Attachment JEZ-1 (March 28, 2014).

mandates by over 16%.”<sup>102</sup> In order to meet the statutory mandate for 2013, Duke was required to reduce usage by 181,368 mWh but only achieved 125,266 mWh.<sup>103</sup> As a result, Duke attempted to use 85,122 mWh of banked savings to reach 116% of the mandate<sup>104</sup> so that they could “collect an incentive of 13% of the net benefit achieved through its programs.”<sup>105</sup> But the PUCO denied Duke’s request, finding that “the company may only use the banked savings to reach its mandated benchmark.”<sup>106</sup> The Commission explained that “in order for the structure to continue to serve as a *true incentive* for Duke to exceed the benchmarks, the Commission finds the banked saving cannot be used to determine the annual shared savings achievement level.”<sup>107</sup>

Based upon a textual and statutory interpretation of the Ohio Revised Code as well as PUCO precedent, Duke should not be permitted to expand its shared savings incentive by including in the mechanism an ability to use banked savings to trigger the incentive.

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<sup>102</sup> *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 (“Duke 2013 True-Up”)*, Case No. 14-457-EL-RDR, Direct Testimony of Trisha A. Haemmerle, at 9 (March 28, 2014); *see also, Duke 2013 True-Up*, Case No. 14-457-EL-RDR, Direct Testimony of James E. Ziolkowski, at Attachment JEZ-1 p. 1 (March 28, 2014).

<sup>103</sup> *Duke 2013 True-Up*, Case No. 14-457-EL-RDR, Direct Testimony of James E. Ziolkowski at Attachment JEZ-1 p. 1.

<sup>104</sup> *Duke 2013 True-Up*, Case No. 14-457-EL-RDR, Direct Testimony of James E. Ziolkowski at Attachment JEZ-1 p. 1.

<sup>105</sup> *Duke 2013 True-Up*”), Case No. 14-457-EL-RDR, Direct Testimony of Trisha A. Haemmerle at 9.

<sup>106</sup> *Duke 2013 True-Up*, Case No. 14-457-EL-RDR Finding and Order at 5.

<sup>107</sup> *Duke 2013 True-Up*, Case No. 14-457-EL-RDR Finding and Order at 5 (emphasis added).



**2. Neither public policy nor the record in this case supports the use of banked savings for purposes of calculating the shared savings incentive.**

As Duke witness Tim Duff conceded at the hearing in this matter, Ohio law does not guarantee a shared savings incentive mechanism.<sup>108</sup> To the contrary, the shared savings incentive is an optional reward that is designed “to reward exemplary utility performance in delivering energy efficiency and peak demand reduction programs to its customers.”<sup>109</sup> Duke’s recent performance, however, is far from exemplary seeing as the Utility has not met its annual benchmarks without the use of banked savings since 2012. Duke missed its 2013 annual benchmark by 56,102 mWh<sup>110</sup> and then missed its 2014 annual benchmark by 78,053 mWh.<sup>111</sup> And Duke projects that it will miss the 2015 annual benchmark since it is only projecting to achieve 134,940 mWh of reductions.<sup>112</sup>

By comparison, the other three electric distribution utilities in the state have exceeded their annual benchmarks and have not had to use banked savings for purposes of calculating the shared savings incentive. For example, AEP Ohio’s 2013 annual benchmark was 387.9 gWh of reduction in usage, but the company achieved 632.7 gWh of energy reduction (including transmission and distribution).<sup>113</sup> And in 2014, AEP

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<sup>108</sup> Transcript at p. 41.

<sup>109</sup> Gonzalez Direct at 27.

<sup>110</sup> *Duke 2013 True-Up*, Case No. 14-457-EL-RDR, Direct Testimony of James E. Ziolkowski at Attachment JEZ-1 p. 1; *see also*, Transcript at p. 15 (July 7, 2015).

<sup>111</sup> *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 (“Duke 2014 True-Up”)*, Case No. 15-534-EL-RDR, Direct Testimony of James E. Ziolkowski at Attachment JEZ-1 p. 1 (March 30, 2015); *see also*, Transcript at p. 20.

<sup>112</sup> *Duke 2014 True-Up*, Case No. 15-534-EL-RDR, Direct Testimony of James E. Ziolkowski at Attachment JEZ-1 p. 1.

<sup>113</sup> *In the Matter of the Annual Portfolio Status Report Under Rule 4901:1-39-05(C), Ohio Administrative Code, by Ohio Power Company*, Case No. 14-853-EL-EEC, 2013 Portfolio Status Report of the Energy Efficiency and Peak Demand Response Programs at pp. 5-8 (May 15, 2014).

Ohio's annual benchmark was 431.8 gWh, but again, the company far exceeded the amount after it yielded 678.7 gWh of energy reduction.<sup>114</sup> Similarly, Dayton Power and Light's 2013 annual benchmark mandated 124,506 mWh of reduction but the company achieved a reduction of 203,491 mWh.<sup>115</sup> In 2014, DP&L achieved 182,014 mWh of reductions when the mandate only required 138,203 mWh.<sup>116</sup> Even FirstEnergy, the only utility to amend its portfolio pursuant to Senate Bill 310, exceeded its annual benchmarks for 2013 and 2014. In 2013, FirstEnergy achieved 675,460 mWh (including T&D) in reductions, well beyond its annual benchmark of 504,809 mWh.<sup>117</sup> In 2014, FirstEnergy had an annual benchmark of 526,262 mWh and achieved of 774,368 mWh (including transmission and distribution improvements) of reductions.<sup>118</sup> In fact, Duke's only witness, Timothy Duff, acknowledged that none of the other utilities have had to use banked savings in order to trigger their shared savings mechanism.<sup>119</sup> Duke should not be permitted to receive an award based upon an annual achievement when the Utility has consistently failed to meet its annual benchmarks for the past two years.

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<sup>114</sup> *In the Matter of the Annual Portfolio Status Report Under Rule 4901:1-39-05(C), Ohio Administrative Code, by Ohio Power Company*, Case No. 15-919-EL-EEC, 2014 Portfolio Status Report of the Energy Efficiency and Peak Demand Response Programs at pp. 5-8 (May 15, 2015).

<sup>115</sup> *In the Matter of The Dayton Power and Light Company's Portfolio Status Report*, Case No. 14-738-EL-POR, 2013 Energy Efficiency and Demand Reduction/Response Portfolio Status Report at pp. 3, 8-10, Appendix A (May 15, 2014).

<sup>116</sup> *In the Matter of The Dayton Power and Light Company's Portfolio Status Report*, Case No. 15-777-EL-POR, 2013 Energy Efficiency and Demand Reduction/Response Portfolio Status Report at pp. 3, 8-10, Appendix A (May 15, 2015).

<sup>117</sup> *In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio Status Report of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, Case Nos. 14-859-EL-EEC, et al., Energy Efficiency and Peak Demand Reduction Program Portfolio Status Report to the Public Utilities Commission of Ohio at p. 5 (May 15, 2014).

<sup>118</sup> *In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio Status Report of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, Case Nos. 15-900-EL-EEC, et al., Energy Efficiency and Peak Demand Reduction Program Portfolio Status Report to the Public Utilities Commission of Ohio at p. 5 (May 15, 2015).

<sup>119</sup> Transcript at p. 45.

Duke tries to lay itself on the mercy of the PUCO by explaining that it did not design its portfolio to meet the annual benchmarks with the understanding that it would be able to use banked savings to trigger its shared savings incentive level.<sup>120</sup> In that same vein, Duke also contends that Senate Bill 310 exacerbated the impact of the banked savings because “the Company could not file applications with the Commission to add new programs to its portfolio after September 20, 2014.”<sup>121</sup> But Duke was certainly aware of Senate Bill 310 when it was signed into law on June 10, 2014 – three months before its effective date. Moreover, Senate Bill 310 had been the subject of much discussion for months leading up to its passage. At no point, however, did Duke choose to amend its portfolio *before* the effective date, knowing that its shared savings mechanism was due to expire after 2015. Instead, Duke chose to carry on with its current portfolio that had not met its annual benchmarks in 2013 and 2014 and was apparently not designed to meet the annual benchmarks in 2015 either.

Even after Senate Bill 310 became effective in September, Duke had thirty days to amend its portfolio plan under the new laws enacted by Senate Bill 310.<sup>122</sup> But again, Duke chose not to avail itself of this option despite the impending lapse of its shared savings incentive mechanism. As OCC witness Gonzalez explained, when asked about Duke not being able to achieve a shared savings incentive if not permitted to use banked savings, “the company was aware of that risk, [but] the company rolled the dice in

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<sup>120</sup> Duff Direct at 7-8; *see also*, Transcript at p. 41.

<sup>121</sup> Duff Direct at 7-8.

<sup>122</sup> *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 Portfolio Plans for 2013 to 2015*, Case No. 12-2190-EL-POR, Verified Application for Approval of Amended Energy Efficiency and Peak Demand Reduction Plans for 2015 Through 2016 (September 17, 2014).

assuming that they would benefit from the same type of incentive mechanisms used previously.”<sup>123</sup>

The evidence in this case also indicates that it is not in the best interest of public policy to allow Duke to use banked savings for the 2016 shared savings incentive. OCC witness Wilson Gonzalez consistently testified that Duke “should not be permitted to use ‘banked’ savings from previous years to trigger the shared savings incentive and make customers pay more for 2016.”<sup>124</sup> Mr. Gonzalez explained that most business incentives do not carry over to future years, and shared savings should be no different because it is designed to reward performance for exceeding the annual savings benchmarks.<sup>125</sup>

Similarly, OEG witness Dr. Stephen J. Baron testified that “[w]hile the use of ‘banked’ MWh is appropriate to determine if the Company met its statutory savings benchmark, it is inappropriate to include previously “saved” MWh in the determination of incentive payments.”<sup>126</sup> Mr. Baron explained that because the shared savings mechanism is to induce the Utility to exceed its benchmarks each year, “[p]rior overachievement of a previous benchmark does not need to be ‘induced.’”<sup>127</sup>

Even the PUCO Staff agreed with this position when witness Gregory Scheck testified that Duke should not be permitted to use accrued banked savings to earn shared savings in a future year.<sup>128</sup> Mr. Scheck reiterated his position at hearing stating “you can

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<sup>123</sup> Transcript at p. 123-124.

<sup>124</sup> Gonzalez Direct at 6, 10-11, 27-28.

<sup>125</sup> Gonzalez Direct at 28.

<sup>126</sup> Baron Direct at 9.

<sup>127</sup> Baron Direct at 9

<sup>128</sup> Scheck Direct at 2.

borrow from any bank that you've earned previously to reach compliance, but any historical bank cannot be used to earn a future year's shared savings.”<sup>129</sup>

**D. OEG’s recommendation on savings below the benchmark should be adopted to protect consumers.**

As set forth in OCC’s Comments and supported by testimony in this matter, Duke should not be permitted to charge customers for shared savings below the statutory benchmark. As it is currently calculated, “Duke’s current tiered formula only reflects a shared percentage if the MWh savings is in excess of the benchmark level for the year, the resulting percentage is then applied to 100% of the dollar savings, not just the dollar savings above the benchmark level.”<sup>130</sup> Under this design, Duke would not just get shared savings on the savings that exceed the benchmarks, but also on the amount that was *required* to meet the annual benchmark. As a result, Ohio Energy Group’s witness Dr. Baron explained that under a lineal relationship, Duke keeps far more of the benefits than just the 13% under the shared savings incentive structure.<sup>131</sup>

Incentive mechanisms should encourage innovation and motivate utilities to exceed statutory benchmarks. To do so, the shared savings “incentive is supposed to be tied to the amount of EE-PDR that is achieved each year in excess of the mandated benchmark level.”<sup>132</sup> Therefore, Dr. Baron testified that the shared savings “incentive mechanism should only apply to the dollar savings above the benchmark.”<sup>133</sup>

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<sup>129</sup> Transcript at p. 187.

<sup>130</sup> Baron Direct at p. 10 (June 20, 2015).

<sup>131</sup> Transcript at p. 114.

<sup>132</sup> Baron Direct at p. 10 (June 20, 2015).

<sup>133</sup> Baron Direct at p. 10; Transcript at pp. 112-114.

Based on this evidence in the record, OCC agrees that to the extent the PUCO approves a shared savings mechanism for 2016, it should function as a true incentive. This means that the Utility should only be allowed to collect the incentive for the amount of savings that exceed the benchmark.

#### **IV. CONCLUSION**

The policy of this State includes ensuring that consumers have adequate, reliable, and reasonably priced retail electric service.<sup>134</sup> Energy efficiency portfolios should not be a profit center for utilities at the expense of customers. Duke's uncapped incentive should end. Customers should receive more of the net benefits from Duke's energy efficiency programs. Charges to customers for Duke's incentive mechanism should be minimized. It is time for the utility incentive pendulum in Ohio to start moving in the direction of the customer. Consumer protections are critical.

To ensure that customers are paying reasonable and not excessive rates, a hard dollar cap of no more than five percent of prudent program spending on Duke's shared savings mechanism for 2016 is appropriate. And the PUCO should adopt the consumer protections recommended by OCC for calculating shared savings, including: use of the Total Resource Cost Test rather than the Utility Cost Test; use of net, rather than gross program savings; and calculating the incentive on a pretax basis.<sup>135</sup> To further protect customers from Duke overcharging customers for EE/PDR, the Utility should not be permitted to use banked savings from previous years to charge customers for shared

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<sup>134</sup> See, R.C. 4928.02(A).

<sup>135</sup> Gonzalez Direct at 21.

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 Post Hearing Brief was served on the persons stated below via electronic transmission, this 21st day of August 2015.

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