

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Annual Energy)	
Efficiency Portfolio Status Report of Duke)	Case No. 17-689-EL-EEC
Energy Ohio, Inc.)	
)	

**COMMENTS BY
NATURAL RESOURCES DEFENSE COUNCIL AND
ENVIRONMENTAL LAW & POLICY CENTER**

On April 17, 2017, Duke Energy Ohio (“Duke” or the “Company”) filed its Annual Energy Efficiency and Peak Demand Reduction Status Report with the Public Utilities Commission of Ohio (“Commission”) for the period of January 1, 2016 to December 31, 2016 (the “Report”), as required under O.A.C. 4901:1-39-05. O.A.C. 4901:1-39-06(A) permits interested persons to file comments within thirty days of such filing.

Natural Resources Defense Council and Environmental Law & Policy Center (“Environmental Commenters”) now file these comments, which focus on the portion of the Report that quantifies the effects of modified language under Senate Bill (“SB”) 310, codified at R.C. 4928.662, that adjusted how electric distribution utilities may estimate their energy savings.¹ Duke seeks to add to its energy efficiency bank an additional 934,519 MWh of historical savings under this language for the 10-year period between 2006 and 2015—amounting to an added 4.3% in cumulative savings, or almost a fifth of the 22% cumulative savings goal for 2027 under R.C. 4928.66.² As a threshold issue, Environmental Commenters note a discrepancy of nearly 60,000 MWh between this savings estimate in the Report and an

¹ Report, App. F (Nexant, *Ohio Senate Bill 310 Energy Efficiency Savings Analysis, 2006-2015*, August 15, 2016).

² *Id.* at 9, Table 2 (column labeled “Updated Prior Impacts for SB310 Counting Provisions”).

874,673 MWh estimate for the same period in the Nexant analysis on which the Report relies.³

While the source of this discrepancy is unclear, Environmental Intervenors base these comments on the 934,519 MWh claimed in the Report itself.

Environmental Commenters recommend that the Commission take the following actions regarding the SB 310 language in question: (1) open a rulemaking to resolve ambiguities and impart consistency to the interpretation of the modified counting language in SB 310; (2) find that savings from the customer action and federal standards approaches articulated in SB 310 cannot be retroactively counted prior to 2014 ; and (3) confirm that any SB 310 claimed savings are excluded from a utility's shared savings award, consistent with Commission precedent. These actions are critical to ensure consistency and transparency in implementing the counting provisions of SB 310, and to ensure that any resulting approach does not diminish the emphasis on providing consumers with high-quality energy efficiency programs that deliver new, cost-effective savings year in and year out.

I. COMMENTS

A. Environmental Commenters recommend the Commission open a rulemaking proceeding to resolve ambiguities and impart consistency to the interpretation of the modified counting language in SB 310.

There is a lack of clarity in the SB 310 language that Duke invokes in its Report, which should be addressed through a formal Commission rulemaking. The Ohio legislature passed SB 310 in 2014, amending Ohio's initial energy efficiency requirements (originally enacted under SB 221).⁴ Among other things, SB 310 introduced the following new language that adjusts how distribution utilities estimate their energy savings:

³ *Id.* at App. F, 1, 27.

⁴ Ohio Legislative Service Commission, Am. Sub. S.B. 221 127th General Assembly.

For the purpose of measuring and determining compliance with the energy efficiency and peak demand reduction requirements under section 4928.66 of the Revised Code, the public utilities commission shall count and recognize compliance as follows:

(A) Energy efficiency savings and peak demand reduction achieved through actions taken by customers or through electric distribution utility programs that comply with federal standards for either or both energy efficiency and peak demand reduction requirements, including resources associated with such savings or reduction that are recognized as capacity resources by the regional transmission organization operating in Ohio in compliance with section 4928.12 of the Revised Code, shall count toward compliance with the energy efficiency and peak demand reduction requirements.

(B) Energy efficiency savings and peak demand reduction achieved on and after the effective date of S.B. 310 of the 130th general assembly shall be measured on the higher of an as found or deemed basis, except that, solely at the option of the electric distribution utility, such savings and reduction achieved since 2006 may also be measured using this method. For new construction, the energy efficiency savings and peak demand reduction shall be counted based on 2008 federal standards, provided that when new construction replaces an existing facility, the difference in energy consumed, energy intensity, and peak demand between the new and replaced facility shall be counted toward meeting the energy efficiency and peak demand reduction requirements.⁵

Duke relies on this language, codified in R.C. 4928.662, as the basis for adding 934,519 MWh to its cumulative savings bank.⁶

There remain open questions about exactly which measures are eligible to count under R.C. 4928.662. For example, subsection (A) of that provision references the counting of “[e]nergy efficiency savings and peak demand reduction achieved through actions taken by customers *or* through electric distribution utility programs that comply with federal standards . . .” (emphasis added). But this language is vague as to what specific actions qualify in each of these categories. Further, with respect to the latter provision of that subsection, even if the

⁵ R.C. 4928.662(A), (B).

⁶ Report, App. F at 3-4.

definition were clear (which it is not), the methodology for determining the degree to which utility-run programs contribute to meeting federal energy standards involves a host of fact-intensive questions, such as: developing the baseline efficiency levels from which savings that contribute to meeting federal standards are calculated, determining how a utility should estimate the number of new products purchased in its service territory that meet the relevant standards, protecting against double counting, accounting for opt-outs, etc. Without clear guidance for how best to structure this methodology, it will be developed on a utility-by-utility ad hoc basis, likely resulting in a patchwork of inconsistent savings estimates.

A formal Commission rulemaking process is essential to resolve these open questions. It is especially needed because these questions are not merely academic; they could have significant implications for the depth, breadth, and quality of energy efficiency programs in future years. To put the 934,519 MWh of historical savings in perspective, in 2016 Duke was required to run programs that saved an incremental 215,055 MWh of energy.⁷ Thus, in its Report Duke is seeking to retroactively add the equivalent of more than four years' worth of energy efficiency programs to its cumulative savings bank. This is no small number. The magnitude to which SB 310 expands the categories of savings will have an impact on future energy efficiency portfolios. For example, the modified SB 310 categories rest largely on actions customers take outside of utility-run programs. The more a utility relies on these categories to reach its annual compliance targets, the less it may rely on programs that are actively designed to provide new, cost-effective benefits to customers. Over time, this could shift the focus entirely toward portfolios that do little more than document savings that a utility had no material role in producing.

⁷ Report at 6, Table 1.

Given these concerns, Environmental Commenters request that the Commission open a formal rulemaking docket to clarify and standardize the interpretation of SB 310's modified counting language.

B. Environmental Commenters recommend the Commission find that savings from the customer action and federal standards measures articulated in SB 310 cannot be retroactively counted prior to 2014.

While there are a number of methodological questions regarding the implementation of R.C. 4928.662 that the Commission should address through a rulemaking, there is one issue that the Commission should be able to resolve definitively in this case: R.C. 4928.662 does not authorize the retroactive counting of customer action and federal standard measures prior to the effective date of SB 310 of September 12, 2014. The law authorizes retroactive application back to 2006 *only* with respect to measuring energy efficiency savings and peak demand reduction that Duke has already achieved “on the higher of an as found or deemed basis,” under R.C. 4928.662(B):

Energy efficiency savings and peak demand reduction achieved on and after the effective date of S.B. 310 of the 130th general assembly shall be measured on the higher of an as found or deemed basis, except that, solely at the option of the electric distribution utility, such savings and reduction achieved since 2006 may also be measured using this method.

In other words, R.C. 4928.662(B) grants the utility discretion to retroactively count additional savings only through application of the “as found” versus “deemed” savings method. Since the retroactive application language relates only to that method, it implicitly excludes the retroactive counting of savings from “actions taken by customers or through electric distribution utility programs that comply with federal standards,” separately described in R.C. 4928.662(A).⁸

⁸ See *State ex rel. Hall v. Police Relief & Pension Fund*, 149 Ohio St. 367, 378 (1948) (under doctrine of *inclusio unius est exclusio alterius*, the specification of particular statutory categories subject to a provision implicitly excludes categories not so named).

The Nexant analysis accompanying Duke's Report applied the "as found" vs. "deemed" savings method to claim savings higher than that reflected in Duke's past evaluation, measurement, and verification reports for its programs based on alternative determinations of the applicable baseline.⁹ The result was a claim of additional incremental savings of approximately 79,567 MWh. Those are the only savings that Duke may validly add to its cumulative savings bank prior to the effective date of SB 310, under the plain language of R.C. 4928.662(B).

C. Environmental Commenters recommend the Commission confirm that any SB 310 claimed savings is excluded from the calculation of annual shareholder incentives, consistent with Commission precedent.

While it appears that Duke is not seeking shared savings on the 934,519 MWh of historical savings, there nonetheless is value to the Commission clarifying how it intends to address shared savings for the modified SB 310 categories in future years. Environmental Intervenors do not dispute that SB 310 gives utilities the discretion to count the qualifying categories of savings towards compliance with their statutory targets. But the Commission has drawn a distinction between allowing these categories to count for compliance, versus allowing them to count toward a utility's shared savings. The Commission has specifically prohibited the counting of savings derived from customer actions toward the shareholder incentive:

However, the Companies may not receive shared savings for energy savings under the Customer Action Program. The Commission has never allowed shared savings for programs like the historic mercantile customer program which involves no action by the Companies to achieve the energy savings. The Companies have not demonstrated that this policy should be changed.¹⁰

⁹ Report, App. F at 14-19.

¹⁰ *In re FirstEnergy ESP IV*, Case No. 14-1297 EL-SSO, Fifth Entry on Rehearing at 147 (Oct. 12, 2016).

Environmental Intervenors recommend the Commission clarify that this prohibition extends to all the expanded savings measures listed under SB 310. Those measures fall within the broader category of “business-as-usual” customer savings that a utility had no material role in producing—whether they document customers taking the initiative outside of utility programs to install energy efficiency appliances, or whether they capture increased uptake of energy efficient lighting that was made possibly via federal standards. As with clarifying exactly which measures “count” under the modified SB 310 language, the determination of which of these measures qualify for shared savings will also have an impact on the quality of energy efficiency programs moving forward. Shared savings is valuable in that it incentivizes exemplary utility performance above and beyond the statutory target. But the incentive should be keyed toward active utility-driven savings as the Commission has previously ruled.¹¹ The less a utility receives shareholder incentives based on savings that it had no material role in producing, the more it will focus on the quality and impacts of its own programs. This retains the incentive for utilities to emphasize programs that actively provide new, cost-effective benefits to customers.

Commission clarity on this issue would therefore protect and enhance the quality of portfolios, allowing utilities and stakeholders the space to develop programs that produce greater, longer-lasting savings opportunities for customers.

II. CONCLUSION

Environmental Commenters appreciate the opportunity to submit these comments and recommend that the Commission take the following actions: (1) open a rulemaking docket to resolve ambiguities in the modified counting language in SB 310; (2) disallow the retroactive counting of savings from the categories described above; and (3) confirm that any SB 310 claimed savings is excluded from a utility’s shareholder incentive. These actions are critical to

¹¹ *Id.*

ensure future consistency and transparency as utilities interpret and report savings under SB 310, and to maintain the integrity of energy efficiency portfolios.

Dated: May 17, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Comments by Natural Resources Defense Council and Environmental Law & Policy Center* submitted on behalf of the Natural Resource Defense Council and Environmental Law & Policy Center was served by electronic mail upon the following Parties of Record on May 17, 2017.

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5/17/2017 3:59:21 PM

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Case No(s). 17-0689-EL-EEC

Summary: Comments Comments by Natural Resources Defense Council and Environmental Law & Policy Center electronically filed by Madeline Fleisher on behalf of Natural Resources Defense Council and Environmental Law and Policy Center