

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	)	
Ohio Power Company for an	)	Case No. 20-585-EL-AIR
Increase in Electric Distribution Rates.	)	
 In the Matter of the Application of	 )	
Ohio Power Company	)	Case No. 20-586-EL-ATA
for Tariff Approval.	)	
 In the Matter of the Application of	 )	
Ohio Power Company for Approval	)	Case No. 20-587-EL-AAM
to Change Accounting Methods.	)	

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**MEMORANDUM IN OPPOSITION TO OCC’S MOTION TO STRIKE**

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**I. BACKGROUND**

Ohio Power Company (“AEP Ohio” or the “Company”) is a public utility as defined by Ohio Revised Code (R.C.) 4905.02 and 4905.03 and is engaged in the business of supplying electric transmission and distribution service to approximately 1.5 million customers in Ohio. The Company’s Application in this case was filed pursuant to R.C. 4909.18 and related sections of the Ohio Revised Code for authority to make changes and increases in electric distribution rates applicable in all incorporated communities and unincorporated areas within AEP Ohio’s entire service territory. As part of its Application and supporting testimony, the Company proposed a set of demand-side management (DSM) programs designed to return to a more traditional utility role in energy efficiency and demand management.

Company witness Williams described the DSM Plan in testimony:

While participants in the programs save energy and reduce demand, participants and non- participants alike benefit as well through the avoidance of generation costs

in the Company's service territory over the life of the demand and energy saving programs. These avoided costs are less than the DSM Plan's costs for programs, so the DSM Plan is cost effective. The DSM Plan represents a suite of residential, business and cross sector programs that provide opportunities to benefit all customers.

Direct Test. Of Jon F. Williams (June 15, 2020), at 5. Mr. Williams further described how the Company historically provided programs to help customers save energy and manage peak demand prior to any legislative requirements to do so, such as:

- programs that encourage customers to use equipment such as storage water heaters to heat water off-peak
- load management space heating equipment
- programmable thermostats to lower energy usage during peak times
- high efficiency heat pumps with a focus on proper installation and ductwork sizing to maximize comfort and system efficiency
- energy saving tips and education
- residential, business and industry analysis and audits to help customers understand and make informed decisions on options to optimize their demand and energy use
- incentives and pilot offerings to give residential and business customers the information and support to make more efficient choices in equipment programs targeted to provide lower income customers access to efficiency and demand reduction programs to save energy

(*Id.* at 8.) Hence, the proposed DSM Plan reflects a return to this more traditional role following the rollback of EE/PDR mandates in R.C. 4928.66 as a result of Am. Sub H. B. 6.

Company witness Williams further explained the program administrative fee component of the DSM Plan:

[T]he fee is earned if the Company achieves a cost effective overall DSM Plan performance in a program year. The Company achieves a cost effective DSM Plan by focusing on keeping administrative costs low and participation as high as possible through effective implementation and incentive levels. If the DSM Plan is cost effective for the year based on the RVT test as defined in the DSM Plan (Exhibit JFW-1, VI., Cost-Benefit Analysis), the program administration fee will be calculated by multiplying the overall DSM Plan spend in the program year (twelve months) by ten percent. However, if the DSM Plan is not cost effective in a given program year (twelve months), the Company will not receive the program administration fee. The program year will begin two months following the date of approval of the base case to allow for ramp up of programs.

(*Id.* at 15-16.) Thus, although the administrative fee is contingent on results, it does not change based on performance and is a flat rate and is not accurately considered a shared savings mechanism. More importantly, the proposal was filed as part of an application for an increase in rates under R.C. 4909.18 where a hearing is mandatory.

Prior to commencement of the process for intervenors to participate in the base rate case, the Office of the Ohio Consumers' Counsel (OCC) prematurely seeks to strike portions of the Company's filing based on the inaccurate characterization of the administrative fee as being equivalent to shared savings under the prior version of R.C. 4928.66. The OCC's over-reliance on a Commission decision in a separate case not involving AEP Ohio and not involving a base rate case under R.C. 4909.18 is misplaced. There are decades of precedent for the Commission to adopt cost-effective DSM programs (including utility incentives) outside of the context of a proceeding under R.C. 4928.66.

## **II. RESPONSE**

### **A. OCC's request is impermissible under R.C. 4909.18 and procedurally inappropriate.**

OCC has filed its Motion to Strike less than one month after AEP Ohio filed its Application in this proceeding, and on no legal or factual basis other than OCC's own mischaracterization of AEP Ohio's DSM Plan proposals compared to the portfolio plan at issue in the Commission's recent *sua sponte* ruling in an EL-POR case involving Duke Energy Ohio.<sup>1</sup> OCC's Motion cites no legal authority that would support the striking of an entire substantive proposal from a base rate case application filed pursuant to R.C. Chapter 4909.18. This is likely

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<sup>1</sup> *In re. Duke Energy Ohio, Inc.*, Case No. 20-1013-EL-POR, *et al.*, Entry at ¶ 8 (June 17, 2020) (Duke *sua sponte* ruling).

because no such authority exists, as the plain language of R.C. 4909.18 itself precludes such a result. The statute provides:

If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission *shall set the matter for hearing* and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. *After such hearing, the commission shall*, where practicable, *issue an appropriate order* within six months from the date the application was filed.

R.C. 4909.18 (Emphasis added.) The statute is clear that the Commission may not decide AEP Ohio's DSM Plan proposal until after proper notice and a hearing.

In addition to being legally flawed, OCC's Motion also lacks any factual basis. Other than its own characterizations, OCC has offered nothing in its Motion to support its claim that AEP Ohio's proposed administrative fee is equivalent to shared savings – and, as Company witness Williams's direct testimony and Section B of this Memorandum Contra make clear, the two concepts are not comparable. Even were it legally able to do so, the Commission should not simply accept OCC's contention or prejudge the Company's DSM Plan as OCC seeks. Rather, it should consider the Company's proposal on its merits and based upon a full evidentiary record developed through discovery and a hearing in these proceedings. Through such process, AEP Ohio will have the opportunity to demonstrate, as a factual and legal matter, that its DSM Plan is beneficial to AEP Ohio customers and permissible under Ohio law. Although the Duke *sua sponte* ruling is not binding on or applicable to AEP Ohio's proposals in this case (as discussed further in Section B below), AEP Ohio also will have an opportunity to demonstrate through the full evidentiary process R.C. 4909.18 requires in this case that its DSM Plan meets the *ad hoc*

standard the Commission referenced in the Duke decision, to the extent such a demonstration may be necessary.

For example, AEP Ohio witness Williams set forth a detailed analysis of all the ways the DSM Plan promotes Ohio energy policy under R.C. 4928.02. Direct Test. Of Jon F. Williams (June 15, 2020) at 12-13. Through the DSM Plan, AEP Ohio is fulfilling the traditional utility role of initiating programs promoting and encouraging conservation of energy and the reduction in the growth rate of energy. As the Company will show, the DSM Plan promotes economic efficiencies and long run incremental costs by providing measurements of cost effectiveness for programs, caps on program spend and a program administration fee to ensure AEP Ohio is encouraged to manage costs and provide cost effective results for the funds spent. AEP Ohio witness Williams demonstrates that, for every \$1 in costs, the DSM Plan delivers over \$3 in benefits. *Id.* at 7 (Figure 1). AEP Ohio's proposal is a win-win and shows high cost-benefit values and includes appropriate incentive structure under RC 4905.70 as part of the base rate case. Providing these benefits and many others to customers as outlined in the testimony of witness Williams and witness Lehman is worthy of a full review of the DSM Plan with further examination through the hearing process.

In sum, a motion to strike may be an appropriate tool to seek the elimination from a case's record testimony or evidence that is inadmissible as an evidentiary matter.<sup>2</sup> Seeking, through a motion to strike, that the Commission predetermine the merits of a utility's substantive base rate case proposal, as OCC has requested, is inappropriate and impermissible under

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<sup>2</sup> See, e.g., *In re. Ohio Power Co. and Columbus Southern Power Co.*, Case No. 10-2376-EL-UNC, *et al*, Opinion and Order at 12-14 (Dec. 14, 2011) (considering motions to strike portions of testimony a hearsay); *In re Verizon Wireless*, Case No. 03-515-TP-ARB, Opinion and Order at 4 (Nov. 13, 2003) (striking witness affidavit based in part upon the fact that the information contained therein was "not relevant" to the case).

controlling Ohio law. Consequently, OCC's Motion to Strike should be denied or ignored and the Company should be given the opportunity to demonstrate the merits of its DSM Plan.

**B. OCC's reliance on the Duke *sua sponte* ruling is misplaced**

Last month, the Commission unilaterally decided to strike the shared savings component from Duke Energy Ohio's Application for a 2021 portfolio of programs. (*See Duke sua sponte* ruling.) OCC now seeks to extend that ruling to this case, claiming that "AEP, like Duke, wants to continue charging consumers for profits on energy efficiency programs that it now proposes to operate despite the lack of mandates." (OCC Motion at 2.) Even if the Commission entertains OCC's impermissible procedural maneuver, movant's characterization of AEP Ohio's program administration fee is inaccurate and its reliance on the Duke *sua sponte* ruling is otherwise misplaced.

The Duke *sua sponte* ruling involved a different set of factual circumstances and decided different legal issues in a different context. Specifically, Duke Energy Ohio extensively relied upon OAC 4901:1-39 throughout its filing, which is a set of rules promulgated to amplify RC 4928.66, and Duke's filing was made as an EL-POR case under those rules as part of a EE/PDR portfolio plan. The Commission found that Duke's filing essentially continued the shared savings component that was used under RC 4928.66. (Duke *sua sponte* ruling at ¶ 8.) Indeed, the Commission explicitly provided that the Duke POR Order was not intended to address future shared savings issues, let alone other win-win incentives in other types of proceedings under different statutes:

We do not intend to rule out any future shared savings provisions. But future proposed shared savings provisions must be accompanied with a demonstration of need that cannot otherwise be met through market-based approaches and a demonstration that the shared savings provision is narrowly tailored to promote the policies of the state codified in R.C. 4928.02.

*Id.* More to the point, the legal issues presented by Duke in its POR Application were not proposed under R.C. 4905.70 or as part of a base distribution rate case under R.C. 4909.18. AEP Ohio's filing is far from business-as-usual approach and instead proposes to return to pre-SB 221 DSM construct. Despite OCC's gross generalization of the administration fee as being equivalent to shared savings, it is not. The Commission said that its Duke *sua sponte* ruling was not binding on future shared savings issues and AEP Ohio's proposed administrative fee is not even shared savings – so the decision has no application and in any case does not support a motion to strike.

The AEP Ohio-proposed program administration fee is not a shared savings mechanism that calculates a percentage of net benefits, rewarding a progressively higher percentage share to higher achievement above goals. As stated in Witness Williams testimony (at 15-16), the fee is a percentage of spending that is capped and not to exceed the budget requested. In fact, any spending that exceeds the annual cap will not be charged to customers. Also, the program administration fee is conditioned on the cost-effective performance of the DSM Plan and only paid if the program results overall in a given year are cost effective. This type of mechanism is factually distinguished from shared savings and is narrowly tailored to serve customer needs and assist the Company in achieving the highest reasonable demand and energy savings within the allowed budget.

In addition, there is precedent for adopting utility DSM plans outside the context of R.C. 4928.66. For example, the Commission approved for Columbia Gas of Ohio (COH) a DSM Plan for 2017-2022 in a case contested by OCC. *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Management Programs for Its Residential and Commercial Customers*, Case No. 16-1309-GA-UNC (*COH DSM Case*). Like AEP Ohio, the

Commission relied upon R.C. 4905.70 and R.C. 4929.02 (a corollary provision to R.C. 4928.02) in adopting COH's DSM program:

R.C. 4905.70 directs the Commission to initiate programs that will promote and encourage energy conservation and reduce the growth rate of energy consumption, promote economic efficiencies, and take into account long-run incremental costs. Further, pursuant to R.C. 4929.02(A)(12), it is the policy of the state to promote an alignment of natural gas company interests with consumer interests in energy efficiency and energy conservation.

*COH DSM Case*, December 21, 2016 Opinion and Order at ¶ 3 and April 10, 2019 Second Entry on Rehearing at ¶ 3. The proponent parties in that case – including the Staff – argued that the plan comports with Ohio law and policy. *COH DSM Case*, December 21, 2016 Opinion and Order at ¶ 123. The Commission agreed, consistent with decades of precedent that adopt DSM programs for utilities on a case-by-case basis:

Pursuant to R.C. 4905.70, the Commission is vested with the authority to initiate programs that will promote and encourage energy conservation and reduce the growth rate of energy consumption, promote economic efficiencies, and take into account long-run incremental costs. Further, pursuant to R.C. 4929.02(A)(12), it is the policy of the state to promote an alignment of natural gas company interests with consumer interests in energy efficiency and energy conservation. Thus, the Commission concludes that it is vested with the statutory authority to authorize natural gas utilities to implement DSM energy efficiency and energy conservation programs and, to that end, has approved such programs for more than 20 years.

*Id.* at ¶ 125. Significantly in the current context, the current COH DSM program adopted by the Commission in a contested proceeding includes an incentive mechanism. (*COH DSM Case*, Application at 16-19.)

### **III. CONCLUSION**

OCC's Motion to Strike should be denied or ignored by the Commission, because it departs from the required statutory process under R.C. 4909.18 applicable to this case, improperly relies on the inapplicable Duke *sua sponte* ruling and fails to recognize decades of



precedent that supports AEP Ohio's proposal to reactivate a modest and conservative set of traditional DSM programs.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing was sent by, or on behalf of, the undersigned counsel to the following parties of record this 8<sup>th</sup> day of July, 2020, via e-mail.

/s/ Steven T. Nourse  
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**Case No(s). 20-0585-EL-AIR, 20-0586-EL-ATA, 20-0587-EL-AAM**

Summary: Memorandum Memorandum In Opposition To OCC's Motion To Strike electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company