BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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. )

**POST-HEARING BRIEF OF OHIO PARTNERS FOR AFFORDABLE ENERGY**

**INTRODUCTION**

Duke Energy Ohio (“Duke”) has danced to its own drummer ever since the Ohio General Assembly established energy efficiency benchmarks in Am. SB 221 (“SB 221”). The Commission has regularly had to adjust Duke’s portfolio plans and direct the Company to comply with the Green Rules (Chapter 4901:1-39, O.A.C., which cover the energy efficiency and demand reduction programs). This application is, in large part, a result of Duke’s playing fast and loose with Commission rules. The application should be dismissed or denied.

Duke has offered customer-funded energy efficiency programs since 1992. Its initial DSM portfolio developed to comply with Senate Bill 221 benchmarks was reviewed during the consideration of Case No. 08-920-EL-SSO (“*SSO I”),* Duke’s first Standard Service Offer filing. OPAE was a signatory party to the stipulation in *SSO I* 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 (October 27, 2008).] Rider DR-SAW turned out to cost customers far more per kilowatt hour or kilowatt saved than the program and rider designs used by other electric distribution utilities.

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. In addition, Rider DR-SAW authorized Duke to recover from consumers 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%. The incentive percentages outlined above were applied to the value of the avoided cost. This approach to funding and the shared savings incentive was unique to Duke; no other utility requested a comparable provision. 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 busy 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 a SB 221-compliant program designed to meet energy efficiency and demand response (“EE/DR”) benchmarks or, as some prefer, mandates. 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. (“*FE 2012 Portfolio Case*”)

The *FE 2012 Portfolio Case* established a template for the structure of a DSM portfolio that complies with Ohio law:

1. Shared Savings –a shared savings incentive 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, Opinion and Order at 15-17 (March 23, 2013).]
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 affected the Duke EE/DR portfolio. The DR-SAW mechanism was found to be illegal in Case No. 09-1999-EL-POR. The approval of *SSO I* had come before the Commission’s rules in Chapter 4901:1-39 were finalized, and the stipulation agreed to by Duke required that it “conform to the Commission’s ESP rules.” [Case No. 09-1999-EL-POR, Opinion and Order at 8 (December 15, 2010).] 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 (“*2011 Rider Case”)*. Because authorization for the DR-SAW mechanism expired in December 2011, Duke sought a new recovery mechanism. [Application at 2 (July 20, 2011).] In addition, the information ultimately filed in the docket by Duke addressed the direction from the Commission in Case No. 09-1999-EL-POR to bring the portfolio into compliance with the filing requirements of the Green Rules. Along with the required filings, 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 *2011 Rider Case* Stipulation ultimately defined the cost recovery mechanism to be used by Duke. [Stipulation at 4 (November 11, 2011).] Duke accepted the shared savings incentive proposal submitted by the Ohio Consumer and Environmental Advocates as a part of their comments on October 5, 2011. Under this shared savings mechanism, Duke receives a percentage of the value of customer avoided costs as an incentive if the savings achieved during the year exceeded the legal benchmarks. The agreement also provides for recovery of projected program costs, subject to true up. [Comments by Members of the Ohio Consumer and Environmental Advocates at 3 (October 5, 2011).] The agreement also included a decoupling mechanism, which ensures recovery of lost distribution revenues. [Id. at 7; Stipulation at 5.]

The stipulation in *2011 Rider Case* makes clear, that “[t]he incentive mechanism shall expire at the end of 2015”. [Stipulation at 5; Opinion and Order at 8n (November 15, 2012).] 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 at 11-13 (May 30, 20120.]

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

In the *2013 Portfolio 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, which was inconsistent with the incentive mechanism outlined in the litigated *FirstEnergy 2012 Portfolio Case*. A stipulation ultimately resolved all issues in Case No. 13-431-EL-POR, with the 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.” [*2013 Portfolio Case*, Stipulation at 5 (September 6, 2013); Opinion and Order at 6 (December 4, 2013).] The stipulation also stated that, consistent with the agreement in the *2011 Rider Case*, 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).” [Id.[[1]](#footnote-1)]

The final case relevant to this proceeding is Case No. 14-457-EL-RDR (the *14* *Rider Case)* 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, missing the benchmark by 56,102 Mwh, achieving only 69.1% of the goal. Duke 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 as permitted by Commission rules. However, Duke also wanted a cut of the savings achieved by customers and claimed it was still entitled to a shared savings incentive, adding additional banked savings into the stew to claim it had reached 113% of the benchmark. This runs directly afoul of the Commission’s ruling in the *FirstEnergy 2012 Portfolio 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.” Case No. 12-2190-EL-POR, Opinion and Orderat 16 (March 20, 2013).

OCC, OPAE, 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 – the *2011 Rider Case* -- though that is now disputed by Duke. There is a clear disagreement among the parties to the stipulation in the *2011 Rider Case* as to how the current shared savings provision operates and whether it should continue.

The Commission issued a Finding and Order in the *14 Rider Case* on May 20, 2015 rejecting Duke’s position on the shared savings incentive:

[a]s to Duke’s use of banked savings, the Commission agrees with OMA and finds the Company may only use the banked savings to reach its mandated benchmark. Therefore, the Commission finds Duke’s use of banked savings to claim an incentive is improper. [Finding and Order at 5.]

On July 20, 2015, the Commission issued an Energy on Rehearing, granting OPAE and Duke’s applications for rehearing for further consideration. The case is pending. Duke has challenged the Commission’s finding which denies the Company the ability to collect a shared savings incentive through the use of banked savings.

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

**ARGUMENT**

1. **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.

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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.]

The 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 the *2011 Rider Case* and *2013 Portfolio Case* make clear that the shared savings mechanism in Duke’s portfolio plan expires at the end of 2015 if there was no agreement among the signatories to the stipulation. Then any party could seek the Commission’s determination “of whether an incentive mechanism should be implemented…(for the year 2016).” [Case No. 13-431-EL-POR, Stipulation at 5; Opinion and Order at 6.] There was no agreement among the parties; the incentive mechanism will expire at the end of 2015; and, the Commission is no longer authorized to implement a new incentive mechanism unless an application is properly filed under Sec. 6(B) of SB 310.

This application does not comply with Sec. 6(B) and must be dismissed. That the 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.

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. The stipulations in the *2011 Rider Case* and the *2013 Portfolio Case* clearly contemplated a review of the efficacy of the shared savings mechanism and required unanimous agreement if the incentive was to be extended, which would by definition require a filing to amend the portfolio. The parties did not so agree, with six parties – all the parties representing consumers – criticizing Duke’s proposed use of banked savings to trigger a shared savings incentive. The incentive as a whole did not comply with the guidelines established in the *FirstEnergy 2012* *Portfolio Case*.

The dispute before the Commission in the *14 Rider Case* give a clear indication of why certain parties, including OPAE, were unwilling to agree to the continuation of the incentive mechanism. Regardless of the reason for the dispute, 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 application must be dismissed.

1. **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 relating 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’.[[2]](#footnote-2) Changing a substantive provision of a plan, a provision which specifically expires at the end of 2015, is not an administrative matter. The Commission lacks the authority to impose an incentive where none exists. This application must be dismissed.

1. **IF THE COMMISSION CHOOSES TO PERMIT DUKE TO AMEND ITS CURRENT EE/DR PORTFOLIO PLAN TO CONTINUE TO RECOVER A SHARED SAVINGS INCENTIVE, IT SHOULD PROHIBIT DUKE FROM USING BANKED SAVINGS TO FORCE CUSTOMERS TO PAY DUKE AN INCENTIVE.**

Duke uses a tortured interpretation of the stipulations agreed to by parties to justify using shared savings to trigger the payment of an incentive for operating EE/DR programs that produce savings in excess of the benchmark. It is clear that parties did not intend banked savings be used to trigger incentives; that Duke implicitly conceded to this interpretation; and, that the Commission has ruled that only EE/DR achievements in a single program year can be used to trigger payment of up to 13% of the savings realized by customers to Duke. Permitting utilities to recover shared savings from EE/DR programs that operated in prior years is bad public policy, robbing customers of the savings they have paid for. [See Direct Testimony of Wilson Gonzalez at 27-28 (June 30, 2015); Prefiled Testimony of Gregory C. Scheck at 2 (June 30, 2015).]

Parties to the stipulation in the *2011 Rider Case*, viewed the shared savings mechanism as identical to that used by AEP-Ohio – with the except that no cap was included. This view was affirmed in the stipulation in the *2013 Portfolio Case*.

Duke’s testimony in support of the *2011 Rider Case* stipulation also made clear that incentives could only be triggered by exception performance in the year for which the additional recovery from customers was requested. That is exactly how Duke Witness Duff described the provision in testimony supporting the stipulation:

The incentive mechanism does not apply until the Company has exceeded its target for annual compliance with the Commission’s regulations for energy efficiency. [Supp. Direct Testimony on Timothy J. Duff at 3. (Novemer 22, 2011).]

Duke Witness Duff’s initial testimony in the *2011 Rider Case* also supports the view of the parties that incentives can be triggered only when annual savings exceed that year’s benchmark:

The level of incentive, the magnitude of the percentage of the net system benefit…that the Company will earn, is tiered and can range from 7.5% up to 15% depending on how much the actual efficiency savings exceed the annual target. [Initial Testimony of Timothy J. Duff at 5 (July 20, 2011).]

It is illogical that parties would have agreed to an unprecedented approach to use banked savings to trigger a shared savings incentive without it being explicit. The record was clear that Duke had 406,747 Mwh in banked savings when the application was filed in the *2011 Rider Case*. The bank would easily trigger shared savings through the period the incentive was authorized even if Duke failed to achieve savings adequate to meet the benchmarks during a single program year. Nothing in the stipulations or supporting testimony explicitly authorized the use of banked savings to trigger a shared savings incentive payment by customers. The stipulation should not be interpreted as authorizing shared savings in 2013 and 2014, nor in 2015 or 2016 if Duke’s programs fail to deliver adequate amounts of new savings to customers. Incentives are aspirational. Duke’s performance is not inspirational.

**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 incentive mechanism, and there is currently a dispute among the parties as to how the incentive mechanism is intended to work. Duke interprets the stipulation in a manner that violates the public policy enunciated and supported by the Commission, which has made clear that customers may only pay a distribution utility an incentive when their annual achievement exceeds the benchmark in the year the savings accrue.

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). Duke did not file a plan amendment under Section 6(B). Under the provisions of SB 310, 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 21st day of August, 2015.

/s/David C. Rinebolt

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1. The 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. [↑](#footnote-ref-1)
2. <http://dictionary.reference.com/browse/administer?s=t> [↑](#footnote-ref-2)