

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy)
Ohio, Inc., for Approval of its Energy Efficiency)
and Peak Demand Reduction Program Portfolio)
Plan.)

Case No. 16-576-EL-POR

REPLY BRIEF OF DUKE ENERGY OHIO, INC.

I. INTRODUCTION

Inexplicably in this case, the Staff of the Public Utilities Commission of Ohio (Staff) has taken a position contrary to previous positions and contrary to Ohio law. Although regulatory policy can be dynamic and responsive, foundational elements should be altered cautiously since regulatory compliance is routinely based upon precedent. In this case, Staff has chosen to pursue a new policy that differs from its previous policy in respect of whether or not an electric distribution utility should be expected to minimally comply with Ohio mandates, or seek to achieve as much energy efficiency as is economically justified. Over the course of settlement and subsequent hearing on the settlement, this case distills down to one question. The question is whether the Public Utilities Commission of Ohio (Commission) should accept or reject its Staff's recommendation to impose an arbitrarily devised cap on overall spending for Duke Energy Ohio, Inc.'s (Duke Energy Ohio or Company) energy efficiency and peak demand reduction programs and shared savings incentive.

The Company submitted an application for approval of a new portfolio of programs and a cost recovery mechanism that is consistent with state law and all of the Commission's regulations concerning such filings. No intervening party contested this fact. The only two parties contesting settlement in this proceeding, the Office of the Ohio Consumers' Counsel (OCC), and the Staff did

not argue that the portfolio itself was improper or lacking in any respect. Thus, there is no question that the portfolio of programs and its related cost recovery mechanism should be approved by the Commission.

After several months of settlement discussion, the Ohio Hospital Association (OHA), Ohio Partners for Affordable Energy (OPAE), Environmental Law and Policy Center (ELPC), Environmental Defense Fund and the Ohio Environmental Council (OEC), Natural Resources Defense Council (NRDC), IGS Energy, Inc. (IGS), The Kroger Company (Kroger), and the Ohio Manufacturers' Association (OMA) all reached a settlement in this case and submitted the Amended Stipulation and Recommendation (Stipulation) to the Commission for its consideration and approval. Only Staff and OCC opted to contest the Stipulation and neither provided a coherent reason much less any analysis to support their proposal for an overall cap on spending for energy efficiency and peak demand reduction. For the reasons set forth in the Company's initial brief and for additional reasons as set forth below, the Commission must reject Staff and OCC's recommendation.

II. DISCUSSION

A. Staff Did Not Raise An Argument Concerning the Commission's Review of Stipulations.

The only public statement of Staff position in this proceeding is contained in the testimony that was filed by Staff witness Patrick Donlon. There is not a single reference in Mr. Donlon's testimony to the analysis frequently applied by the Commission for approval of stipulated settlements. At no time did Mr. Donlon opine about the "prongs" that constitute the Commission analysis. But Staff raises this issue in its initial brief and suggests that the Stipulation does not benefit ratepayers or the public interest. Staff has utterly neglected to provide any support for this position. Moreover, other than the arbitrary recommendation for an overall cost cap, Staff had no

disagreement with any of the elements of the Company's proposed portfolio. Mr. Donlon readily agreed that Staff had no issues with the Company's proposed budget, nor the cost effectiveness of the proposed programs, nor the portfolio overall.¹ The only opinion expressed by Mr. Donlon was that the Commission should impose an overall cap on energy efficiency costs for the Company. Mr. Donlon did not claim that his recommendation was in any way tied to the Commission's analysis for Stipulations. The only conclusion to be drawn from this is that Staff opted not to make this argument. Accordingly, Staff's argument with respect to the Stipulation should be totally disregarded. Indeed, Staff itself recognizes that it is unfair to included information that is outside the evidentiary record. In its Motion to Strike in a similar case, Staff argues the following:

“For fairness in this government process affecting Ohioans, the Commission does not permit parties to include in their post-hearing briefs information that is outside the evidentiary record. The use of non-record information violates the Commission precedent and the Ohio Rules of Evidence, which are designed for fairness. The Commission has established a hearing process for adducing and testing the evidence that parties offer.”²

Staff must be held to the same standard that it argues in this related case. Accordingly, since Staff neglected to address any of the criteria used by the Commission in determining the reasonableness of a stipulated settlement, Staff's argument on brief should be rejected.

B. The Staff's Recommendation For An Overall Cap Is Arbitrary and Unsupported.

For reasons set forth in the Company's Initial Post Hearing Brief and for additional reasons discussed herein, Staff's recommendation should be rejected by the Commission. Not only is the

¹ Trans.Vol. I at pg.149.

² *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 2017 through 2019*, Case No.16-743-EL-POR, Motion to Strike Portions of the Post Hearing Briefs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio and the Office of the Ohio Consumers' Counsel, March 15, 2017 at pg.1.

recommendation for an overall cap on spending a significant departure from Staff's previous positions in these cases, it is illogical and totally unsupported by any analysis.

In a recent case that was resolved by settlement with the Staff and approved by the Commission, the Staff argued in favor of a stipulation that provided for an even higher cap on the amount of shared savings the Company could earn, and that incentivized the Company to "over-comply with the energy efficiency requirements in the future in order to earn a shared savings incentive."³ Yet, now Staff argues just the opposite.

In Staff's initial brief in this case, Staff states that "the rider in which energy efficiency costs are collected has become one of the highest riders on residential bills."⁴ Staff apparently arrived at this conclusion by comparing various riders on Duke Energy Ohio's bills, rather than comparing the energy efficiency rider itself over time.⁵ Staff's analysis is illogical and nonsensical as it is tantamount to comparing the cost of apples with the cost of a gallon of milk. The items compared bare no relationship to one another and therefore a comparison of costs is of no consequence. Moreover, Staff has provided no analysis or research or understanding with respect to actual energy efficiency costs.

Staff's recommendation for a cap likewise conflicts with state policy. The General Assembly enacted Amended Substitute Senate Bill 221 (SB221) in 2008. Thereafter, the Commission promulgated rules that describe in great detail what is to be considered in designing and management of an energy efficiency program that allows an electric distribution utility to comply with the State of Ohio mandates. These rules anticipate a careful and methodical approach

³ *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*, Case No.14-457-EL-RDR, *et al.*, Post Hearing Brief Submitted On Behalf of the Staff of the Public Utilities Commission of Ohio, April 28, 2016 at pg.11.

⁴ Staff's Post Hearing Brief at pg.8

⁵ Trans. Vol.I at p.161.

that includes consideration of cost effectiveness as a significant element of the plan. Indeed, cost effectiveness is a defined term and the utility is required to establish cost effectiveness as an element of its overall portfolio plan.⁶ Yet Staff itself has not considered cost effectiveness in any respect and Staff's recommendation promotes just the opposite result. The Stipulation that was agreed to by all parties except OCC and Staff in this case, provides for a cap on shared savings. Once the cap is reached, the Company ceases to share in the savings achieved through energy efficiency, and the customer retains 100 percent of the benefit. Yet Staff disregards this reality and instead imposes a cap that would necessarily limit the utility's achievement and the customers' ultimate benefit. And Staff does all this with no reason. Staff claims to have aimed for "consistency" amongst the four electric distribution utilities, but Staff's ultimate recommendations resulted in anything but consistency.⁷

Likewise, Staff claims to have evaluated various options for cost caps, but Staff is unable to point to any specific analysis or study that supports its ultimate conclusions. Staff loosely applied an economic theory with no connection to the facts of the case. Mr. Donlon suggests that energy efficiency costs are dropping due to the concept of an 'economic theory of a product life cycle.' However, Staff did no research into any element of this theory in order to support the overall concept.⁸ There can be no doubt in this case that Staff has simply picked a number out of thin air and attempted to argue its validity where none exists.

C. Staff's Analysis of What the Company Needs In Order to Achieve Compliance is Uninformed and Flawed.

Staff argues that the cap it proposes will be sufficient to allow the Company to achieve its mandate in each of the next three years. Staff points out that in from 2009 to 2015, Duke Energy

⁶ Rule 4901:1-39-01(F), O.A.C.

⁷ Trans. Vol. I at pg.162.

⁸ Trans. Vol. I at pg.169.

Ohio has underspent its budget and over-achieved its projected energy savings.⁹ The facts do not support Staff's position.

First, while the Company is proud of the fact that it was able to spend less and achieve more energy efficiency for its customers, hence improving cost effectiveness of the portfolio. Staff fails to acknowledge that the Company's actual annual efficiency achievement fell short of the annual benchmark from 2013-2015. It is unreasonable and illogical to assume that one could spend less than projected and still meet the annual mandates based on cost data in years that the Company failed to meet the annual benchmark.

A second and even more substantive flaw is illustrated when looking at the actual costs per KWH that resulted from compliance in the years 2013 through 2015 in an attachment to his rebuttal testimony, TJD-Attachment 1.¹⁰ Applying the actual costs per KWH shown in TJD-Attachment 1 and in the Table below to the Staff's proposed annual cost, it is clear that the Company would not have met its mandate and likely will be unable to do so in the future. In fact, if one applied the three average actual cost per KWH of 18.2 cents, a conservative number compared to the higher actual cost per KWH in 2015, to the proposed cap amount the Company would fall almost 10% short of its projected 2018 mandate. Staff's attempt to somehow justify their proposed inadequate cap is wishful thinking and simply does not add up.

⁹ Initial Post Hearing Brief of the Staff at pg.9.

¹⁰ Rebuttal Testimony of Timothy J. Duff, Duke Energy Ohio Exh.13.

Projected KWH Achievement Under Proposed PUCO Staff Annual Cap Based on Historic Spending (\$/KWH)							
Calendar Year	Annual Benchmarks By Program Year	Actual KWH Savings	Actual Program Costs	Actual Cost per KWH Saved	PUCO Staff Proposed Annual Cap	Project KWH Achievement at Capped Spend	Projected 2018 Energy Efficiency Benchmark (KWH)
2013	185,577,181	144,101,736	\$22,130,677	\$0.154	\$33,820,565	220,219,297	203,213,000
2014	200,065,510	152,268,735	\$30,608,344	\$0.201	\$33,820,565	168,248,718	203,213,000
2015	201,496,694	164,010,308	\$31,531,908	\$0.192	\$33,820,565	175,914,546	203,213,000
2013-2015 Average	195,713,128	153,460,260	\$28,090,310	\$0.182	\$33,820,565	185,539,221	203,213,000

D. Mr. Duff Understands Staff’s Proposal And Fully Explained Why It Was Unacceptable.

Staff argues that Mr. Duff lacked an understanding of Staff’s overall cap proposal. However, Staff is mistaken; Mr. Duff did understand that the Staff’s proposed cap would not include lost distribution revenues. In fact, on the very first page of Mr. Duff’s Rebuttal Testimony, he clearly explains his understanding of the cap proposed by the Staff to be, “a cap on the Company’s costs for all energy efficiency programs and shared savings.” Mr. Duff understanding of the Staff’s proposal is further demonstrated in the analysis he provided with respect to the inequity of the Staff’s cap proposal compared to what the Commission approved for AEP Ohio.

In TJD Attachment 2, Mr. Duff illustrated the variances in Staff’s approach for each of the Ohio electric distribution utilities. In this exhibit, Mr. Duff only refers to program costs and shared savings incentive. There is no mention of lost distribution revenue. Moreover, lost distribution revenue in the context of this discussion is not a significant factor as the number is typically small. Duke Energy Ohio’s decoupling rider, Rider DDR, trues up lost revenue for all rate classes except

rates TS, DS and DP.¹¹ Mr. Duff is aware of all of these factors but nonetheless explains why Staff's proposal is insufficient to allow the Company to meet its mandates. His testimony is supported by analysis, years of experience in managing Duke Energy Ohio's energy efficiency compliance and historic record. It is disingenuous for Staff and OCC to question his credibility in this context and the Commission should not do so.

E. Any cap adopted should be equitable with the cap adopted by the Commission for AEP.

Neither the Staff nor OCC have addressed the extreme inequity that would occur in the funding level for energy efficiency of the different utilities, if the Commission chooses to adopt the varying proposed caps for the four different Ohio utilities. Customer shopping within a utility service territory has a significant impact on an individual utility's Operating Revenues, but has absolutely no impact on the magnitude of its annual energy efficiency mandate for the utility. In order to ensure that Duke Energy Ohio's customers are not negatively impacted by applying a cap that is lower than that of other utilities, if the Commission deems a cap appropriate, it should establish a cap that allows the same amount of money to spend per KWH it is required to save (\$/KWH). Witness Duff's testimony details the appropriate percentage to apply to operating revenues to ensure that a cap would be equitable to the cap amount approved for AEP Ohio.

F. OCC's contention that opt-outs have not been factored into the Company's analysis regarding the adequacy of the proposed cap.

OCC's position that opt-outs will impact the amount of energy efficiency required of Duke Energy Ohio is correct. However, OCC's position does nothing more than shed additional light on why it is inappropriate to base a cap on Operating Revenues. The reality opt-outs will most certainly impact the magnitude of the utility annual energy efficiency mandate, however opt-out has

¹¹ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of a Distribution Decoupling Rider*, Case No. 11-5905-EL-RDR, Finding and Order, May 30, 2012.

no impact on the operating revenues upon which the cap proposed by Staff and supported by OCC is based. It is illogical to think that opt-outs should be considered in the reasonableness of the proposed cap, when it is not a variable that impacts the calculation of the cap.

Additionally, no analysis was performed by the Staff or OCC to show that opt-outs were factored into determination or the appropriateness of the percentages to be applied to operating revenues. A final flaw in the OCC claim with respect to opt-out, is that they fail to recognize that the Mercantile Exemption has been in place and already been factored into the Company's historic achievement and mandates, so the Company's analysis showing that the proposed cap is inadequate given historic spending required did in fact reflect opt-out.

G. The \$8 Million After-Tax Cap Established for Duke Energy Ohio's Shared Savings Incentive is Appropriate.

While OCC contends that the \$8 Million after-tax cap on Duke Energy Ohio's that was established in the Company's Amended Stipulation is too high, the Company believes that it is appropriate and consistent relative to the caps on shared savings previously approved by the Commission. For example, the cap on shared savings approved for AEP Ohio is \$20 million after-tax. In fact, if one looks at the values shown in TJD attachment 2,¹² one can see that while Duke Energy Ohio's cap is 40% of that approved for AEP Ohio, based on the size of its 2015 annual benchmark, Duke Energy Ohio is over 47% the size of AEP. The Company is not proposing that it's shared savings cap be \$9.4 million and hence proportion to AEP's approved cap, but it does believe that it's stipulated \$8 million cap on shared savings is reasonable and in the interest of customers.

¹² Rebuttal Testimony of Timothy J. Duff, Duke Energy Ohio Exh.13.

H. The Company's Request for a Deferral of Ongoing Costs is Reasonable and Lawful.

OCC, like Staff now seeks to interject arguments that it has not made during the course of this proceeding and which are raised on brief for the first time. Additionally, OCC is raising the issue regarding the Company's request for a deferral in the wrong proceeding. On February 3, 2017, Duke Energy Ohio filed an application for a deferral of ongoing program costs and lost distribution revenue related to its energy efficiency portfolio.¹³ OCC has submitted a motion to intervene in that proceeding.¹⁴ One of the reasons such a filing was required was because of the many continuances sought by many of the parties in this case. Since the Company has elected to continue its energy efficiency programs into 2017, without Commission approval, the Company seeks assurance from the Commission that it will be permitted to recover prudent costs. OCC should in fact support such a request since it allows customers to continue to save money on their energy bills and allows the Company to continue to provide energy efficiency programs in a cost effective manner. To the extent OCC unwisely objects to the recovery of such costs, it may make its arguments when costs are considered for recovery. It is unnecessary and irrelevant in this case and as a result, OCC's untimely and inappropriate comments should be rejected.

I. The Smart Thermostat Program and Space Heating Program Should Be Approved

In the Stipulation submitted by all but two of the parties in this case, there is a section that provides for collaboration between the Company, IGS Energy and ELPC to develop a smart thermostat program. Likewise there is a space heating program. Both of these allow the Company to enhance the already robust portfolio. These programs will first be analyzed and subjected to

¹³ *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Energy Efficiency and Peak Demand Reduction Program Costs and Lost Distribution Revenue*, Case No.17-349-EL-AAM, Application, February 2, 2017.

¹⁴ *Id.*, Motion to Intervene, March 6, 2017.

rigorous study to ensure that they are cost effective and will comply with the Total Resource Cost Test that will include avoidance of natural gas and other non-electric fuel costs. Once they are determined by the Company to be cost effective, they will be presented to the Duke Energy Ohio Collaborative for its review and understanding. Thus, OCC and other interested parties will have ample opportunity to be heard if they find them to be not cost effective or otherwise imprudent.

OCC's believes that the programs should not be approved because the Company does not yet have information that is specified in Rules 4901:1-39-03, O.A.C. It should be noted that the Company did submit a Market Potential Study in this proceeding.¹⁵ However OCC neglects to recognize that this additional information will be developed and presented to the Duke Energy Ohio Collaborative before the programs are initiated. Likewise, the Commission Staff will have ample opportunity to participate in the Collaborative and provide its recommendations with respect to these programs prior to actual initiation. Moreover, similar programs have been approved for other utilities in recent cases so the concepts inherent in the programs are known and will be further delineated in subsequent proceedings.

In the interest of efficiency, to the extent CRES providers wish to offer rebates for smart thermostats prior to inclusion of the program in the Company's portfolio, CRES providers may do so and to the extent the program is found to be cost effective, CRES providers should subsequently be reimbursed. This arrangement is efficient, expedient and necessitated by the timing of these cases. There is no retroactive ratemaking involved since the rebates are effectively approved by virtue of the Commission approving the Stipulation that provides for said rebates. Again, it is unclear why OCC opposes a measure that allows customers to save money.

¹⁵ Duke Energy Ohio DSM Market Potential Study Report, August 15, 2016.

III. CONCLUSION

Staff and OCC seek to impose a cap on overall spending that is insufficient to allow the Company to meet its energy efficiency mandates as required by the State of Ohio. Moreover, the requirement for such a cap has never been established by the law or by Commission rule. To the extent such a policy objective is needed, the Staff must defer to the General Assembly, which to date has not chosen to act in this way. For this reason, and for the reasons set forth above and in the Company's Initial Post Hearing Brief, the Commission should reject Staff and OCC's ill-conceived recommendation and approved the Stipulation that was submitted.

Respectfully submitted,

DUKE ENERGY OHIO, INC.



Amy B. Spiller
Deputy General Counsel
Elizabeth H. Watts (Counsel of Record)
Associate General Counsel
Duke Energy Business Services LLC
139 East Fourth Street
1303-Main
Cincinnati Ohio 45202
513-287-4359 (telephone)
513-287-4385 (facsimile)
amy.spiller@duke-energy.com
elizabeth.watts@duke-energy.com

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal delivery, or electronic mail, on this 7th day of April, 2017, to the following parties.



Elizabeth H. Watts

Bojko@carpenterlipps.com
Ghiloni@carpenterlipps.com
paul@carpenterlipps.com
mfleisher@elpc.org
fdarr@mwncmh.com
mpritchard@mwncmh.com
joliker@igsenergy.com
John.Jones@ohioattorneygeneral.gov
dparram@bricker.com
cmooney@ohiopartners.org
tdougherty@theOEC.org
jfinnigan@edf.org
rick.sites@ohiohospitals.org
mwarnock@bricker.com
dborchers@bricker.com
stinson@bricker.com
rkelter@elpc.org
mleppla@theoec.org
swilliams@nrdc.org
rdove@attorneydove.com