

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy)
Ohio, Inc., for Recovery of Program Costs, Lost) Case No. 20-613-EL-RDR
Distribution Revenue and Performance Incentives)
Related to its Energy Efficiency and Demand)
Response Programs.)

**MOTION OF DUKE ENERGY OHIO, INC., TO FILE RESPONSIVE COMMENTS TO
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL COMMENTS FILED MAY 14,
2020**

Comes now Duke Energy Ohio, Inc. (Duke Energy Ohio or Company) and hereby moves the Public Utilities Commission of Ohio (Commission) for approval to file responsive comments to the procedurally inappropriate comments filed by the Office of the Ohio Consumers' Counsel (OCC) in this proceeding on May 14, 2020 (OCC Comments). The rule cited by OCC as purportedly authorizing its comments is not applicable to this proceeding and the Commission has not yet issued any procedural schedule in this case. Therefore, OCC should not have filed any comments. However, as OCC has done so, the Company requests the Commission's approval to file responsive comments, attached as Attachment A to this motion, in response to OCC's Comments.

Duke Energy Ohio submits the following memorandum in support of its motion.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

/s/ Larisa M. Vaysman

Rocco O. D'Ascenzo (0077651)

Deputy General Counsel

Jeanne W. Kingery (0012172)

Associate General Counsel

Larisa M. Vaysman (0090290)

Senior Counsel

Duke Energy Business Services LLC
139 East Fourth Street, 1303-Main
Cincinnati, OH 45202
(513) 287-4320 (telephone)
(513) 287-4385 (facsimile)
Rocco.DAscenzo@duke-energy.com
Jeanne.Kingery@duke-energy.com
Larisa.Vaysman@duke-energy.com

Attorneys for Duke Energy Ohio, Inc.

MEMORANDUM IN SUPPORT

I. THE PRESENT PROCEEDING IS FOR COST RECOVERIES AND RECONCILIATION PERTAINING TO THE THIRD PROGRAM YEAR OF AN ALREADY-APPROVED MULTI-YEAR PORTFOLIO.

On June 15, 2016, the Company filed for approval of a three-year portfolio of energy efficiency and peak demand reduction programs for years 2017, 2018, and 2019.¹ That proceeding culminated in a settlement that was adopted, modified, and approved by the Commission in late 2017 and included cost recovery for program costs, lost distribution revenues, and shared savings.² In a recent order in the same proceeding, the Commission approved the extension of the portfolio through December 31, 2020, with the budget proposed by the Company for 2020 programs.³

Since the approval of the portfolio in late 2017, the Company has filed annual “true-up” applications for recovery in 2018 and 2019 for the previous year’s program costs, lost distribution revenues, and shared savings.⁴ In these cost recovery proceedings, Staff has examined whether the Company’s submitted costs were prudent, eligible for recovery, incremental to base rates, and substantiated.⁵ However, the Commission did not reconsider the core components of the approved portfolio and the approved cost mechanism.

II. THE COMMENT PERIOD LAID OUT IN RULE 4901:1-39-06 DOES NOT APPLY TO THIS PROCEEDING.

OCC states that it files its comments “under Ohio Adm. Code 4901:1-39-06(B), which allows any person to file comments within 30 days after Duke’s application.”⁶ Rule 4901:1-39-

¹ *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. 16-576-EL-POR, Application (June 15, 2016).

² *Id.*, Opinion and Order, p. 23 (September 27, 2017).

³ *Id.*, Finding and Order, p. 17 (February 26, 2020).

⁴ *See* Case Nos. 18-397-EL-RDR, 19-622-EL-RDR.

⁵ *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 Demand Response Programs*, Case No. 18-397-EL-RDR, Finding and Order, p. 4 (July 31, 2019).

⁶ Consumer Protection Comments by The Office of the Ohio Consumers’ Counsel, p. 1 n.1.

06(B) does indeed permit “any person” to “file comments within thirty days after the filing of an electric utility's proposed recovery mechanism.” But this allowance for comments does not apply in the instant case, where the Company is not filing a “program portfolio plan” or “a proposed rate adjustment mechanism,” but merely an application for cost recovery for costs associated with an *already-approved* portfolio, to be collected via an *already-approved* cost recovery mechanism.

The provision on which OCC is relying permits comments only after a new proposed rate adjustment mechanism is filed with a new program portfolio plan, which is not happening in this proceeding. The current rules are explicit: their “[p]rogram portfolio plan and filing requirements” kick in only “[u]pon the *expiration* of any existing commission-approved program portfolio plans.”⁷ Only upon such expiration is a utility required to “file an updated program portfolio plan to be implemented in the following calendar year.”⁸ And only “with the filing of” this plan is a utility required to “file a proposed rate adjustment mechanism for recovery of costs.”⁹ The provision on which OCC relies permits comments after the filing of such a “proposed recovery mechanism” (which is only filed with an updated portfolio plan *after expiration* of a utility’s existing approved plan). Thus, it does not apply to the instant proceeding, which does not involve a filing for an updated portfolio plan to be implemented in the following calendar year, but only a filing for cost recovery for a past year.

III. GIVEN THE ABSENCE OF ANY PROCEDURAL SCHEDULE, THE COMPANY SHOULD BE PERMITTED TO FILE COMMENTS IN RESPONSE TO THE OCC COMMENTS.

The current rules, which contemplate a new program portfolio plan and proposed cost recovery mechanism being filed every year after the expiration of existing portfolios, do not

⁷ 4901:1-39-04(A) (emphasis added).

⁸ *Id.*

⁹ 4901:1-39-06(A).

provide for comments or objections after an application for cost recovery *prior* to the expiration of an existing approved portfolio. Under the previous version of the EE Rules, parties had thirty days after the filing of a utility’s application for cost recovery to “file objections.”¹⁰ Then, the Commission would typically issue a procedural schedule setting dates for comments and reply comments.¹¹ However, there is *currently* neither a rule nor a procedural schedule that provides for the filing of any comments or objections in this proceeding. Accordingly, the Company should be permitted to respond to the OCC Comments with the attached responsive comments.

IV. CONCLUSION.

For the above reasons, the Company requests approval to file the attached responsive comments.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

/s/ Larisa M. Vaysman

Rocco O. D’Ascenzo (0077651)

Deputy General Counsel

Jeanne W. Kingery (0012172)

Associate General Counsel

Larisa M. Vaysman (0090290)(Counsel of Record)

Senior Counsel

Duke Energy Business Services LLC

139 East Fourth Street

1303-Main

Cincinnati, OH 45202

(513) 287-4320 (telephone)

(513) 287-4385 (facsimile)

Rocco.DAscenzo@duke-energy.com

Jeanne.Kingery@duke-energy.com

Larisa.Vaysman@duke-energy.com

¹⁰ O.A.C. 4901:1-39-07(B) (eff. December 10, 2009).

¹¹ *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. 18-397-EL-RDR, Entry, p. 2 (May 2, 2019); *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. 19-622-EL-RDR, Entry, p. 2.

Attorneys for Duke Energy Ohio, Inc.

Willing to accept service via email

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion of Duke Energy Ohio, Inc., to File Responsive Comments to the Office of the Ohio Consumers' Counsel Comments Filed May 14, 2020 was served on the following parties this 28th day of May 2020 by regular U. S. Mail, overnight delivery or electronic delivery.

/s/ Larisa M. Vaysman
Larisa M. Vaysman

John.jones@ohioattorneygeneral.gov

Christopher.Healey@occ.ohio.gov
amy.botschner.obrien@occ.ohio.gov

Attachment A

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PUBLIC UTILITIES COMMISSION OF OHIO**

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Ohio, Inc., for Recovery of Program Costs, Lost) Case No. 20-613-EL-RDR
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**RESPONSIVE COMMENTS OF DUKE ENERGY OHIO, INC. TO
THE COMMENTS OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
FILED MAY 14, 2020**

I. INTRODUCTION

This case concerns the Application, filed by Duke Energy Ohio, Inc. (Duke Energy Ohio or Company), for recovery of program costs, lost distribution revenues, and a performance incentive for costs incurred in 2019, pursuant to its portfolio of energy efficiency programs, which was approved on September 17, 2017 in Case No. 16-576-EL-POR. Although no procedural schedule has been issued in this case, the Office of Consumers' Counsel filed comments on May 14, 2020 (OCC Comments).¹ The following are the Company's comments in response to the OCC Comments.

II. OCC'S PLEAS TO RECONSIDER THE COMMISSION'S PRIOR ORDERS ARE IMPROPER IN THIS PROCEEDING AND UNREASONABLE.

A. The Commission has already authorized the Company to include shared savings in its cost recovery for 2019 programs and issued a timeline for winding down 2020 programs.

¹ Consumer Protection Comments by the Office of the Ohio Consumers' Counsel (May 14, 2020).

Among other things, OCC seeks to relitigate two questions that have already been resolved by the Commission: the inclusion of shared savings in the Company's cost recovery and the timeline for winding down the existing programs.² Both of these issues have been resolved.

In Case No. 16-576-EL-POR, the Commission approved the inclusion of shared savings in the Company's existing portfolio,³ and approved the inclusion of shared savings in the Company's proposed budget for 2020 just a few months ago.⁴ OCC filed an application for rehearing of the Commission's September 2017 order, seeking to reduce the amount of shared savings the Company could collect,⁵ but the Commission has not ruled on this application and there have been no other changes to Ohio law that would require elimination of shared savings. Thus, the September 2017 order approving shared savings stands. OCC cannot launch a collateral attack on it in this proceeding.

In the same case, the Commission issued an order just a few months ago, providing a schedule to *all* of the utilities for winding down existing 2020 programs (Wind-Down Order).⁶ The existing state of emergency was declared on March 9,⁷ over two weeks before the deadline for rehearing of the Wind-Down Order passed.⁸ And yet, OCC did not file an application for rehearing challenging the reasonableness of those deadlines. And, although that docket remains open with motions and applications for rehearing pending, OCC had not filed any motion in that proceeding seeking a global change to the wind-down procedures set out in the Wind-Down Order

² OCC Comments, pp. 1-3.

³ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its 2017-2019 Energy Efficiency and Peak Demand Reduction Program Portfolio Plan*, Case No. 16-576-EL-POR, Opinion and Order, pp. 1, 18-19 (September 27, 2017).

⁴ *Id.*, Finding and Order, pp. 17, 19-20 (February 26, 2020).

⁵ *Id.*, Application for Rehearing by the Office of the Ohio Consumers' Counsel, pp. 2-3 (October 27, 2017).

⁶ *Id.*, Finding and Order (February 26, 2020).

⁷ Executive Order 2020-01D.

⁸ See R.C. 4903.10 (permitting application for rehearing to be filed within thirty days).

for COVID-related reasons. OCC should not be permitted to do so here, where the Company is merely seeking cost recovery for past programs pursuant to an already-approved mechanism.

B. The economic consequences of the COVID-19 pandemic make energy efficiency programs more important, not less important, to maintain.

Even if they were otherwise proper, OCC's requests to eliminate the Company's shared savings for 2019 and accelerate the wind-down of its energy efficiency programs are unsubstantiated and unreasonable.

First, OCC does not assert any basis specific to the Company for denying the Company recovery of *any* shared savings in this case; only that, generally, there is a "health and financial crisis" and that customers are struggling. The Company has taken several measures to relieve its customers' hardships, as detailed in its filings in Case No. 20-599-GE-UNC. Likewise, the Commission has initiated multiple dockets specifically for addressing the emergency, in which it has issued numerous orders to utilities and/or CRES providers to govern their relationships with customers during this time. The mere existence of the emergency cannot be used to simply eliminate entire components of previously approved cost recovery mechanisms and previously approved budgets for individual utilities on a one-off basis, especially when the costs in question were incurred completely before the state of emergency.

Second, the Company's programs have benefited and continue to benefit both program participants and Ohio customers generally. Not only do program participants reduce their energy costs, they also provide energy and capacity benefits which will benefit the entire system, including non-participating customers. The Company bids EE resources into the capacity market and credits customers correspondingly. Furthermore, reducing demand reduces rates by permitting the Company to avoid additional capital expenditures associated with increased load, such as new

substations, transformers, and power lines. Finally, reducing load reduces emissions, which generates environmental benefits for everyone in the Company's service territory.

In addition to being procedurally inappropriate in this proceeding, OCC's recommendation to accelerate the wind-down of 2020 programs is unreasonable at this late stage. The Company, as well as vendors serving the programs, have planned for a wind-down pursuant to the Wind-Down Order. Barely half the year remains. Changing the schedule now would be prejudicial and upset the expectations of virtually all stakeholders.

III. THE COMPANY'S PROJECTED PROGRAM COSTS FOR 2020 REMAIN REASONABLE AND, IN ANY EVENT, ARE SUBJECT TO RECONCILIATION.

OCC argues that the Company's projections for 2020 are "overstated because they do not appear to account for the fact that the PUCO ordered Duke . . . to wind down their programs this year."⁹ The Company's projection of approximately \$45.3 million in total 2020 recovery¹⁰ is less than the amount authorized by the Commission of \$46,895,800,¹¹ and remains reasonable. In any event, any shortfall will be reconciled in the following year's filing in March 2021.

IV. THE COMPANY HAS BEEN FORTHRIGHT ABOUT THE INCLUSION OF EMPLOYEE INCENTIVES IN ITS FILING.

OCC complains about the Company's inclusion of certain employee incentives in its application for cost recovery, and suggests that the Company's filing "ignores the fact that this issue has been resolved," such that all employee incentives must be excluded from cost recovery.¹² This is not the case. The Commission has never categorically and definitively excluded all

⁹ OCC Comments, p. 4.

¹⁰ Direct Testimony of Jim Ziolkowski, Attachment JEZ-1, p. 5.

¹¹ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its 2017-2019 Energy Efficiency and Peak Demand Reduction Program Portfolio Plan*, Case No. 16-576-EL-POR, Opinion and Order, pp. 3, 17 (September 27, 2017).

¹² OCC Comments, p. 6.

incentive pay from inclusion in the Rider EE-PDR. Rather, the Commission has accepted Staff's recommendations to exclude the Company's incentive pay expenses recently on the basis of Staff having insufficient information to distinguish between the types of incentive pay included, *i.e.* whether the incentives in question were "financial" incentives.¹³ The Commission's reasoning, however, indicates that incentive pay that is not "tied to financial goals" is potentially recoverable.¹⁴

Contrary to OCC's implications, the Company has taken pains to be forthright in its treatment of incentive pay. The Company has explicitly highlighted the incentive pay included in its filing in supporting testimony and provided a breakdown to ensure clarity along the criteria previously described by Staff, whose recommendation was accepted by the Commission.¹⁵ OCC implies that the Company is overlooking the Commission's prior rulings on this issue by discussing it in terms of Staff's prior recommendations.¹⁶ This is untrue; the Company simply focuses on Staff's past recommendations because Staff makes the initial review and/or audit, and because the Commission has relied on Staff's recommendation in past cases.

¹³ See, e.g., *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. 18-397-EL-RDR, Staff Review and Recommendation, p. 2 (June 12, 2019) (Staff recommending the exclusion of all of the incentive pay requested because the Company "did not provide the full information required to isolate non-financial incentives from financial incentives").

¹⁴ *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. 18-397-EL-RDR, Finding and Order, p. 5 ("[W]e agree with Staff's exclusion of incentive pay tied to financial goals and find Staff's evaluation was appropriate.").

¹⁵ See Direct Testimony of Jim Ziolkowski, pp. 6-8.

¹⁶ OCC Comments, p. 6.

V. THE COMPANY FILING COMPLIES WITH OHIO LAW IN ITS TREATMENT OF THE COST CAP.

OCC makes no attempt to distinguish the cost cap overturned by the Ohio Supreme Court in *In re Application of Ohio Edison Company* late last year,¹⁷ but nonetheless insists that the Company should not be permitted to exceed the four percent cost cap imposed by the September 27, 2017 order because the Commission has not yet explicitly addressed the impact of the Supreme Court's decision. As the Company has previously explained, it simply prepared its filing in accordance with the most recent Ohio law.¹⁸ One would expect OCC to agree with this approach, given that it has previously implored the Commission to "immediately remove [another utility's] nearly identical charge" after an Ohio Supreme Court decision struck down a "similar" charge.¹⁹ Furthermore, the Company has been thoroughly transparent in both its Application and supporting testimony regarding its reasoning and calculations.²⁰ Given the reasoning of *Ohio Edison* and in the absence of contrary authority from the Ohio Supreme Court, there is no basis for either enforcing the four-percent cost cap or otherwise delaying approval of the Company's application for cost recovery.²¹ Accordingly, the Commission should approve the Application as filed.

VI. CONCLUSION

¹⁷ See OCC Comments, pp. 7-8 (discussing *In re Application of Ohio Edison Co.*, 158 Ohio St.3d 27, 2019-Ohio-4196).

¹⁸ Application, pp. 3-5; Direct Testimony of Trish Haemmerle, pp. 6-7; Direct Testimony of Jim Ziolkowski, pp. 4-5.

¹⁹ *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 16-0395-EL-SSO, Supplemental Brief for Ending DP&L's Charge to Consumers for Its So-called Distribution Modernization Rider and for Making the Charge Subject to Refund by the Ohio Consumers' Counsel, p. 24 (August 1, 2019).

²⁰ See *supra* note 18.

²¹ OCC claims that the Company's Application will be "automatically approved" 30 days after the OCC Comments if the Commission takes no action. OCC Comments, p. 8. This is not true because, as the Company explained in its accompanying Motion, the automatic approval provided for in Rule 4901:1-39-06(B) is for a new proposed recovery mechanism and therefore does not apply to the instant case.

For the reasons above, the Commission should reject all of the recommendations made by OCC in the OCC Comments.

Respectfully submitted,
DUKE ENERGY OHIO, INC.

/s/ Larisa M. Vaysman

Rocco O. D'Ascenzo (0077651)
Deputy General Counsel
Jeanne W. Kingery (0012172)
Associate General Counsel
Larisa M. Vaysman (0090290)
Senior Counsel
Duke Energy Business Services, Inc.
139 East Fourth Street, ML 1301
Cincinnati, Ohio 45202
Phone: 513-287-4320
Rocco.DAscenzo@duke-energy.com
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Willing to accept service via email