Before

**The Public Utilities Commission of Ohio**

In the Matter of the Application of Duke )

Energy Ohio, Inc., for Authority to )

Establish a Non-residential Energy ) Case No. 14-1575-EL-POR

Efficiency Program for Inclusion in its )

Energy Efficiency Portfolio )

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**Initial Comments of**

**Industrial Energy Users-Ohio**

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**January 27, 2015 On Behalf of Industrial Energy Users-Ohio**

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# Introduction

On September 9, 2014, Duke Energy Ohio, Inc., (“Duke”) filed an application requesting authority to conduct a pilot program for non-residential customers referred to as Smart Energy in Offices.[[1]](#footnote-1) According to Duke, this program is designed to increase energy efficiency by educating certain targeted customers to change energy consumption.[[2]](#footnote-2) Further, Duke is seeking to increase its portfolio program budget by nearly $2 million.[[3]](#footnote-3) While Industrial Energy Users-Ohio (“IEU-Ohio”) takes no position on the potential benefits of such a program, the following comments address the filing in light of the adoption of Substitute Senate Bill 310 (“SB 310”). Under the new provisions of Ohio law governing existing portfolio plans, the Public Utilities Commission of Ohio (“Commission”) must either dismiss the Application or find that it is an amendment and permit qualified electric intensive customers to opt out of the portfolio plan.

# Discussion

Because Duke is seeking to change provisions of its current portfolio plan, this Application is governed by the requirements of SB 310. Under Section 7(B) of SB 310, the Commission, prior to January 1, 2017, is prohibited from taking any action with regard to any portfolio plan or application regarding a portfolio plan with two exceptions.

Under the first exception contained in Section 7(B), the Commission may approve, or modify and approve, an application to amend a portfolio plan if the application is to amend an existing portfolio plan under Section 6(B) (“plan exception”).[[4]](#footnote-4) Under the second exception, the Commission may take those actions necessary to administer the implementation of the existing portfolio plan (“implementation exception”).

The implementation exception does not provide the Commission authority to act on Duke’s Application. Through this Application, Duke is seeking to add a new program and its related program costs up to nearly $2 million. Because Duke is seeking to add a program to its existing plan rather than implement an existing program, the implementation exception to the prohibition in Section 7(B) does not apply and Section 7 requires that the Application be dismissed.[[5]](#footnote-5)

Although Duke alleges that the proposed program does not change the existing portfolio plan because the current portfolio plan contemplates that it may be modified,[[6]](#footnote-6) that claim places form over substance. The Application seeks to expand the programs and costs of the current plan. The authorization of the request in the Application, therefore, is not an “action necessary to administer the implementation of [the] existing portfolio plan[].”[[7]](#footnote-7)

Because Duke’s Application would result in an amendment to the current plan,[[8]](#footnote-8) however, the plan exception may require the Commission to approve, or modify and approve, the Application.[[9]](#footnote-9) The amended plan or amended plan as modified then will be effective until December 31, 2016.[[10]](#footnote-10)

If the Commission deems the Application in this proceeding as one seeking an amendment to the current portfolio plan, a customer of Duke that takes service above primary voltage levels or a commercial or industrial customer that has made a written request for registration as a self-assessing purchaser pursuant to R.C. 5727.81 (*i.e.,* the customer may self-assess the kilowatt-hour tax) would be permitted to elect to opt out of the portfolio plan (rather than wait to make the election on or after January 1, 2017).[[11]](#footnote-11) , If the Commission determines that the plan exception applies, the Commission should make an affirmative finding that the Commission is approving an amended portfolio plan and that eligible customers may opt out as provided by Section 8 of SB 310.

# Conclusion

Through this Application, Duke is seeking to amend its current portfolio plan to add a new program and recover related costs. Because Duke is seeking to add a program to its current plan rather than implement the current plan, the implementation exception to the prohibition on changes to an current portfolio plan contained SB 310 does not apply, but the plan exception may require the Commission to approve, or modify and approve, the Application. If the Commission finds that it may approve or modify and approve the Application under the plan exception, the Commission should also expressly find that energy intensive customers may use the opt out procedures provided by Section 8 of SB 310.

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 *Initial Comments of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 27th day of January 2015, *via* electronic transmission.

*/s/ Frank P. Darr*

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1. Application of Duke Energy Ohio, Inc., for Authority to Establish a Non-residential Energy Efficiency Program for Inclusion in its Energy Efficiency Portfolio (Sept. 9, 2014) (“Application”). [↑](#footnote-ref-1)
2. *Id*. at 2-3. [↑](#footnote-ref-2)
3. *Id*. at 3. [↑](#footnote-ref-3)
4. *See 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 Plans for 2013 through 2015*, Case Nos. 12-2190-EL-POR, *et al*., Finding and Order (Nov. 20, 2014) (approving modification to current portfolio plan). [↑](#footnote-ref-4)
5. Duke’s recent attempt to extend its shared savings provision raised a similar problem. *See In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Continue its Cost Recovery Mechanism for Energy Efficiency Programs Through 2016*, Case No. 14-1580-EL-RDR, Ohio Partners for Affordable Energy’s Motion to Intervene and Memorandum in Support and Motion to Dismiss and Memorandum in Support (Sept. 30, 2014). [↑](#footnote-ref-5)
6. Application at 2. [↑](#footnote-ref-6)
7. SB 310, Section 7(B). [↑](#footnote-ref-7)
8. Duke has created a potential procedural problem because the provisions allowing for an amendment of the current portfolio plan were not effective until September 12, 2014 and Duke did not refile the Application after the effective date of SB 310. As a matter of efficiency, the Commission should address the Application as if Duke had properly sought an amendment to the current portfolio plan. As a factual matter, the Application was filed before October 12, 2014, thus meeting the filing deadline established by SB 310. The alternative is a dismissal as required by Section 7 of SB 310. [↑](#footnote-ref-8)
9. SB 310, Section 6(B). [↑](#footnote-ref-9)
10. *Id*. [↑](#footnote-ref-10)
11. Section 8 of SB 310 provides, “Beginning January 1, 2015, a customer of an electric distribution utility may opt out of the opportunity and ability to obtain direct benefits from the utility’s portfolio plan that is amended under division (B) of Section 6.” All customers meeting certain voltage or usage levels will have the right to opt out beginning January 1, 2017. R.C. 4928.6611. [↑](#footnote-ref-11)