

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
|--|---|-------------------------|
| In the Matter of the Application of Duke |) | Case No. 11-4393-EL-RDR |
| Energy Ohio, Inc. for an Energy |) | |
| Efficiency Cost Recovery Mechanism |) | |
| and for Approval of Additional |) | |
| Programs for Inclusion in its Existing |) | |
| Portfolio | | |

**POST HEARING BRIEF IN BEHALF OF THE OHIO ENVIRONMENTAL COUNCIL
AND THE NATURAL RESOURCES DEFENSE COUNCIL**

I. Ohio utility laws and policies provide wide support for energy efficiency including incentives for implementation of energy efficiency programs.

It cannot be argued that incentives are improper in Ohio’s regulatory environment. Despite ongoing efforts to transform Ohio’s electricity markets, Ohio utility laws and policies specifically recognize the value of energy efficiency and energy efficiency programs. Ohio Revised Code §4928.63 states:

“[I]n order to promote the welfare of the people of this state; stabilize the economy; assist in the improvement and development within this state of not-for-profit entity, industrial, commercial, distribution, residential, and research buildings and activities required for the people of this state; improve the economic welfare of the people of this state by reducing energy costs and by reducing energy usage in a cost-efficient manner using, as determined by the director, both the most appropriate national, federal, or other standards for products and the best practices for the use of technology, products, or services in the context of a total facility or building; and assist in the lowering of energy demand to reduce air, water, or thermal pollution. *It is hereby determined that the accomplishment of those purposes is essential so that the people of this state may maintain their present high standards in comparison with the people of other states and so that opportunities for improving the economic welfare of the people of this state, for improving the housing of residents of this state, and for favorable markets for the products of this state’s natural resources, agriculture, and manufacturing shall be improved.*” (Emphasis Added).

By encouraging the education of and implementation of energy efficiency programs for small business owners;¹ providing funding mechanisms for low income customer energy efficiency programs;² allowing recovery for costs associated with energy efficiency portfolio programs;³ creating an energy efficiency revolving loan fund and program;⁴ and finally creating an energy efficiency benchmark,⁵ the general assembly has made it quite clear that not only are energy efficiency programs good for Ohio, but also that incentives for increased utility deployment of energy efficiency resources are appropriate and encouraged.⁶ In addition, OAC §4901:1-39-02 states as its purpose: To establish rules to implement programs that will encourage innovation and market access for cost effective energy efficiency and to achieve and even exceed the statutory benchmarks for the benefit of the state of Ohio. The question before the Commission is not *whether* to approve an incentive mechanism; but rather what type of incentive mechanism is appropriate.

II. The Commission should approve the shared savings mechanism stipulated to in this case.

A. Shared savings mechanisms incentivize utilities to achieve greater and more cost-effective energy efficiency savings and are permitted under Ohio law.

In the case at bar, the Commission specifically noted: “In considering the appropriateness of the incentive, we are mindful that we have previously indicated that “incentive mechanisms, including shared savings, are an effective means of aligning the utilities’ and consumers’ interests in implementing energy efficiency programs.” See Entry May 9, 2012, citing *In the Matter of the Application of the Cleveland Electric Illuminating Company, Ohio Edison*

¹ ORC §4928.02(M) and 4928.62

² ORC §4928.51, §4928.52, §4928.55 and §4928.56

³ ORC §4928.142(D)(1) and ORC §4928.143(B)(2)(i)

⁴ ORC §4928.61, §4928.62 and §4928.63

⁵ ORC §4928.66

⁶ OAC §4901:1-39-07(A)

Company, and the Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2010 through 2012 and Associated Cost Recovery Mechanism, Case No. 09-1947-EL-POR, et al. Opinion and Order (March 23, 2011).

Shared savings mechanisms provide utilities an earnings opportunity for their efforts to help customers save energy by offering shareholders a portion of the net benefits customers receive (that is, the benefits from avoiding more costly energy sources less the cost of the efficiency programs) as a reward for excellent performance at saving energy and lowering customer bills, provided minimum performance thresholds are met.⁷

The shared savings mechanism parties stipulated to in this case:

- Aligns Duke's incentives with that of its customers: when its programs cost effectively save energy for customers, the Company benefits;
- Is based on performance, not investment: the Company benefits when it saves more energy cost-effectively;
- Balances the *risks* already included in Ohio law (the non-compliance penalty in Revised Code Section 4928.66 (C)) with a *reward* based on performance;
- Includes a review by interested parties and an expiration date, so that parties and the Commission can evaluate the performance of the mechanism.⁸

Approving the shared savings mechanism would help further Ohio policy to ensure efficient and reasonably-priced electric service⁹ and to encourage innovation and market access for cost-effective supply- and demand-side retail electric service,¹⁰ because it would ensure that

⁷ NRDC Exhibit 1 at 3, Lines 15-19.

⁸ NRDC Exhibit 1 at 4, Lines 25-26 and 5, Lines 1-6.

⁹ O.R.C. §4928.02(A)

¹⁰ O.R.C. §4928.02(D)

investing in energy efficiency, the lowest-cost, least risky, and cleanest way to meet energy needs, is a profitable option for Duke.¹¹

Ohio Energy Group (OEG) argues against incentives because Duke intends to divest itself of generation assets. However, the transition to competitive generation service in Ohio should have no effect on *whether* the Commission approves a shared savings mechanism for Duke. In fact there is nothing in Ohio law that would allow an electric distribution utility to disregard its energy efficiency requirements upon divestiture of its generation assets. Instead, Ohio law requires the electric distribution utility to implement programs that help customers save energy.¹² Ohio law also explicitly allows a utility to develop a shared savings or incentive program.¹³ A utility that has an investment opportunity tied to success in delivering cost effective energy efficiency will be more likely to devote management attention, ingenuity, and effort to the task of helping customers save energy.¹⁴ Also, a utility that can cost-effectively save more energy than the law requires will be reducing bills in its service territory, avoiding distribution, transmission, and generation costs that would otherwise affect its customers.¹⁵ The move to competitive generation service does nothing to remove the public policy justification for utility energy efficiency programs, which are necessary because of the market barriers that keep customers from investing in energy saving opportunities that would reduce their energy bill.

B. The shared savings mechanism should be *triggered* when Duke exceeds its statutory benchmarks, but its *incentive* should not be limited to a portion of the excess net benefits (those net benefits the Company's programs created when it exceeded the statutory benchmarks).

¹¹ NRDC Exhibit 1 at 3, Lines 1-3.

¹² ORC §4905.70, §4928.02 and §4928.62

¹³ OAC §4901:1-39-07(A)

¹⁴ Hearing Transcript at pg. 151, lines 17-25, page 152, lines 1-2 (June 7, 2012)

¹⁵ Hearing Transcript at pg. 148, line 19 through pg. 149, line 22.(June 7, 2012).

One of the key decisions parties made when designing the shared savings mechanisms was the level of performance at which the utility should begin to “share” the net benefits its energy efficiency programs create for customers. In this case, parties set that threshold at the point where Duke begins over-complying with the energy savings requirements in Revised Code Section 4928.66. The impacts of transmission and distribution projects and mercantile self-direct projects are excluded. This is a reasonable trigger. The law requires energy savings that meet the law’s requirements, although it’s important to realize that customers would still save money (just not as much) if the Company did not quite meet the law’s requirements. For that reason, some shared savings mechanisms (like California’s¹⁶) are triggered when a utility meets a high percentage of the target, such as 80%.¹⁷

No shared savings mechanisms operating, on the other hand, restrict the pool of net benefits from which the Company takes a share to only those net benefits in excess of the law’s requirements.¹⁸ To do so would not create enough of an earnings opportunity to convince a utility to dedicate time, investment, and ingenuity to its energy efficiency effort¹⁹: just a possible \$350,000 on an energy efficiency budget of \$25 million.²⁰ Moreover, such a restriction would fail to recognize the importance of optimizing the cost effectiveness of the programs until the Company reaches its compliance target. By providing Duke a meaningful percentage of the net benefits associated with its programs, the Company is motivated to deliver as much energy efficiency as it can in the most cost effective manner possible.²¹

The Commission should reject the argument that because a certain level of performance is mandated by law, there is no rationale for an incentive that includes net benefits created in

¹⁶ National Action Plan for Energy Efficiency, *Aligning Utility Incentives with Investment in Energy Efficiency*, U.S. Environmental Protection Agency, November 2007, Page 6-9.

¹⁷ NRDC Exhibit 1 at 5, Lines 10-21.

¹⁸ NRDC Exhibit 1 at 6, Lines 14-15.

¹⁹ NRDC Exhibit 1 at 6, Lines 7-9.

²⁰ Duke Energy Exhibit 10 at 9.

²¹ Duke Energy Exhibit 10 at 9.

meeting the legal mandate.²² In fact, there are a variety of different programs and practices utilities can use to meet and exceed their energy efficiency obligations. The shared savings mechanism rewards the Company more when those efforts are more cost effective (because the incentive is based on net savings). Nor should the utility's incentive only be limited to efforts that would not have occurred absent the incentive.²³ That is not a principle that can be easily applied to a utility's entire portfolio of energy efficiency programs. It e cannot be assumed that the targets will be met absent an incentive: utilities in Ohio have fallen short *and* exceeded the energy savings targets since 2009. The utility that fell short did not have a shared savings incentive in place.²⁴

C. The range of revenues that could be produced by the shared savings mechanism are reasonable.

The actual Company revenues produced by the shared savings mechanism will be dependent on the degree to which Duke exceeds its annual energy efficiency target and the net benefits of its programs. The maximum incentive the Company is likely to earn is \$8.2 million²⁵ If the Company does not exceed its target, it will earn nothing. If the Company slightly exceeds the target, its incentive will be less generous: Just 5 percent of net benefits if the Company exceeds the target by less than 5 percent.²⁶ The Company's incentive under the stipulated mechanism would be within the range of what other states have found reasonable. American Electric Power's shared savings mechanism in Oklahoma, for example, allows it get 25% of the net benefits from measurable energy efficiency programs. California's energy efficiency

²² OEG Exhibit 7 at 6, Lines 2-4.

²³ OEG Exhibit at 6, Lines 6-7.

²⁴ See *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company to Amend Their Energy Efficiency Benchmarks*, Case No. 09-1004-EL-EEC, et al. and *In the Matter of the Application of the Cleveland Electric Illuminating Company, Ohio Edison Company, and the Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2010 through 2012 and Associated Cost Recovery Mechanism*, Case No. 09-1947-EL-POR, et al. Opinion and Order (March 23, 2011).

²⁵ Duke Energy Exhibit 10 at 8.

²⁶ NRDC Exhibit 1 at 4, Table.

performance incentive allowed utilities to get 9% of net benefits when it reached 85% to 100% of its energy efficiency goals.²⁷

D. The Commission should ensure that the Company's opportunity to earn a return from energy efficiency is comparable to its earnings opportunities in other investments, like utility infrastructure.

The goal of an incentive is to equalize investment opportunities between energy efficiency and competing sources of utility time and capital.²⁸ But energy efficiency isn't precisely like other utility investments. Therefore, the Commission should attempt to get incentives for energy efficiency performance in the same "ballpark" as other utility incentives. As discussed above, the range of incentives stipulated to in this case is within the range of what other states have found reasonable.

III. Mr. Kollen's testimony is contrary to Ohio law, unfounded by any analysis, research or review of the costs and benefits of shared savings to customers, and should be disregarded by the Commission.

Mr. Kollen testified that Duke is not entitled to incentives for exceeding the statutory benchmarks for energy efficiency because Duke intends to divest itself of its generation assets and because Ohio is moving to an unregulated environment.²⁹ This position is contrary to the law of Ohio. As stated above Ohio's law, rules and policies encourage energy efficiency programs and expenditures. In fact, directly contrary to Mr. Kollen's testimony, Ohio specifically allows for shared savings mechanism as a means to incentivize energy efficiency programs.³⁰

Mr. Kollen is not qualified to address matters regarding energy efficiency. He hasn't testified about energy efficiency and peak demand in Ohio.³¹ In his history of Expert Appearances attached to his Direct Testimony, which was 22 pages long spanning 1986 to the

²⁷ NRDC Exhibit 1 at 7, Lines 1-6.

²⁸ NRDC Exhibit 1 at 6, Line 18.

²⁹ OEG Exhibit 7 at 3, Lines 3-10.

³⁰ OAC §4901:1-39-07(A)

³¹ Hearing Transcript at 47-48, lines 24-25 and 1-3

present, he only appeared in one matter regarding energy efficiency.³² He is not aware of energy efficiency or peak demand projects undertaken by OEG members or of the incentive structure of other Ohio utilities.³³ He is unaware as to whether Ohio statutes allow an electric distribution utility to avoid its energy efficiency mandate.³⁴ He has not performed any rate studies or analyses with regard to his proposed alternative incentive.³⁵ He did not review any incentive mechanisms for energy efficiency in other jurisdictions other than Ohio or in regard to other Ohio utilities.³⁶ He did not investigate why PJM would create a market for energy efficiency.³⁷ He was unaware that Ohio utilities were bidding energy efficiency resources into PJM's Base Residual Auction.³⁸ He has never investigated, but nonetheless does not accept the notion that energy efficiency measures benefit transmission and distribution asset development.³⁹ In short, Mr. Kollen's experience and knowledge relative to energy efficiency is very limited to say the least. The weight given to his testimony should be commensurate with his experience; especially when compared to more knowledgeable witnesses presented by the parties.

Most importantly, Mr. Kollen characterizes shared savings mechanisms, and the higher levels of energy efficiency deployment shared savings will encourage, as a net cost; but he failed to review, analyze, or even estimate the considerable benefits to Duke Customers associated with these higher levels of energy efficiency. This failure demonstrates his fundamental lack of understanding of Ohio law and energy efficiency, and recommends that his testimony should be given very little weight on these points.

³² Hearing Transcript at 48, lines 12-23.

³³ Hearing Transcript at 51, line 20 through p. 52, line 21.

³⁴ Hearing Transcript at 58, line 24 through p. 59, line 6.

³⁵ Hearing Transcript at 61, lines 13-20.

³⁶ Hearing Transcript at 61, lines 17-15 through page 61, line 3.

³⁷ Hearing Transcript at 64, lines 12-14.

³⁸ Hearing Transcript at 64, lines 18-20 through page 65, line 2.

³⁹ Hearing Transcript at 67, lines 19-24.

III. Duke should be granted a waiver.

Duke has filed most of the information required in O.A.C. 4901:1-39. In addition, the company will file an updated program portfolio plan in 2013 and a new potential study.⁴⁰ The members of the Collaborative extensively reviewed the new energy efficiency programs proposed by the company⁴¹ and the programs all have benefits well in excess of cost and access energy efficiency opportunities that are now unaddressed in the Company's portfolio. For the limited purpose of launching these well-vetted programs as soon as possible, the Commission should grant Duke its requested waiver.

Respectfully submitted,

/s/ Cathryn N. Loucas

Trent A. Dougherty, Counsel of Record
Cathryn Loucas (0073533)
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
(614) 487-7506 – Telephone
(614) 487-7510 – Fax
trent@theoec.org
cathy@theoec.org

/s/ Christopher Allwein

Christopher Allwein
1373 Grandview Avenue, Suite 212
Columbus, Ohio 43212
PH: 614.429.3092 FAX: 614.670.8896
callwein@williamsandmoser.com

⁴⁰ Duff Second Supplemental Direct at 4-5.

⁴¹ Hearing Transcript at pg 141, line 22 through pg. 142, line 5.

Certificate of Service

I hereby certify that a copy of the foregoing **POST HEARING BRIEF IN BEHALF OF THE OHIO ENVIRONMENTAL COUNCIL and The NATURAL RESOURCES DEFENSE FUND** was served upon the following parties of record this 22nd day of June, 2012, *via* electronic mail.

/s/ Cathryn N. Loucas
Cathryn N. Loucas

PH: 419.425.8860 FAX: 419.425.8862
Cmooney2@columbus.rr.com

Counsel for Duke Energy Ohio

Elizabeth H. Watts
Amy B. Spiller
Duke Energy Ohio
2500 Atrium II
139 East Fourth Street, P.O. Box 960
Cincinnati, Ohio 45201-0960
Elizabeth.watts@duke-energy.com
Amy.spiller@duke-energy.com

Counsel for Ohio Energy Group

David F. Boehm, Esq.
Michael Kutz, Esq.
Jody M. Kyler, Esq.
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
PH: 513.421.2255 FAX: 513.421.2764
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
jkyler@BKLawfirm.com

Counsel for PUCO Staff

William Wright
Attorney General's Office
Public Utilities Commission of Ohio
180 East Broad Street, 6th FL
Columbus, OH 43215
William.wright@puc.state.oh.us

Counsel for Ohio Partners for Affordable Energy

Colleen L. Mooney
231 West Lima Street
Findlay, OH 45839-1793

Counsel for People Working Cooperatively, Inc.

Mary Christensen
Christensen & Christensen LLP
8760 Orion Place, Suite 300
Columbus, OH 43240
Mchristensen@columbuslaw.org

Bruce Weston, Consumers' Counsel Office of the Ohio Consumers Counsel

Melissa R. Yost
Kyle Kern
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
PH: 614.466.8574
yost@occ.state.oh.us
kern@occ.state.oh.us

Counsel for the Environmental Law & Policy Center

Robert Kelter
Jason Vickers
Environmental Law & Policy Center
1207 Grandview Ave., Suite 201
Columbus, Ohio 43212
T: 614-732-0966; F: 614-487-7510
rkelter@elpc.org
jvickers@elpc.org

VECTREN RETAIL, LLC

Joseph M. Clark (Counsel of Record)
6641 North High Street, Suite 200
Worthington, OH 43085
Telephone: (614)781-1896
Telecopier: (812)492-9275
jmclark@vectren.com

SIERRA CLUB

Henry W. Eckhart, Counsel of Record
1200 Chambers Road, Suite 106
Columbus OH 43212-1703
Phone: (614)461-0984
Fax: (614) 485-9487
henryeckhart@aol.com

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

6/22/2012 12:41:29 PM

in

Case No(s). 11-4393-EL-RDR

Summary: Brief Post Hearing Brief In Behalf of Ohio Environmental Council and Natural Resources and Defense Fund electronically filed by Ms. Cathryn N. Loucas on behalf of The Ohio Environmental Council