

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**POST HEARING BRIEF  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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June 22, 2012

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**I. INTRODUCTION**

The Office of the Ohio Consumers' Counsel ("OCC") submits this brief on behalf of the residential utility customers of Duke Energy Ohio, Inc. ("Duke" or "the Company"). At issue in this proceeding are Duke's energy efficiency and peak demand reduction programs ("EE/PDR"). This case is significant for residential customers because the Public Utilities Commission of Ohio's ("PUCO") will rule upon Duke's application for approval of certain energy efficiency programs and determine how much money Duke's customers will pay for these programs. Most of the parties signed a Stipulation and Recommendation ("Stipulation") that was filed on November 18, 2011, to resolve all issues in the case.<sup>1</sup>

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<sup>1</sup> *In the Matter of the application of Duke Energy Ohio, Inc. for an energy Efficiency Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in its Existing Portfolio*, Case No. 11-4393-EL-RDR, Stipulation and Recommendation (November 18, 2011). The Signatory Parties to the Stipulation are Duke Energy Ohio, Inc., OCC, Ohio Partners for Affordable Energy, Vectren Retain, LLC, People Working Cooperatively, the Ohio Environmental Council, the Environmental Law and Policy Center, the Natural Resources Defense Council, and the Sierra Club.

On May 9, 2012, the Commission issued an Entry (“Entry”) which permitted testimony on the following issues:

- (a) Explain, in detail, why or why not Duke should be granted a waiver of the requirements established in Chapter 4901:1-39, O.A.C, including, but not limited to, Rules 4901:1-39-03(B), 4901:1-39-04, and 4901:1-39-05, O.A.C.
- (b) What is the range of revenue that could be earned via Duke’s proposed incentive mechanism in this case?
- (c) Should Duke’s incentives be limited to performance that exceeds statutory benchmarks?
- (d) Should an incentive be equal or greater to the return on investment that Duke could earn by investing the same sums in utility infrastructure?
- (e) How should the Commission view Duke’s proposed incentive mechanism in light of Duke’s significantly excessive earning threshold?<sup>2</sup>

Testimony was submitted, and an evidentiary hearing was held to address the Commission’s inquiries. The Attorney Examiners requested at the evidentiary hearing that the parties submit post-hearing briefs addressing only these issues.<sup>3</sup>

OCC’s understanding is that the parties to the Stipulation are bound by it for purposes of responding to the PUCO’s questions. As a party to the Stipulation, OCC’s brief is in conformance with the terms of the Stipulation and addresses point (e).

**II. DUKE’S INCENTIVE REVENUES SHOULD BE INCLUDED IN THE COMPANY’S EARNINGS FOR THE SIGNIFICANTLY EXCESSIVE EARNINGS TEST CALCULATION ON EACH YEAR, TO ENSURE THAT CUSTOMERS ARE AFFORDED THE PROTECTION INTENDED IN SENATE BILL 221.**

Inquiry (e) of the Commission’s May 9, 2012 Entry states: “[h]ow should the Commission view Duke’s proposed incentive mechanism in light of Duke’s significantly

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<sup>2</sup> *In the Matter of the application of Duke Energy Ohio, Inc. for an energy Efficiency Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in its Existing Portfolio*, Case No. 11-4393-EL-RDR, Entry (May 9, 2012) at ¶9.

<sup>3</sup> Transcript at 161-162.

excessive earning threshold?” In response to the Commission’s question, OCC submits that Duke’s incentive revenues should be included in the calculation of the Company’s earnings for the Significantly Excessive Earnings Test (“SEET”).

The SEET is a consumer protection mechanism. In Senate Bill 221 (“S.B. 221”) the 127<sup>th</sup> General Assembly determined that the Commission must protect Ohio customers by requiring electric distribution utilities to return to customers the amount of any significantly excessive earnings.<sup>4</sup> Specifically, S.B. 221 requires the Commission, on an annual basis, to compare the earnings of Ohio investor-owned utilities operating under electric security plans (“ESPs”) to the earnings of publicly-traded companies with comparable risk.<sup>5</sup> If, after conducting such a comparison, the Commission determines that a utility’s ESP rate “adjustments” resulted in “significantly excessive” earnings, the utility must refund the excess earnings back to the utility’s customers.<sup>6</sup>

Examination of the plain language<sup>7</sup> of R.C. 4928.143(F) shows that there is no exclusion of revenues from energy efficiency incentives for the SEET calculation.<sup>8</sup> This point is undisputed in this proceeding. Even the Company acknowledges that all revenues collected and earnings associated with the Company’s previous energy efficiency recovery mechanism were “captured in the Company’s recent significantly excessive earnings test (SEET) filing in Case No. 12-1280-EL-UNC.”<sup>9</sup>

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<sup>4</sup> See R.C. 4928.143(F).

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

<sup>7</sup> Note that pursuant to Ohio’s rules of statutory construction, “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage.” R.C. 1.42.

<sup>8</sup> See *id.*

<sup>9</sup> Duke Ex. 10, (Prefiled Second Supplemental Direct Testimony of Timothy J. Duff) at 14-15.

In addition, the Ohio Energy Group (“OEG”) witness, Lane Kollen, testified that earnings associated with the Company’s energy efficiency portfolio should be included in the SEET calculation.<sup>10</sup> Witness Kollen eloquently explained that “the SEET statute is designed to protect customers from excessive charges by capping the earnings of the utility at a ‘significantly excessive return’ threshold. The exclusion of incentive revenues from the SEET calculations would not further the public policy objective of protecting customers.”<sup>11</sup> OCC concurs with this statement, and submits that Duke’s incentive revenues should be included as revenue for the purpose of determining whether Duke’s earnings were significantly excessive.

### **III. CONCLUSION**

OCC respectfully submits this brief in accordance with the Attorney Examiner’s request in this case to address the issues raised in paragraph nine of the Commission’s May 9, 2012 Entry.

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<sup>10</sup> OEG Ex. 7, (Prefiled Direct Testimony of Lane Kollen) at 7-8.

<sup>11</sup> *Id.* at 7-8.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Brief was served via electronic service upon the parties this 22<sup>nd</sup> day of June 2012.

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