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Via E-file

June 22, 2012

Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43215

In re: Case No. 11-4393-EL-RDR

Dear Sir/Madam:

Please find attached the POST-HEARING BRIEF OF THE OHIO ENERGY GROUP e-filed today in the above-referenced matter.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,

David F. Boehm, Esq.
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DFBkew
Encl.
Cc: Certificate of Service

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In The Matter Of The Application Of Duke Energy Ohio 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**

POST-HEARING BRIEF OF THE OHIO ENERGY GROUP

I. INTRODUCTION

The Ohio Energy Group ("OEG") hereby submits this Brief in support of its recommendations in this proceeding. OEG is a non-profit entity organized to represent the interests of large industrial customers in electric and gas regulatory proceedings before the Public Utilities Commission of Ohio ("PUCO" or "Commission"). OEG's members who are participating in this proceeding are: AK Steel Corporation, Air Products and Chemicals, Inc., Ford Motor Company and GE Aviation. These companies take electric service from Duke Energy Ohio, Inc ("Duke" or "Company"). OEG's principal position in this case was set forth in its Post-Hearing Brief filed December 9, 2011. OEG strongly urges the Commission to adopt its recommendations in that Post-Hearing Brief. However, OEG will confine its present discussion to the items the Commission listed in its May 9, 2012 Entry ("Entry") in this proceeding. OEG takes no position regarding the Commission's finding 9(a) of the Entry regarding whether Duke should be granted a waiver of the requirements of Ohio Adm. Code 4901:1-39.

II. ARGUMENT

A. <u>Finding 9(b):</u> What is the range of revenue that could be earned via Duke's proposed incentive mechanism in this case?

As a preliminary matter, no incentive mechanism is either appropriate or necessary for Duke to meet the energy efficiency and peak demand reduction ("EE/PDR") standards set forth in R.C. Section 4928.66.[1] Allowing Duke to recover an EE/PDR incentive is unreasonable because Duke has agreed to divest all of its generation assets. Under the Commission-approved Stipulation in Duke's most recent Electric Security Plan proceeding, the Company will no longer provide generation-related service to customers in its service territory and will divest all of its generation assets on or before December 2014.[2] Duke's planned divestiture of its generation assets and the Company's agreement to participate in the PJM reliability pricing model base residual auction transfers generation supply responsibility away from Duke and to the market.[3]

When a utility has divested all of its generation assets, customers no longer receive a critical benefit of implementing energy efficiency measures - delaying the construction, and the substantial costs associated with the construction of a new power plant. There is little to no additional benefit of utility-sponsored energy efficiency programs for customers, particularly large industrial customers who already carefully manage their energy consumption and implement their own self-funded energy efficiency measures. Further, any benefits of reduced market energy prices resulting from energy efficiency are generic benefits spread throughout the PJM system and do not provide targeted savings solely to Duke's customers. The same could be said for any reliability or environmental benefits of energy efficiency. Thus, Duke's customers would pay the costs of energy efficiency efforts that benefit non-Duke customers who have not

[1] Direct Testimony and Exhibits of Lane Kollen (May 30, 2012)("Kollen Testimony") at 2:20-22.
[2] Stipulation and Recommendation, Case No. 11-3549-EL-SSO (Oct. 24, 2011) at 7, paragraph II(B); at 9-10, paragraph II(F); and at 25, paragraph VIII(A).
[3] Kollen Testimony at 3:3-6.

had to pay such costs.[4] And because Duke is divesting its generation assets, there are no lost shareholder returns that are foregone by investing in energy conservation rather than supply-side alternatives. Requiring customers to pay an incentive for utilities to exceed EE/PDR benchmarks is not justified in a deregulated environment in which the market determines supply and prices.[5]

Duke is required to achieve the energy efficiency objectives mandated by statute, but no more. In exchange for compliance, Duke should be allowed to recover the reasonable costs of compliance, but no more.[6] As a fundamental matter, Duke should not be rewarded for complying with the law, particularly when it is allowed to recover its EE/PDR expenditures on a dollar for dollar basis. Nor should Duke be rewarded for over-complying with the law. As a matter of public policy, the regulatory process should not be used to expand the scope of the statutory requirements by introducing incentives for the utility to exceed the statutory benchmarks.[7] The energy efficiency benchmarks established under S.B. 221 provide sufficient incentive for utilities to implement energy efficiency measures as well as cost recovery for utility EE/PDR programs.

As a practical matter, without any incentives, Duke substantially overachieved its benchmark requirements in 2010 by 489% and will recover 100% of the expenditures it incurred to do so.[8] Thus, the actual empirical evidence is that an incentive is unnecessary for Duke to comply with (or even exceed) the statutory benchmarks in the future. The evidence is that an incentive simply will increase costs to customers in order to unnecessarily reward shareholders for behavior and compliance that already is mandated by law and has been and can continue to be achieved without such incentives.[9] Staff witness Scheck testifies that Duke's pre-tax incentive from 2009-2011 was 23.1 % or $13.99 million, while Duke's

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[4] Direct Testimony and Exhibits of Stephen Baron (Nov. 18, 2011)("Baron Testimony") at 14:1-12.
[5] Baron Testimony at 14:15-23.
[6] Kollen Testimony at 4:2-5.
[7] Kollen Testimony at 4:5-11.
[8] Kollen Testimony at 4:12-14; Baron Testimony 7:13-15.
[9] Kollen Testimony at 4:14-19.

estimated after-tax earnings incentive were 14.99% or $9.08 million.[10] And Mr. Scheck added that "[a]s the level of avoided costs increase over time due to the increasing benchmarks, the amount of incentive dollars earned via energy efficiency will likely increase, all other things being held equal."[11] The Commission should not approve the recovery of such substantial amounts of money merely because Duke complied with what is already required by law.

If, however, the Commission deems it appropriate to approve an incentive mechanism, then the effects on customers should be limited and minimized. This can be achieved by "capping" the incentive at the lesser of a specified dollar amount or the dollar amount derived from a percentage applied to the overall cost of the energy efficiency program. Alternatively, a cap could be based on either of those limits.[12] An incentive dollar cap is designed to provide an absolute limit on the impact on customer bills from the incentive. A percentage factor tied to the overall cost of energy efficiency expenditures scales the incentive to the expenditures incurred, but does not provide an absolute dollar limit.[13]

If the Commission adopts an incentive mechanism, OEG recommends that it incorporate both a percentage cap and an absolute dollar cap. The application of both limits to cap the incentive provides a reasonable balance between the potential reward to shareholders and the ultimate cost paid by customers. As an initial incentive cap, OEG recommends the lesser of 3% of total annual energy efficiency expenditures or $1.0 million annually.[14]

B. <u>Finding 9(c):</u> Should Duke's incentives be limited to performance that exceeds statutory benchmarks?

Notwithstanding OEG's overall opposition to any incentive, if the Commission deems incentives appropriate, the incentives should be limited to performance that exceeds the statutory benchmark, subject

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[10] Prepared Testimony of Gregory C. Scheck (May 30, 2012)("Scheck Testimony") at 7:14-19.
[11] Scheck Testimony at 7:20-22.
[12] Kollen Testimony at 4:20-5:2.
[13] Kollen Testimony at 5:3-6.
[14] Kollen Testimony at 5:7-12.

to the requirements that the energy efficiency expenditures are economic and that they provide benefits to customers that exceed the cost of the incentives.[15] Duke has met and exceeded the statutory benchmark for energy efficiency in prior periods. There is no valid rationale to reward shareholders for performance that is mandated by law and already provides full compensation for all actual costs incurred.[16]

Staff witness Scheck testified that "if the annual benchmarks for energy efficiency are exceeded, the Staff recommends that the Company earn an incentive on the entire amount of energy efficiency achieved for that calendar year."[17] The Commission should reject Staff's unreasonable recommendation. Rather, if the Commission determines that the utility should be incentivized to exceed the statutory requirements, then such incentives should be limited to expenditures that provide demonstrated benefits to customers, would not have been made but for the incentives, and that provide benefits that exceed the costs to customers, including the costs of the incentives.[18] These conditions ensure that the rewards paid to shareholders are commensurate with the costs incurred and/or avoided by the energy efficiency expenditures.[19]

C. <u>Finding 9(d):</u> Should an incentive be equal or greater to the return on investment that Duke could earn by investing the same sums in utility infrastructure?

OEG does not believe that the incentive, if any, should be tied to the rate of return on infrastructure investments in any manner. According to witness Scheck, "Staff recommends that in order to encourage more investment in energy efficiency by the Company, the internal rate of return on that investment would likely need to be relatively high in relation to any other alternative investment with similar risks, whether it was utility infrastructure related or not."[20] Again, the Commission should reject Staff's recommendation.

[15] Kollen Testimony at 5:18-23.
[16] Kollen Testimony at 6:1-4.
[17] Scheck Testimony at 8:9-11.
[18] Kollen Testimony at 6:4-8.
[19] Kollen Testimony at 6:8-10.
[20] Scheck Testimony at 9:6-9.

Unlike infrastructure investments, which require investments in capital or rate base by equity shareholders and debt creditors, the utility does not invest dollars in capital or rate base for EE/PDR compliance or over-compliance.[21] Instead, energy efficiency expenditures are considered as "expenses" and recovered on a dollar for dollar by the Company from its customers. These energy efficiency expenditures are not rate base or capital investments and do not and should not earn a rate of return.[22] The expenditures are treated similar to other expenses, such as operation and maintenance expense or property tax expense, which are recovered as they are incurred rather than over an extended period of time.[23] Duke has no capital invested or at risk, and thus, should not earn a return on the EE/PDR expenditures.

D. <u>Finding 9(e):</u> How should that Commission view Duke's proposed incentive mechanism in light of Duke's significantly excessive earnings threshold?

OEG's interpretation of this Finding is that the Commission is seeking comment on whether the incentive revenues should be included in the calculation of the Company's earnings for the significantly excessive earnings threshold test ("SEET") pursuant to R.C. 4928.143(F). As a general matter, OEG has consistently maintained in multiple proceedings that the statute requires that all revenues received by the utility from customers be included in the SEET calculation unless specifically excluded. There is no such exclusion for energy efficiency incentives. Thus, these incentive revenues should be included in the SEET calculation.[24] This conclusion is consistent with the Commission's determination in the various SEET proceedings that all revenues and all expenses must be included in the SEET calculations, except for certain extraordinary and non-recurring amounts and off-system sales.[25]

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[21] Kollen Testimony at 6:15-19.
[22] Kollen Testimony at 6:19-22.
[23] Kollen Testimony at 6:22-7:1.
[24] Kollen Testimony at 7:11-15.
[25] *See, e.g.*, Case No. 10-1261-EL-UNC, Opinion & Order (Jan. 11, 2011).

In addition, from a public policy perspective, the SEET statute is designed to protect customers from excessive charges by capping the earnings of the utility at a "significantly excessive return" threshold. Such a return threshold is greater than a reasonable return and even greater than an excessive return. The exclusion of incentive revenues from the SEET calculations would not further the public policy objective of protecting customers. Instead, it would allow the utility to charge customers more and then allow the utility to retain those additional revenues even if its earnings exceed the significantly excessive threshold.[26]

III. CONCLUSION

For the foregoing reasons, the Commission should adopt OEG's recommendations in this proceeding.

Respectfully submitted,

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June 22, 2012

[26] Kollen Testimony at 7:23-8:4.

CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing was served by electronic mail (when available) or ordinary mail, unless otherwise noted, this 22nd day of June, 2012 to the following:

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