

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval to)
Continue Cost Recovery Mechanism) Case No. 14-1580-EL-RDR
For Energy Efficiency Programs)
through 2016.)

**OHIO PARTNERS FOR AFFORDABLE ENERGY'S
MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT
AND MOTION TO DISMISS
AND MEMORANDUM IN SUPPORT**

Ohio Partners for Affordable Energy (“OPAE”) hereby respectfully moves the Public Utilities Commission of Ohio (“Commission”) for leave to intervene in the above-captioned matter pursuant to R.C. §4903.221 and Section 4901-1-11 of the Commission’s Code of Rules and Regulations, with full powers and rights granted by the Commission specifically, by statute or by the provisions of the Commission’s Code of Rules and Regulations to intervening parties. OPAE moves to dismiss the above-referenced application. The reasons for granting this motion to intervene and motion to dismiss are contained in the memoranda in support attached hereto and incorporated herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Ohio Partners for Affordable Energy (“OPAE”) should be permitted to intervene in this matter pursuant to Section 4903.22.1, Revised Code, and the Commission’s Rules and Regulation contained in Rule 4901-01-11 of the Ohio Administrative Code. The above-referenced docket concerns the application filed by Duke Energy Ohio, Inc. (“Duke”) to modify its current demand side management (“DSM”) portfolio by extending the ability to recover shared savings -- which currently terminates at the end of 2015 -- through 2016.

In determining whether to permit intervention, the following criteria are to be considered: the nature of the person’s interest; the extent to which that interest is represented by existing parties; the person’s potential contribution to a just and expeditious resolution of the proceeding; and, whether granting the intervention will unduly delay or unjustly prejudice any existing party. OPAE meets all four criteria for intervention in this matter.

OPAE is an Ohio corporation with a stated purpose of advocating for affordable energy policies for low and moderate income Ohioans. Additionally, OPAE includes as members non-profit organizations such as community action agencies located in the service area of Duke, and who will pay higher rates if this

application is granted.¹ As such, OPAE has a real and substantial interest in this matter.

As required by statute and regulation for intervention, OPAE has an interest in this proceeding that will modify the stipulation and DSM portfolio plan approved by the Commission in Case No. 11-4393-EL-RDR. OPAE was a party in Case No. 11-4393-EL-RDR, as well as Case Nos. 12-1857-EL-RDR and 13-431-EL-POR which are related to the initial case. OPAE's primary interest in this case is to protect Duke's customers from rate increases that will result if a flawed shared savings mechanism is extended beyond its expiration date in contravention of the stipulation in Case No. 11-4393-EL-RDR and the newly effective SB 310.

For the above reasons, OPAE has a direct, real and substantial interest in this matter. The disposition of this matter may impair or impede the ability of OPAE to protect its interests. No other party to the matter will represent the interests of OPAE, the non-residential customers which make up its membership, and the clients OPAE's member agencies serve. OPAE's participation in this matter will not cause undue delay, will not unjustly prejudice any existing party, and will contribute to the just and expeditious resolution of the issues raised by this case. Further, OPAE has been recognized by the Commission in the past as an advocate for consumers who will be affected by the outcome of this case.

Therefore, OPAE is entitled to intervene in this matter with the full powers and rights granted by statute and by the provisions of the Commission's Codes of Rules and Regulations to intervening parties.

¹ A listing of OPAE members can be found on the website: www.ohiopartners.org.

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Introduction

Duke seeks to modify an existing DSM portfolio plan approved by the Commission. Duke’s modification is in contravention of the plain meaning of the newly effective Substitute Senate Bill 310 (“SB 310”), which prohibits any modifications of existing portfolios. The only approach that will potentially permit Duke to recover shared savings in 2016 is to file a revised portfolio plan with the Commission for its review and approval. The provisions of the current portfolio are clear. The provisions of SB 310 are clear. The Commission should dismiss this application.

Statement of Facts

Duke has long offered energy efficiency programs to its customers. These programs were reviewed during the Commission’s consideration of Case No. 08-920-EL-SSO, Duke’s first Standard Service Offer (“SSO”) filing. OP&AE was a signatory party to the stipulation in this initial SSO case. The plan approved by the Commission included Rider DR-SAW, a unique approach to cost recovery, along with an incentive mechanism that permitted Duke to recover an escalating return on investment for exceeding the benchmark savings requirements. Case No. 08-920-EL-SSO, Stipulation at 24. Under the terms of the provision, Duke was

permitted a 6% return on investment for achieving between 101 and 110% of the required savings; 11% if savings were between 111% and 115%; 13% if savings were between 116% and 125%; and, 15% if savings exceeded the required benchmark by more than 125%. This approach to funding and shared savings was unique among the Ohio electric distribution utilities. Under the Save-a-Watt approach, Duke received a percentage of the avoided costs of energy and capacity avoided due to the impacts of demand side management programs. The incentive percentages outlined above were to be applied to the value of the avoided cost. The cost of the programs themselves was paid for by the generation and capacity savings produced by the programs; the 'incentive' provided to the utility. Duke was also authorized to recover lost distribution revenues.

The Save-a-Watt mechanism was called into question in Case No. 09-1999-EL-POR, the annual report filed by Duke on its energy efficiency program. The approval of Duke's first SSO came before the Commission's rules in Chapter 4901:1-39 were finalized, and the 08-920 stipulation required that Duke "conform to the Commission's ESP rules". Case No. 09-1999, Opinion and Order at 8. After a thorough review of the arguments, the Commission found that Duke must "remove the recovery of lost generation revenues...from its Rider DR-SAW beginning on December 10, 2009." *Id.* at 15. The Commission noted that the order would not bar recovery of shared savings "should Duke meet or exceed its benchmarks." *Id.* The Commission ordered Duke to refund any over-recovery to customers. *Id.* at 16.

The question of recovery of Duke's energy efficiency portfolio costs was next raised in Case No. 11-4393-EL-RDR. Because approval of the Save-a-Watt mechanism expired in December 2011, Duke sought a new recovery mechanism. Application at 2. Duke proposed Rider EE-PDR, which would "recover program

costs and an incentive in the form of the percentage of the avoided cost benefits realized.” Id. at 3. The Stipulation in Case No. 11-4393-EL-RDR ultimately defined the cost recovery mechanism to be used by Duke. Stipulation at 4. Duke accepted the shared savings proposal filed by the Ohio Consumer and Environmental Advocates as a part of their comments on September 21, 2014. This included recovery of projected program costs subject to true up. Case No. 11-4393-EL-RDR, Comments by Members of the Ohio Consumer and Environmental Advocates at 3. The agreement also included a decoupling mechanism. Id. at 7; Case No. 11-4393-EL-RDR Stipulation at 5.

The final cost recovery component was a shared savings mechanism. Duke agreed, and the stipulation in Case No. 11-4393-EL-RDR makes clear, that “[t]he incentive mechanism shall expire at the end of 2015”. Stipulation at 5; see also Case No. 11-4393-EL-RDR, Opinion and Order at 8. Duke witness Duff characterized the shared savings mechanism as being “identical in structure” to the stipulated shared savings mechanism established by many of the same parties and Columbus Southern Power Company and Ohio Power Company approved by the Commission in Case Nos. 11-5568-EL-POR and 11-5569-EL-POR, with one exception -- there would be no cap on the incentive. Second Supplemental Direct Testimony of Timothy J. Duff, Case No. 11-4393-EL-RDR, at 11-13.

The next case that is relevant to this matter is Case No. 13-431-EL-POR. The case was filed because the Commission directed in Case No. 11-4393-EL-RDR that Duke comply with Rule 4901:1-39-04 O.A.C. and file a three-year portfolio plan for review. The application requested authority to continue the programs included in the portfolio plan approved in Case No. 11-4393-EL-RDR, along with two new additional programs. Duke also requested authority for a one-

year extension of the cost recovery mechanism approved in the 2011 case; this is the issue relevant to the instant matter.

In Case No. 13-431-EL-POR, the Staff of the Commission (“Staff”), the Office of the Ohio Consumers’ Counsel (“OCC”), Kroger, and OPAE all objected to the extension of the shared savings mechanism. Although a stipulation ultimately resolved all issues in Case No. 13-431-EL-POR, the stipulating parties did not agree to the extension of the shared savings mechanism as requested by Duke, specifically restating that the mechanism “shall expire at the end of 2015.” Case No. 13-431, Stipulation at 5; Opinion and Order at 6. The stipulation also stated that, consistent with the agreement in Case No. 11-4393-EL-RDR, the parties, no sooner than the third quarter of 2014, would assess whether the existing shared savings mechanism which expires at the end of 2015 would be extended for the year 2016. If no agreement was reached, interested parties were permitted to seek the Commission’s determination of whether or not the expired mechanism would be used in 2016. Stipulation at 5; Opinion and Order at 6.²

A final case that is relevant to this proceeding is Case No. 14-457-EL-RDR wherein Duke filed an application to modify Rider EE-PDR, which recovers the cost of its energy efficiency and demand side management portfolio plan. The filing makes clear that Duke failed to meet the required energy efficiency benchmark in 2013, but complied with the requirement through the use of ‘banked’ savings; i.e., savings achieved in earlier years in excess of the amount of savings required by statute. OCC, OPAE, and The Ohio Manufacturers Association Energy Group (“OMAEG”) all intervened and offered comments on the application. The shared

² The Opinion and Order also noted in Footnote 1 that “Staff, OCC, and OPAE contest the calculation of allowable program costs in the calculation of shared savings, and have filed comments to the effect in *In re Duke Energy Ohio, Inc.*, Case No. 13-753-EL-RDR, and incorporate those comments in the Stipulation.” Opinion and Order at 6.

savings mechanism was the focus of several comments: the lack of a cap; the treatment of certain program costs; and, Duke's use of 'banked' savings to trigger the shared savings provisions. The latter was not contemplated by the initial stipulation – Case No. 11-4393-EL-RDR – though that is now disputed by Duke. Suffice it to say that there is a disagreement among the parties to the stipulation in Case No. 11-4393-EL-RDR as to how the current shared savings provision operates.

This line of cases brings us to the current application. However, one other action has occurred that is relevant to – in fact bans – this application. The General Assembly passed, and Governor Kasich signed into law, Senate Bill 310, which is now in effect. In addition to the stipulations, the new law is controlling in this case.

Argument

The Application Should Be Dismissed Because Substitute Senate Bill 310 Prohibits the Modification of an Existing Energy Efficiency and Demand Reduction Portfolio Plan.

SB 310 became effective on September 12, 2014, three days after this application was filed. SB 310 requires, in pertinent part:

SECTION 6. (A) If an electric distribution utility has a portfolio plan that is in effect on the effective date of this section, the utility shall do either of the following, at its sole discretion:

(1) Continue to implement the portfolio plan with no amendments to the plan, for the duration that the Public Utilities Commission originally approved, subject to divisions (D) and (E) of this section;

(2) Seek an amendment of the portfolio plan under division (B) of this section.

SECTION 7. (A) The Public Utilities Commission shall neither review nor approve an application for a portfolio plan if the application is pending on the effective date of this section.

(B) Prior to January 1, 2017, the Commission shall not take any action with regard to any portfolio plan or application regarding a portfolio plan, except those actions expressly authorized or required by Section 6 of this act and actions necessary to administer the implementation of existing portfolio plans. [Emphasis added.]

This application was filed on September 9, 2014. Under the plain language of SB 310, the Commission is prohibited by Section 7 from taking any action regarding an existing portfolio plan. Changes can only be accomplished by filing an amended plan under the provisions of Section 6. This application unlawfully seeks to modify an existing plan.

The stipulations and the Commission decisions in Case Nos. 11-4393-EL-RDR and 13-341-EL-POR make clear that the shared savings mechanism in Duke's portfolio plan expires at the end of 2015. The Commission did not authorize the use of the shared savings mechanism expiring at the end of 2015 for 2016 prior to the effective date of SB 310. As Section 6 of SB 310 makes clear, a utility cannot modify its current plan. The Commission lacks the authority to act on this Application to amend the current plan and it should be dismissed.

That this Application was filed prior to the effective date of SB 310 is irrelevant. The statute clearly states that the Commission "shall neither review nor approve an application for a portfolio plan if the application is pending on the effective date of this section." Section 7(A), Senate Bill 310. Moreover, "the Commission shall not take any action...regarding a portfolio plan, except those expressly authorized or required by Section 6 of this act.... Section 7(B), Senate Bill 310. Under Ohio law, the Commission lacks any authority to act on this application so it should be dismissed.

Finally, the shared savings mechanism that expires at the end of 2015 was to be reviewed by interested parties to “assess the reasonableness and effectiveness of the incentive mechanism” to determine whether it should be used or modified and used in 2016 per the terms of the stipulations in Case Nos. 11-4393-EL-RDR and 13-341-EL-POR. The consultation was to take place “no sooner than the third quarter of 2014”. If the parties did not agree, any party could seek the Commission’s determination “of whether an incentive mechanism should be implemented for the remainder of the portfolio plan period (for the year 2016).” Stipulation Case No. 13-431 at 5. The parties did not agree. Given that modifications to the existing mechanism are now unlawful and outside the Commission’s authority to approve, the only issue is whether the existing mechanism without modification continues. This issue is entirely governed by the stipulations that state that the existing mechanism will expire at the end of 2015. No agreement has been reached among the parties for implementing an incentive mechanism for 2016.

The stipulations in Case Nos. 11-4393-EL-RDR and 13-341-EL-POR clearly contemplated a review of the efficacy of the shared savings mechanism. They provided an opportunity for parties to agree to extend the existing mechanism, but the parties did not so agree. The stipulated language to extend the mechanism with modifications or substitute another incentive mechanism is now inapplicable. The Commission is not authorized to take any action to modify an existing portfolio other than to consider applications filed by a utility to amend its portfolio plan in a

manner that complies with SB 310. The Commission is not authorized to take the action Duke requests. The application must be dismissed.

Conclusion

Duke has repeatedly attempted to extend the shared savings approach agreed to by parties in Case No. 11-4393-EL-RDR beyond the date it expires – December 31, 2015. Consumer parties and environmental organizations have demurred. No agreement has been reached to continue the existing shared savings mechanism. Meanwhile, the Commission’s authority to modify the existing portfolio and shared savings mechanism has been trumped by an intervening act: the passage of SB 310. If a utility wishes to continue to implement its existing energy efficiency and demand side management portfolio plan, it cannot modify it in any way. The Commission now lacks the authority to act on a request to modify. Duke’s current shared savings provision expires at the end of 2015. It cannot be extended without agreement of the stipulating parties. The stipulating parties have not so agreed.

The instant application does not comply with current law or the stipulations and must be dismissed.

Respectfully submitted,

/s/ David C. Rinebolt

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Intervene and Motion to Dismiss and Memoranda in Support was served electronically upon the persons identified below in this case on this 30th day of September, 2014.

/s/ David C. Rinebolt
David C. Rinebolt

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/30/2014 3:42:35 PM

in

Case No(s). 14-1580-EL-RDR

Summary: Motion Motion to Intervene and Motion to Dismiss of Ohio Partners for Affordable Energy electronically filed by Mr. David C Rinebolt on behalf of Ohio Partners for Affordable Energy