

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MOTION TO INTERVENE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") moves to intervene in this case that was filed three years after OCC settled a case with Duke Energy Ohio that resolved energy efficiency programs and charges to Duke's 618,000 residential electric consumers through 2015 (but not for 2016). Duke Energy Ohio ("Duke" or "Utility") has filed an Application, with regard to Senate Bill 310, requesting the Public Utilities Commission of Ohio ("PUCO") to allow it to collect from customers the costs of its 2016 energy efficiency programs, among other things.¹

Duke's Application raises at least two major issues. One is what charges should customers have to pay for energy efficiency in 2016, per the settlement and Order in Case No. 11-4393-EL-RDR. And the other is what provision of Senate Bill 310 (a continued plan or an amended plan) is invoked by Duke's Application (which Duke believes is a continued plan).

For its part, Duke seeks to continue its current portfolio of energy efficiency and peak demand reduction programs for years that include 2016. Duke seeks approval for

¹ See R.C. Chapter 4911, R.C. 4903.221 and Ohio Adm. Code 4901-1-11.

continued authority to charge customers for higher levels of shared savings (i.e., Duke profits) by avoiding a cap on its charges. And Duke is apparently proposing to continue using *past* “banked” savings to charge *current* customers more money. Further, Duke proposes continued authority to charge customers for shared savings (profit) on all energy efficiency (including efficiency for Duke to merely comply with the statutory benchmark) instead of limiting charges for shared savings to just the energy efficiency that exceeds (as an incentive) the statutory benchmark.

The reasons the PUCO should grant OCC’s Motion to Intervene on behalf of Duke’s residential electric customers are further set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

In 2011, the Consumers' Counsel settled with Duke and other parties Duke's energy efficiency mechanism for charging customers for its energy efficiency portfolio in the years 2012 through 2015. A key consumer protection in the settlement was that the appropriateness of any charges to customers for the year 2016 was left open for a future PUCO case and decision. In this regard, the PUCO acknowledged in Case No. 13-431-EL-POR that:

The mechanism for recovering costs from Duke's customers, including recovery of prudent program costs incurred, lost distribution revenues and an incentive mechanism, shall expire at the end of 2015, as controlled by the stipulation in the 2011 Portfolio Case.²

Meanwhile, in legislation (Senate Bill 310) this year, the General Assembly allowed for two different options for energy efficiency programs and charges to consumers for the next two years affecting Ohio consumers. In this regard, uncoded Section 6 of Senate Bill 310 states:

² *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Energy Efficiency and Peak-Demand Reduction Portfolio Programs*, Case No. 13-431-EL-POR, Opinion and Order at 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.

By way of background, in Case No. 11-4393-EL-RDR, Duke agreed (in a settlement with OCC and others) that its cost recovery and shared savings mechanism would expire on December 31, 2015.³ Moreover, the Utility's incentive mechanism was to be reevaluated by "interested parties" in the third quarter of 2014 to "assess the reasonableness and effectiveness of the incentive mechanism and to consider whether or not [the interested parties] support its further use as structured or as modified."⁴

Duke claims in its Application that "the majority of signatory parties are in agreement with continuing the cost recovery mechanism." Duke did not specify which parties are in agreement. For the record, OCC is not in agreement. In this regard, the

³ *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 at 5 (Nov. 18, 2011). This agreement was acknowledged in the Stipulation and Recommendation resolving Case No. 13-431-EL-POR.

⁴ *Id.*

interested parties did not reach an agreement as to the appropriateness of Duke's requested incentive mechanism for 2016.⁵

OCC has authority under law to represent the interests of all the 618,000 residential utility customers of Duke, pursuant to R.C. Chapter 4911. R.C. 4903.221 provides, in part, that any person "who may be adversely affected" by a PUCO proceeding is entitled to seek intervention in that proceeding. The interests of Ohio's residential customers may be "adversely affected" by this case, especially if the customers were unrepresented in a proceeding where Duke is seeking approval for an incentive mechanism that has costs that customers pay. Thus, this element of the intervention standard in R.C. 4903.221 is satisfied.

R.C. 4903.221(B) requires the PUCO to consider the following criteria in ruling on motions to intervene:

- (1) The nature and extent of the prospective intervenor's interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding; and
- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

First, the nature and extent of OCC's interest is representing the residential electric customers of Duke in this case involving Duke's request to continue its energy efficiency programs and related charges to consumers. This interest is different than that

⁵ Application at ¶ 10 on page 3.

of any other party and especially different than that of the Utility whose advocacy includes the financial interest of stockholders.

Second, OCC's advocacy will include advancing the position that Duke's residential electric customers should pay no more than what is reasonable and lawful under Ohio law, for service that is adequate under Ohio law. OCC's position is therefore directly related to the merits of this case that is pending before the PUCO, the authority with regulatory control of public utilities' rates and service quality in Ohio.

In this regard, issues in this case will include whether Duke's Application is reasonable under its 2011 settlement⁶ with OCC and others. And issues will include whether Duke's Application is proper under Uncodified Section 6(A)(1) of Substitute Senate Bill 310.

Duke's Application involves the issue of whether its proposal for shared savings should instead include a hard dollar cap to limit Duke's charges to consumers. It should include a cap in 2106. Also, Duke's Application involves the issue of whether it should be limited to charging customers for shared savings on only the efficiency savings that exceed the statutory benchmark (so that Duke is not charging customers for an incentive for it to merely comply with the statutory benchmark).⁷ Duke's charges to consumers should be so limited in 2016. And the Application seems to involve an issue of whether

⁶ See *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 at 5, (November 18, 2011) and August 15, 2011 Opinion and Order at 8.

⁷ Ohio Power Company (Case Nos. 11-5568-EL-POR, 11-5569-EL-POR, Opinion and Order at 8), The Dayton Power and Light Company (Case No. 13-0833-EL-POR at 8) and FirstEnergy (Case No. 12-2190-EL-POR, Opinion and Order at 16) all currently have hard dollar caps on their shared savings incentive mechanisms.

Duke may use past “banked” savings to charge *current* customers more money. Duke should not be allowed to use past banked savings to charge customers for an incentive award for 2016.

Third, OCC’s intervention will not unduly prolong or delay the proceedings. OCC, with its longstanding expertise and experience in PUCO proceedings, will duly allow for the efficient processing of the case with consideration of the public interest.

Fourth, OCC’s intervention will significantly contribute to the full development and equitable resolution of the factual issues. OCC will obtain and develop information that the PUCO should consider for equitably and lawfully deciding the case in the public interest.

OCC also satisfies the intervention criteria in the Ohio Administrative Code (which are subordinate to the criteria that OCC satisfies in the Ohio Revised Code). To intervene, a party should have a “real and substantial interest” according to Ohio Adm. Code 4901-1-11(A)(2). As the advocate for residential utility customers, OCC has a very real and substantial interest in this case where Duke is seeking approval of its 2016 EE/PDR cost recovery and incentive mechanism that are charged to customers.

In addition, OCC meets the criteria of Ohio Adm. Code 4901-1-11(B)(1)-(4). These criteria mirror the statutory criteria in R.C. 4903.221(B) that OCC already has addressed and that OCC satisfies.

Ohio Adm. Code 4901-1-11(B)(5) states that the PUCO shall consider “The extent to which the person’s interest is represented by existing parties.” While OCC does not concede the lawfulness of this criterion, OCC satisfies this criterion in that it uniquely has been designated as the state representative of the interests of Ohio’s residential utility

customers. That interest is different from, and not represented by, any other entity in Ohio.

Moreover, the Supreme Court of Ohio confirmed OCC's right to intervene in PUCO proceedings, in deciding two appeals in which OCC claimed the PUCO erred by denying its interventions. The Court found that the PUCO abused its discretion in denying OCC's interventions and that OCC should have been granted intervention in both proceedings.⁸

OCC meets the criteria set forth in R.C. 4903.221, Ohio Adm. Code 4901-1-11, and the precedent established by the Supreme Court of Ohio for intervention. On behalf of Ohio residential customers, the PUCO should grant OCC's Motion to Intervene.

Respectfully submitted,

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⁸ See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶13-20.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Motion to Intervene* was served on the persons stated below via electronic transmission, this 14th day of October, 2014.

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Summary: Motion Motion to Intervene by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Kern, Kyle L.