

PUBLIC UTILITIES COMMISSION OF OHIO

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

**REPLY COMMENTS OF
THE NATURAL RESOURCES DEFENSE COUNCIL, ENVIRONMENTAL LAW AND
POLICY CENTER, AND OHIO ENVIRONMENTAL COUNCIL**

I. INTRODUCTION

On September 9, 2014, Duke Energy Ohio, Inc. (“Duke” or the “Company”) filed an application to continue the cost-recovery mechanism in place for its current demand side management (“DSM”) portfolio through the 2016 program year (“Application”). On October 22, 2014, the Public Utilities Commission of Ohio (“Commission”) issued an Entry in the above-captioned docket setting forth a schedule for intervention and comments on Duke’s Application. In accordance with that Entry, on December 5, 2014, Natural Resources Defense Council (“NRDC”), Environmental Law and Policy Center (“ELPC”), and the Ohio Environmental Council (“OEC”) (collectively, the “Environmental Advocates”) submitted initial comments on Duke’s Application. The Environmental Advocates now submit these reply comments.

As discussed in our initial comments, Duke’s request to extend the current cost-recovery and shared savings incentive mechanisms into 2016 does not run afoul of SB 310 and thus the Commission has the authority to act on the Company’s Application. The only real issue in this proceeding is the appropriateness of Duke’s existing incentive structure. Environmental Advocates continue to support the extension of the shared savings mechanism as presently structured into the 2016 program year, but we also urge the Commission to revisit these issues

for Duke’s next program portfolio, which will presumably cover the three program years beyond 2016. The purpose of shared savings is to reward innovation and exemplary utility performance in delivering DSM programs to customers, and this objective should continue be the yard stick by which to measure the development of incentive mechanisms.

II. DUKE’S APPLICATION DOES NOT CONSTITUTE AN “AMENDMENT” AND THE COMMISSION HAS THE AUTHORITY TO APPROVE IT UNDER SB 310

Ohio Partners for Affordable Energy (“OPAE”), Industrial Energy Users-Ohio (“IEU-Ohio”), and the Kroger Company (“Kroger”),¹ argue in their initial comments that the Commission lacks the authority to act on Duke’s Application because they claim that it would unlawfully require the Commission to amend an existing portfolio plan.² But this incorrectly applies SB 310’s clear provisions.

These parties assert that Duke is somehow seeking to “modify”³ or “add a provision”⁴ to its existing DSM portfolio to permit it to recover costs and incentives into 2016. Sections 6(A) and (B) of SB 310 allow utilities to take their portfolio plans down one of two paths during the two year freeze period: extension or amendment. Duke’s Application constitutes the former. OPAE correctly notes that “the provisions of the current DSM portfolio are clearly defined and have already been reviewed in litigated proceedings before this Commission.”⁵ Yet OPAE, IEU-Ohio and Kroger nonetheless ignore the very provisions that were explicitly negotiated by the parties, stipulated to and approved by the Commission in the 2011 (11-4393-EL-RDR) and 2013 (13-431-EL-POR) dockets and which Duke now seeks to extend into 2016—the *identical* cost-recovery and shared savings mechanisms in those cases. Duke makes no request to modify any

¹ OPAE Initial Comments at 1-9; IEU-Ohio Initial Comments at 3-6; Kroger Initial Comments at 3.

² OPAE Initial Comments at 1-9; IEU-Ohio Initial Comments at 3-6.

³ OPAE Initial Comments at 1.

⁴ IEU-Ohio Initial Comments at 4.

⁵ OPAE Initial Comments at 1.

elements of its current program suite, and makes no request to modify the cost-recovery mechanism approved in the prior dockets. In fact, if Duke's request is granted, it will run its programs and recover costs and shared savings *exactly* as it has since these mechanisms were first put in place in 2011.

OPAE also argues that because the parties to the stipulations did not reach an agreement to extend the mechanism, the Commission now lacks authority under SB 310 to act on Duke's Application.⁶ But the request now before the Commission was specifically anticipated in the 2011 and 2013 stipulations and orders.⁷ Those dockets contemplated a two-step process by which the parties would evaluate an extension of the mechanism beyond the 2015 program year, and in the event they could not agree to the terms, the Commission would determine the fate of the cost-recovery package.⁸ A Commission determination on cost recovery for 2016 is simply an extension of the current portfolio terms, and is appropriate and consistent with SB 310.

OPAE also seems to imply that Duke's request signals a departure from its current cost recovery mechanism because it specifically references the use of banked savings as a trigger for the shared savings incentive.⁹ OPAE asserts that this design element was not contemplated by the initial Stipulations.¹⁰ But while the comments filed in the current proceeding certainly reflect disagreement among the parties as to the propriety of using banked savings, the record is clear that the current mechanism approved through December 31, 2015 contemplates the use of

⁶ *Id.* at 7-8.

⁷ *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 at 5 (Nov 18, 2011); *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Energy Efficiency and Peak Demand Reduction Portfolio of Programs*, Case No. 13-431-EL-POR, Amended Stipulation at 5 (September 9, 2013).

⁸ *Id.*

⁹ OPAE Initial Comments at 5-6.

¹⁰ *Id.* at 6.

banked savings to trigger the incentive.¹¹ To the extent OPAE is raising this issue to bolster its argument that Duke's Application "amends" the existing portfolio, a review of the record shows that these design elements were explicitly discussed in both dockets and that no amendment or modification of the current cost recovery structure is being sought.

Specifically, in 11-4393-EL-RDR Duke's witness Timothy Duff established the initial parameters of the cost-recovery and incentive mechanisms, including tiered incentive levels based on differing degrees of achievement,¹² as well as the use of banked savings from prior program years to trigger the incentive and to establish a level of achievement for the purpose of determining Duke's earnings in a given year.¹³ While the parties filed comments in 11-4393-EL-RDR responding to certain elements of Duke's proposal (including the banking issue) and in some cases recommending different approaches,¹⁴ Duke ultimately accepted the OCEA group's modified shared savings proposal which had acknowledged and impliedly agreed to the use of banked savings. OCEA, OPAE, Vectren, and PWC all signed onto a Stipulation (with Ohio Energy Group ("OEG") abstaining) that defined the agreed-to recovery of projected program costs, shared savings, and a pilot decoupling mechanism.¹⁵ The Commission approved this Stipulation on August 15, 2012, finding with regard to cost-recovery and shared savings that the parameters set out by Duke and the stipulating parties would "benefit ratepayers and the public interest."¹⁶

¹¹ Case No. 14-457-EL-RDR currently before the Commission reflects this disagreement over the use of banked savings to trigger the incentive, though the record is clear that this use has already been stipulated to and approved by the Commission through the end of the 2015 program year.

¹² Case No. 11-4393-EL-RDR, Direct Testimony of Timothy J. Duff at 5 (July 20, 2011).

¹³ *Id.* at 7-8.

¹⁴ *See, e.g.*, Case No. 11-4393-EL-RDR, OCEA Initial Comments at 8-12 (September 21, 2011); OPAE Initial Comments at 6-8 (September 21, 2011); PWC Initial Comments (September 21, 2011); OEG Reply Comments (September 21, 2011).

¹⁵ Case No. 11-4393-EL-RDR, Stipulation at 5 (Nov 18, 2011).

¹⁶ Case No. 11-4393-EL-RDR, Order at 15 (August 15, 2012).

These mechanisms were again approved by the Commission when Duke re-filed its programs in the 13-431-EL-POR docket.¹⁷ Mr. Duff restated in his testimony how the shared savings mechanism would work.¹⁸ With respect to the use of banked savings to trigger the incentive, Mr. Duff characterized it as the same methodology that was vetted and approved in 11-4393-EL-RDR.¹⁹ While a handful of intervenors objected to extending the mechanism and some recommended that a cap be put in place, no parties specifically referenced the banking issue.²⁰ On September 9, 2013, the parties filed an Amended Stipulation agreeing to a series of additional, negotiated programs, and agreeing that the cost-recovery and shared savings mechanisms originally approved in 11-4393-EL-RDR would be left intact.²¹ NRDC, OEC, ELPC, Ohio Consumers' Council ("OCC"), Greater Cincinnati Energy Alliance, OPAE, Kroger, EMC Development Company, Ohio Advanced Energy Economy, and the Sierra Club were signatories to the stipulation, with OEG again abstaining. The Commission approved the Stipulation on December 4, 2013.²²

While it is clear that the parties commenting on Duke's current Application do not agree on the appropriateness of using banked savings to trigger the incentive, there is no valid dispute that this design element was a part of the cost recovery mechanism that was (at least tacitly) agreed to by the parties to the 2011 and 2013 dockets and approved by the Commission. OPAE points out that this Commission prohibited the use of banked savings in AEP and FirstEnergy's

¹⁷ Case No. 13-431-EL-POR, Application (April 15, 2013).

¹⁸ Case No. 13-431-EL-POR, Direct Testimony of Timothy J. Duff at 8-11 (April 15, 2013).

¹⁹ *Id.* at 11.

²⁰ *See, e.g.*, Case No. 13-431-EL-POR, Objections of OPAE, OEG and Kroger (objecting to shared savings mechanism), Objections of OCC, OPAE, OEG and Kroger (recommending cap).

²¹ Case No. 13-431-EL-POR, Amended Stipulation (September 9, 2013).

²² Case No. 13-431-EL-POR, Opinion and Order at 6 (December 4, 2013).

last DSM portfolio filings.²³ While this precedent is certainly instructive for the Commission’s disposition on the current Application (and beyond 2016), it is irrelevant to the limited question of whether Duke’s Application is consistent with SB 310. Because Duke is seeking to extend the *identical* mechanism originally negotiated and stipulated to by many of the parties to the 2011 and 2013 dockets—including the use of banked savings—the Application does not trigger amendment.

Further, because the Application does not amend Duke’s existing portfolio, Environmental Advocates recommend that the Commission deny IEU-Ohio’s request in its initial comments to allow certain customers to opt out of the portfolio plan starting in January 2015.²⁴ Section 8 of SB 310, which allows a subsection of industrial and commercial customers to opt out of paying into the DSM portfolio where the utility amends its plan under Section 6(B), is never triggered in this case. Duke’s Application does not constitute an “amendment” under SB 310, and thus the Commission would not reach the question of opt out for these customers and must deny IEU-Ohio’s request.

Finally, IEU-Ohio claims that Section 7(B) of SB 310, which allows the Commission to take actions “necessary to administer the implementation of existing portfolio plans,” is inapplicable because Duke is seeking to “add a provision rather than implement an existing one.”²⁵ As discussed above, however, the Application does not trigger an “amendment” to

²³ See *In the Matter of the Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Programs Plans for 2013 through 2015*, Case No. 12-2190-EL-POR, *Opinion and Order* at 16 (March 20, 2013) (finding that “banked savings shall only be counted toward shared savings in the year it is banked.”); See also *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Case No. 11-5568-EL-POR; *In the Matter of the Application of Ohio Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Case No. 11-5569-EL-POR.

²⁴ IEU-Ohio Initial Comments at 5-6.

²⁵ *Id.* at 5-6

Duke's DSM portfolio, rather an extension of its exact parameters. Thus, as with its invocation of Section 8, IEU-Ohio's assertion with respect to Section 7(B) is irrelevant to the present inquiry. The pertinent point is that Duke's Application constitutes a simple extension of the current portfolio, the benefits of which have already been endorsed and approved by the Commission in both the 2011 and 2013 dockets.²⁶ Duke's Application does not run afoul of SB 310, and should be approved.

III. THIS COMMISSION HAS DEEMED THE CURRENT COST RECOVERY MECHANISM VALID, AND IT SHOULD BE EXTENDED THROUGH 2016

As discussed in our initial comments, Environmental Advocates support utility recovery of the prudently incurred costs of implementing energy efficiency programs, as well as performance-based incentives to ensure that investing in efficiency is at least as attractive as generation and grid resources. For these reasons, Environmental Advocates contributed to the development of Duke's current cost-recovery and shared savings incentive package, and are now supporting extension through 2016.

This Commission ruled in both the 2011 and 2013 dockets that Duke's shared savings incentive is appropriate. Now several of the commenters question the propriety of applying an incentive at all to Duke's final year of its current DSM portfolio, despite the fact that Duke will be administering identical programs as in the prior approved years. IEU-Ohio, OEG and others claim that Duke should not be provided an incentive for achieving energy savings benchmarks that it is already required to meet under the law.²⁷ But the Commission rejected this argument in the prior dockets, finding in 2011 that:

... [the] shared savings incentive mechanism proposed by Duke is *appropriately structured to incent Duke to deliver as many benefits as possible to customers*. In

²⁶ Case No. 11-4393-EL-RDR, Order at 15; Case No. 13-431-EL-POR, Amended Stipulation at 5; Case No. 13-431-EL-POR, Opinion and Order at 6.

²⁷ IEU-Ohio Initial Comments at 5; OEG Initial Comments at 2-4.

addition, we believe it is important to recognize that Duke's shared savings mechanism still allows customers to retain at least 87 percent of the savings. *When Duke delivers more energy in the most cost effective way, customers receive a direct benefit.*²⁸

Given the Commission's positive disposition on shared savings incentives, the only real debate on this docket is how to structure the mechanism for the final year of Duke's current portfolio. The intervenors to this docket propose a host of design elements for the incentive in 2016, including percentage and hard dollar caps, the prohibition of banked savings to trigger the incentive, and different approaches to calculating the mechanism.²⁹ As noted by NRDC and OEC in the 2011 docket, the shared savings mechanism as designed provides two overarching benefits: 1) to help further Ohio policy to ensure efficient and reasonably-priced electric service, and 2) to encourage innovation and market access for cost-effective supply- and demand-side retail electric service, by ensuring that investing in energy efficiency, the lowest-cost, least risky, and cleanest way to meet energy needs, is a profitable option for Duke.³⁰ We stand by these principles and support the extension of the shared savings mechanism as currently structured into the 2016 program year.

But Environmental Advocates note that we also agree with comments made by Ohio Manufacturers' Association, OCC and others that the purpose of a shared savings mechanism is to reward innovation and exemplary utility performance in delivering DSM programs to customers, and this objective should be the yardstick by which to measure the development of future incentive mechanisms.³¹ While Environmental Advocates request that the Commission grant Duke's Application, we are also mindful of recent rulings placing caps on the incentive mechanisms received by both AEP and FirstEnergy. Given these factors, and in the interest of

²⁸ Case No. 11-4393-EL-RDR, Opinion and Order at 15 (emphasis added).

²⁹ OMA Initial Comments at 6; OCC Initial Comments at 9; OEG Initial Comments at 4-6; Kroger Initial Comments at 5-6;

³⁰ Case No. 11-4393-EL-RDR, NRDC and OEC Post-Hearing Brief at 3-4 (June 22, 2012).

³¹ OMA Initial Comments at 6; OCC Initial Comments at 9.

continually evaluating cost recovery and incentive mechanisms to ensure they are having their intended effect, we recommend that the Commission revisit the incentive mechanism in the context of Duke's next portfolio filing, and consider specifically the appropriateness of a cap that is proportionate to that ordered in the most recent AEP, FirstEnergy and DP&L portfolio filings.

IV. CONCLUSION

The Environmental Advocates appreciate the opportunity to provide reply comments on Duke's Application, and urge the Commission to extend cost recovery into 2016.

Dated: January 9, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Reply Comments*, submitted on behalf of NRDC, ELPC and OEC, was served by electronic mail, upon the following Parties of Record, this 9th day of January, 2015.

/s/ Samantha Williams

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