

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc., for Authority to) Case No. 14-0075-EL-POR
Establish an Energy Efficiency Pilot)
Program)

**REPLY COMMENTS OF
INDUSTRIAL ENERGY USERS-OHIO**

Frank P. Darr (Reg. No. 0025469)
(Counsel of Record)
Matthew R. Pritchard (Reg. No. 0088070)
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
fdarr@mwncmh.com
(willing to accept service by e-mail)
mritchard@mwncmh.com
(willing to accept service by e-mail)

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ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO

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I. INTRODUCTION

On January 13, 2014, Duke Energy Ohio, Inc., (“Duke”) filed an application with the Public Utilities Commission of Ohio (“Commission”) requesting authority that would allow Duke and the Greater Cincinnati Energy Alliance (“GCEA”) to coordinate efforts related to home energy improvements that deliver energy efficiency in Duke’s service territory.¹ Duke represents that the program is a pilot designed to test the value of co-marketing financing in addition to Duke’s Smart\$aver Residential Program, and it further requests that it be permitted to include 100% of the energy efficiency benefits achieved during the pilot for inclusion as benefits attained in its currently approved residential program.²

In its Comments, the Staff of the Commission (“Staff”) states that the Commission may approve the Application, even though it would modify the current portfolio plan, because the current plan includes a provision under which Duke agreed

¹ Application of Duke Energy Ohio, Inc., for Authority to Establish an Energy Efficiency Pilot Program (Jan. 13, 2014) (“Application”).

² *Id.* at 2-3.

to work with GCEA to develop proposals for a partnership.³ The Commission should reject the Staff's view that the Application is not an amendment. Because the Application seeks to amend the current portfolio plan, the Commission must either deny the Application or find that the amendment is permitted under Section 6 of Substitute Senate Bill 310 ("SB 310") and permit energy intensive customers to opt out of the benefits and costs of the amended plan.

II. DISCUSSION

The Staff recommends that the Commission modify and authorize the new program requested by Duke, but asserts that the Application is not an amendment to the current portfolio plan because "the Company agreed to work with GCEA to develop proposals for a partnership and coordination between the two organizations."⁴ Staff's recommendation, however, does not properly address the limits of the Commission's authority under SB 310.

As Industrial Energy Users-Ohio ("IEU-Ohio"), the Staff, and Ohio Partners for Affordable Energy ("OPAE")⁵ agree in their comments,⁶ this Application is governed by SB 310. Under Section 7 of SB 310, the Commission, prior to January 1, 2017, is prohibited from taking any action with regard to any portfolio plan or application regarding a portfolio plan with two exceptions. Under the first exception contained in Section 7(B), the Commission may approve, or modify and approve, an application to amend a portfolio plan if the application is to amend an existing portfolio plan under

³ Comments Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio at 3-4 (Jan. 27, 2015) ("Staff Comments").

⁴ *Id.*

⁵ Comments of Ohio Partners for Affordable Energy at 1-2 (Jan. 27, 2015).

⁶ The Office of the Ohio Consumers' Counsel also filed comments, but does not address the effect of the requirements of SB 310 on the Application.

Section 6(B) (“plan exception”).⁷ Under the second exception, the Commission may take those actions necessary to administer the implementation of the existing portfolio plan (“implementation exception”).

Staff leaves unstated which exception to Section 7(B)’s prohibition is the basis for Commission authorization, but implies that it is relying on the implementation exception because Staff believes that the Application is not an amendment.⁸ That claim, however, is not correct. The current portfolio plan does not contain the program that Duke is seeking. Thus, approval of the Application would require the Commission to amend the current plan to add the program.

Even if the Application does not seek to amend the current plan, the Commission, nevertheless, could not approve the program under the implementation exception. The implementation exception narrowly describes the actions the Commission may take as those “*necessary to administer the implementation of [the] existing portfolio plan[]*.”⁹ Neither Duke nor any other party offers any basis for the Commission to conclude that the Application proposes a program “necessary” to the implementation of Duke’s existing portfolio plan. Accordingly, the implementation exception to the bar on Commission approval of actions regarding the portfolio plan is not satisfied.

Approval of the Application to expand the programs and potential costs of the current portfolio plan, moreover, would be contrary to the express legislative intent of

⁷ See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015*, Case Nos. 12-2190-EL-POR, *et al.*, Finding and Order (Nov. 20, 2014) (approving modification to current portfolio plan).

⁸ Staff Comments at 3.

⁹ SB 310, Section 7(B).

SB 310. In that legislation, the General Assembly revised the portfolio requirements to hold them at 2014 levels through 2016¹⁰ while it studies the statutory portfolio mandates, and the initiation of the study is expressly intended to result in the enactment of legislation to reduce those portfolio mandates.¹¹ Because the General Assembly has expressed the intent to freeze and then lower the portfolio requirements, the Commission should not undertake changes that expand existing portfolio plans and the costs of those plans.

According to the Staff, however, the Commission may approve any addition to the current portfolio plan that might have been contemplated but not effected prior to adoption of SB 310 without demonstration that the addition is “necessary” to implement the existing plan.¹² Under the Staff’s view, the scope of the implementation exception would overwhelm the prohibition of Commission action to modify an existing portfolio plan, a result that is clearly contrary to the General Assembly’s intention to limit the expansion of energy efficiency programs while it studies the portfolio requirements.

Contrary to the view of OPAE, however, the Commission must also consider the effect of the plan exception. If the Commission finds that the Application seeks to amend the current portfolio plan as provided by Section 6(B) of SB 310, the Commission may approve the Application. Although OPAE takes the position that the

¹⁰ R.C. 4928.64 & R.C. 4928.66.

¹¹ SB 310, Sections 3 & 4.

¹² In comments filed in another Duke proceeding, the Staff extends this argument even further, arguing that an application seeking authorization for additional programs not contemplated by the current portfolio plan should be approved under the implementation exception contained in Section 7(B) of SB 310. *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Nonresidential Energy Efficiency Program for Inclusion in its Energy Efficiency Portfolio*, Case No. 14-1575-EL-POR, Comments Submitted on Behalf of the Public Utilities Commission of Ohio at 2 (Jan. 27, 2015).

Commission must dismiss the Application because the implementation exception does not apply,¹³ OPAE's position does not address fully the plan exception.¹⁴

Approval of the Application under the plan exception, however, triggers an additional right of certain customers to opt out of the amended portfolio plan. If the Commission deems the Application in this proceeding as one seeking an amendment to the current portfolio plan and approves a modified plan, a customer of Duke that takes service above primary voltage levels or a commercial or industrial customer that has made a written request for registration as a self-assessing purchaser pursuant to R.C. 5727.81 (*i.e.*, the customer may self-assess the kilowatt-hour tax) may elect to opt out of the portfolio plan (rather than wait to make the election on or after January 1, 2017).¹⁵ If the Commission determines that the plan exception applies, therefore, the Commission should make an affirmative finding that the Commission is approving an amended portfolio plan and that eligible customers may opt out as provided by Section 8 of SB 310.

III. CONCLUSION

Duke seeks to amend its current portfolio plan to add a new program. Under the requirements of SB 310, the Commission may not approve the Application unless it may be approved under the plan exception of SB 310. If the Commission finds that it may approve or modify and approve the Application under the plan exception, the

¹³ Comments of Ohio Partners for Affordable Energy (Jan. 27, 2015).

¹⁴ OPAE summarily concludes that the plan exception described below is not applicable. *Id.* at 2. The Commission may find otherwise. See Initial Comments of Industrial Energy Users-Ohio at 3 n.6 (Jan. 27, 2015).

¹⁵ Section 8 of SB 310 provides, "Beginning January 1, 2015, a customer of an electric distribution utility may opt out of the opportunity and ability to obtain direct benefits from the utility's portfolio plan that is amended under division (B) of Section 6." All customers meeting certain voltage or usage levels will have the right to opt out beginning January 1, 2017. R.C. 4928.6611.

Commission should also expressly find that energy intensive customers may use the opt out procedures provided by Section 8 of SB 310.

Respectfully submitted,

/s/ Frank P. Darr

Frank P. Darr (Reg. No. 0025469)
(Counsel of Record)
Matthew R. Pritchard (Reg. No. 0088070)
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
fdarr@mwncmh.com
(willing to accept service by e-mail)
mpritchard@mwncmh.com
(willing to accept service by e-mail)

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Reply Comments of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 12th day of February 2015, *via* electronic transmission.

/s/ Frank P. Darr

Frank P. Darr

Amy B. Spiller (Reg. No. 0047277)
Deputy General Counsel
Elizabeth H. Watts (Reg. No. 0031092)
Counsel of Record
Associate General Counsel
Duke Energy Business Services LLC
139 East Fourth Street, 1303-Main
P.O. Box 960
Cincinnati, OH 45201-0960
Amy.Spiller@duke-energy.com
Elizabeth.watts@duke-energy.com

COUNSEL FOR DUKE ENERGY OHIO, INC.

William L. Wright
Section Chief, Public Utilities Section
Katie L. Johnson
Assistant Attorney General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215-3793
Telephone: (614) 466-4397
Facsimile: (614) 644-8764
katie.johnson@puc.state.oh.us

**ON BEHALF OF THE STAFF OF THE PUBLIC
UTILITIES COMMISSION OF OHIO**

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

Michael J. Schuler, Counsel of Record
Kyle L. Kern
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (614) 466-9547 (Schuler)
Telephone: (614) 466-9585 (Kern)
Facsimile: (614) 466-9475
michael.schuler@occ.ohio.gov
kyle.kern@occ.ohio.gov

**COUNSEL FOR THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL**

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839-1793
Telephone: (419) 425-8860
or (614) 488-5739
Facsimile: (419) 425-8862
cmooney@ohiopartners.org

**COUNSEL FOR OHIO PARTNERS FOR
AFFORDABLE ENERGY**

Trent A. Dougherty (0079817)
(Counsel of Record)
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
Telephone: (614) 487-7506
Facsimile: (614) 487-7510
TDougherty@theOEC.org

John Finnigan (0018689)
Senior Regulatory Attorney
Environmental Defense Fund
128 Winding Brook Lane
Terrace Park, Ohio 45174
Telephone: (513) 226-9558
jfinnigan@edf.org

**COUNSEL FOR THE OHIO ENVIRONMENTAL
COUNCIL AND ENVIRONMENTAL DEFENSE
FUND**

Christine M.T. Pirik
Nicholas Walstra
Attorney Examiners
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, OH 43215
Christine.pirik@puc.state.oh.us
Nicholas.walstra@puc.state.oh.us

ATTORNEY EXAMINERS

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