

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke	)	
Energy Ohio, Inc., for Authority to	)	
Establish a Non-residential Energy	)	Case No. 14-1575-EL-POR
Efficiency Program for Inclusion in its	)	
Energy Efficiency Portfolio	)	

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

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**FEBRUARY 12, 2015**

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**I.     INTRODUCTION**

On September 9, 2014, Duke Energy Ohio, Inc., (“Duke”) filed an application requesting authority to conduct a pilot program for non-residential customers referred to as Smart Energy in Offices.<sup>1</sup> According to Duke, this program is designed to increase energy efficiency by educating certain targeted customers to change energy consumption.<sup>2</sup> Further, Duke estimates the program expenditure to be nearly \$2 million.<sup>3</sup> Under the new provisions of Ohio law governing existing portfolio plans, the Public Utilities Commission of Ohio (“Commission”) must either dismiss the Application or find that it is an amendment and permit qualified electric intensive customers to opt out of the portfolio plan.

In its Comments, the Staff of the Commission (“Staff”) states that the Commission may approve the Application even though it would modify the current

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<sup>1</sup> Application of Duke Energy Ohio, Inc., for Authority to Establish a Non-residential Energy Efficiency Program for Inclusion in its Energy Efficiency Portfolio (Sept. 9, 2014) (“Application”).

<sup>2</sup> *Id.* at 2-3.

<sup>3</sup> *Id.* at 3.

portfolio plan because the current plan provides that “additional program offerings may be filed with the Commission to seek approval, as appropriate” and because the Commission previously approved a similar program for commercial and industrial customers as part of the existing portfolio plan.<sup>4</sup> Staff’s recommendation based on the assumption that the Application does not amend Duke’s current portfolio plan, however, is not correct. Because the Application seeks to amend the current portfolio plan, the Commission must either deny the Application or find that an 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.

## **I. DISCUSSION**

To support its recommendation that the Commission approve the Application, the Staff asserts that the Application is not an amendment to the current portfolio plan because the new program is “the type of program that was contemplated when [Duke] filed its original [energy efficiency] Portfolio Plan in April 2013.”<sup>5</sup> The Application, however, does not implement the existing portfolio plan and is not “necessary” to implement the existing portfolio plan. Further, Staff’s argument that the Application seeks to implement the current portfolio plan would undermine the limitations and outcomes required by SB 310.

This Application is governed by SB 310. Under Section 7(B) 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

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<sup>4</sup> Comments Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio at 2 (Jan. 27, 2014) (“Staff Comments”).

<sup>5</sup> Staff Comments at 2.

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

Initially, the Staff’s position that the Application seeks to implement the current portfolio plan is not factually true. The Application seeks to add a program that does not currently exist in the Duke portfolio plan; without an amendment to the current plan, Duke would not be authorized to expend and collect from customers the nearly \$2 million in proposed program costs. Thus, the claim that the Application is seeking to implement the existing plan is unwarranted.

Likewise, Staff’s suggestion that the current plan’s provision permitting Duke to seek approval of the new program ignores the expressly narrow scope of the implementation exception. The Staff argues that the Commission should find that the Application is not an amendment of the current portfolio plan because the plan provides that Duke may seek additional program offerings and Duke has offered similar programs under the current plan. The implementation exception, however, describes those actions the Commission may take as those “*necessary* to administer the implementation of [the] existing portfolio plan[.]” (Emphasis added). The Application

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<sup>6</sup> 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).

and Staff do not offer any basis for the Commission to conclude that the program is “necessary” to the implementation of Duke’s current portfolio plan.<sup>7</sup>

Further, the Staff points to approval of amendments to the current portfolio plan as a basis for supporting its claim that the Application implements the current portfolio plan.<sup>8</sup> The decision cited by Staff, however, predates the effective date of SB 310 by over two years.<sup>9</sup> Because SB 310 fundamentally changed the authority of the Commission to approve changes in the current portfolio plan, approval of portfolio plan amendments that predates the effective date of SB 310 does not demonstrate that this Application is consistent with the implementation exception, as discussed above.<sup>10</sup>

Approval of the Application as an implementation of the current portfolio plan, moreover, would be contrary to the express legislative intent of SB 310. In that legislation, the General Assembly revised the portfolio requirements to hold them at 2014 levels through 2016<sup>11</sup> 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.<sup>12</sup> Because the General Assembly has expressed the

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<sup>7</sup> Staff points out that Duke may fall short of the frozen portfolio targets for 2015 or 2016, but also notes that it believes it would “be better for [Duke] to implement the [proposed program] in order to reach, and possibly exceed, its goals for 2015 and 2016 rather than rely on previously banked savings.” Staff Comments at 3-4. Staff’s suggestion that Duke will fall short, thus, is undermined by the fact that Duke currently has sufficient banked savings to meet the frozen portfolio requirements. Thus, the proposed program is not necessary to meet the current portfolio requirements and certainly is not necessary to carry out the current portfolio plan.

<sup>8</sup> Staff Comments at 2-3.

<sup>9</sup> *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, Opinion and Order (Aug. 15, 2012).

<sup>10</sup> SB 310, Section 7(B).

<sup>11</sup> R.C. 4928.64 & R.C. 4928.66.

<sup>12</sup> SB 310, Sections 3 & 4.

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. Under 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.

Because the Application seeks to amend the Application, however, the other exception to Section 7(B) may apply. Under that exception, 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 Section 6(B) (“plan exception”).<sup>13</sup>

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 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

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<sup>13</sup> 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).

portfolio plan (rather than wait to make the election on or after January 1, 2017).<sup>14</sup> 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 Duke customers may opt out as provided by Section 8 of SB 310.

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

Respectfully submitted,

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<sup>14</sup> 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.

## **CERTIFICATE OF SERVICE**

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO'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

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### **ATTORNEY EXAMINERS**



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