

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**INITIAL BRIEF 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)
mpritchard@mwncmh.com
(willing to accept service by e-mail)

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ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO

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Duke Energy Ohio, Inc. (“Duke”) has an energy efficiency and peak demand reduction (“EE/PDR”) portfolio compliance plan (“portfolio plan”) approved by the Public Utilities Commission of Ohio (“Commission”) that extends through December 31, 2016. Under its portfolio plan, however, Duke’s cost recovery mechanism is only authorized through December 31, 2015. Duke’s portfolio plan also only authorizes Duke to collect lost distribution revenue and shared savings through December 31, 2015.

On September 9, 2014, Duke filed an application in the above-captioned matter seeking to amend its current portfolio plan (“Application to Amend its Portfolio Plan”). More specifically, the Application to Amend its Portfolio Plan seeks Commission authorization to extend the authorization of its recovery mechanism and the collection of lost distribution revenue and shared savings for an additional 12 months ending December 31, 2016.¹ Comments and Reply Comments were filed on the Application to Amend its Portfolio Plan in December 2014 and January 2015, respectively. A hearing was held in this matter on July 7, 2015. Pursuant to the briefing schedule established

¹ Duke Ex. 1.

by the Attorney Examiner at the conclusion of the hearing, Industrial Energy Users-Ohio (“IEU-Ohio”) submits this Initial Brief.

As provided by Substitute Senate Bill 310 (“SB 310”), the Commission should modify and approve Duke’s Application to Amend its Portfolio Plan and deny Duke’s request to extend its collection of shared savings through the end of 2016. The Commission should also find that Duke’s Application to Amend its Portfolio Plan triggers the availability for Duke’s energy-intensive customers to opt out of Duke’s amended portfolio plan.

I. SB 310

SB 310 became effective on September 12, 2014, and modified the law in Ohio regarding Ohio’s portfolio mandates. SB 310 provides that if an electric distribution utility (“EDU”) has a portfolio plan in effect on the effective date of SB 310 (September 12, 2014), then the EDU must either continue its existing portfolio plan with no amendments through 2016, or seek an amendment within 30 days of the effective date of SB 310 (October 12, 2014).² Section 7(A) of SB 310 further provides that the Commission may neither review nor approve an application for a portfolio plan if the application is pending on September 12, 2014. If an EDU did not file an application to amend the existing portfolio plan by October 12, 2014, the Commission may not “take any action” with regard to the existing plan except those “actions necessary to administer the implementation” of the EDU’s existing portfolio plan.³

² SB 310, Section 6.

³ SB 310, Section 7(B).

If an EDU files an application seeking to amend its portfolio plan, SB 310 provides the EDU's energy-intensive customers the ability to opt out of the amended plan.⁴

II. ARGUMENT

A. Duke seeks to amend its current portfolio plan

Duke's current portfolio plan was authorized on December 4, 2013, in Case No. 13-431-EL-POR.⁵ The current portfolio plan extends through December 2016 but only provides for a cost recovery mechanism and authorization to collect lost distribution revenue and shared savings through the end of 2015.⁶ Duke's Application to Amend its Portfolio Plan demonstrates that Duke is seeking to amend its current portfolio plan to extend its cost recovery mechanism and its authorization to collect lost distribution revenue and shared savings for an additional 12 months through the end of December 2016.⁷ Duke's witness Duff further confirmed at the hearing that Duke's Application to Amend its Portfolio Plan, if approved, would result in an amendment to its current portfolio plan.⁸ Thus, it is beyond dispute that Duke seeks to amend the current terms of its portfolio plan.

⁴ SB 310, Section 8.

⁵ *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 (Dec. 4, 2013) (hereinafter "2013 Portfolio Plan Case" or "2013 Portfolio Plan Order," where appropriate); Duke Ex. 1 at 2.

⁶ Duke Ex. 1 at 2; Tr. at 34-35.

⁷ Duke Ex. 1 at 4.

⁸ Tr. at 34-35, 43.

B. The Commission should modify and approve Duke's Application to Amend its Portfolio Plan rather than dismiss it pursuant to Section 7(A) of SB 310

By filing its Application to Amend Its Portfolio Plan on September 9, 2014, Duke has created a potential procedural problem because the provisions allowing for an amendment of the current portfolio plan were not effective until September 12, 2014. As a matter of efficiency, the Commission should address the Application to Amend its Portfolio Plan as if Duke had properly sought an amendment to the current portfolio plan. As a factual matter, the Application to Amend its Portfolio Plan was filed before October 12, 2014, thus meeting the filing deadline established by SB 310. The alternative is a dismissal as required by Section 7(A) of SB 310.⁹

C. The Commission should not authorize Duke to collect a shared savings incentive from customers in 2016

If the Commission does not dismiss Duke's Application to Amend its Portfolio Plan, the Commission may, and in this case should, modify the mechanism requested by Duke to remove the provision that would permit Duke to recover shared savings.

Initially, Duke acknowledges that its ability to collect shared savings in 2016 is a moot issue if the Commission upholds its Finding and Order in Case No. 14-457-EL-RDR (which is pending on rehearing).¹⁰ In that decision, the Commission held that Duke could not rely on banked savings from prior years to claim a shared savings incentive in a subsequent year.¹¹ Duke's witness Duff testified that it would not

⁹ See also Ohio Partners for Affordable Energy's Motion to Intervene and Motion to Dismiss and Memorandum in Support (Sep. 30, 2014).

¹⁰ Duke Ex. 3 at 9-10; Tr. at 40-41.

¹¹ *In the Matter of the Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to its Energy Efficiency and Demand Response Programs*, Case No. 14-457-EL-RDR, Finding and Order at 5 (May 20, 2015).

be able to meet or exceed the 2016 benchmark without reliance on banked savings.¹² Accordingly, unless the Commission reverses its Finding and Order in Case No. 14-457-EL-RDR regarding the use of banked savings to calculate a shared savings incentive, Duke's request to extend the recovery of shared savings into 2016 is a moot issue. The Commission, therefore, should reject the provision of Duke's Application to Amend its Portfolio Plan that seeks to extend its authorization to collect shared savings for an additional 12 months.

Even if the Commission addresses the merits of Duke's request, the Commission should still reject Duke's request to extend the collection of shared savings through the end of 2016 because Duke's request is unreasonable. In the Application to Amend its Portfolio Plan, the only claim that Duke makes to support the continuation of the shared savings provision is that the net present value of the avoided costs associated with the energy and capacity achievements has been over 3.5 times the costs incurred to achieve those results.¹³ By law, however, Duke is required to provide a cost-effective program.¹⁴ The requirement to demonstrate prudent management of the compliance obligations should be an adequate "incentive" for Duke to reduce its portfolio compliance costs. There is no reason for the Commission to find that a shared savings provision is necessary when Duke has demonstrated only that it is doing what the law requires it to do.

Additionally, Duke's witness Duff testified that without authorization to rely on banked savings to calculate its shared savings incentive, Duke will operate its portfolio

¹² Duke Ex. 3 at 9-10; Tr. at 40-41.

¹³ Duke Ex. 1 at 3.

¹⁴ Rule 4901:1-39-04(A), Ohio Administrative Code.

plan inefficiently in an effort to maximize its shared savings incentive.¹⁵ However, Mr. Duff also testified that operating its portfolio plan programs inefficiently in an effort to maximize its shared savings incentive would have the potential to create additional and imprudent costs for customers.¹⁶ Under these circumstances, Duke's testimony demonstrates that it would be unreasonable to authorize Duke to collect any shared savings in 2016.

In sum, the Commission should reject Duke's request to extend its authorization to collect shared savings through the end of 2016 because the issue is moot and because Duke has failed to demonstrate that extending the authorization is just and reasonable.

D. The Commission should find that Duke's Application to Amend its Portfolio Plan triggers the availability under SB 310 for Duke's energy-intensive customers to opt out of the amended plan

If an EDU files an application to amend its portfolio plan, the Commission must either approve, or modify and approve, the application pursuant to Section 6(B) of SB 310. Accordingly, if the Commission does not dismiss Duke's Application to Amend its Portfolio Plan pursuant to Section 7(A) of SB 310, Duke's portfolio plan will be amended under SB 310.

Section 8 of SB 310 further provides, "[b]eginning 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." For purposes of Section 8 of SB 310, "customer" is defined as a customer that takes service above primary voltage levels or a commercial or industrial customer that has

¹⁵ Duke Ex. 3 at 9-10; Tr. at 36-38.

¹⁶ Tr. at 36-38.

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).¹⁷ So that it is clear that the effect of Duke's Application to Amend its Portfolio Plan triggers the customer's right to accelerate the opportunity to opt out of the portfolio plan, the Commission should make an affirmative finding that eligible customers may opt out of the amended plan as provided by Section 8 of SB 310.

III. CONCLUSION

The Commission should conclude that Duke is seeking to amend its portfolio plan pursuant to Section 6 of SB 310. The Commission should also modify Duke's proposed amended plan and should reject Duke's request to extend its authorization to collect shared savings through the end of 2016. Because an application to amend a portfolio plan results in an amended portfolio plan (as the Commission must either approve, or modify and approve), the Commission should also confirm that eligible customers may opt out of Duke's amended portfolio plan immediately pursuant to Section 8 of SB 310.

Respectfully submitted,

/s/ Matthew R. Pritchard

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

fdarr@mwncmh.com

mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

¹⁷ 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 *Initial Brief 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 21st day of August 2015, via electronic transmission.

/s/ Matthew R/ Pritchard

Matthew R. Pritchard

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.

David C. Rinebolt (Counsel of Record)
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793
drinebolt@ohiopartners.org
cmooney@ohiopartners.org

COUNSEL FOR OHIO PARTNERS FOR AFFORDABLE ENERGY

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

Kyle L. Kern (Counsel of Record) (Reg. No. 0084199)
Michael J. Schuler (Reg. No. 0082390)
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Kyle.kern@occ.ohio.gov
Michael.schuler@occ.ohio.gov

COUNSEL FOR THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Kimberly W. Bojko (Reg. No. 0069402)
Joel E. Sechler (Reg. No. 0076320)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, OH 43215
Bojko@carpenterlipps.com
sechler@carpenterlipps.com

COUNSEL FOR THE OHIO MANUFACTURERS' ASSOCIATION

Christopher J. Allwein (Reg. No. 0084914)
(Counsel of Record)
Margeaux Kimbrough (Reg. No. 0085152)
Kegler Brown Hill & Ritter LPA
Capitol Square, Suite 1800
65 East State Street
Columbus, OH 43215-4294
callwein@keglerbrown.com
mkimbrough@keglerbrown.com

**COUNSEL FOR PEOPLE WORKING
COOPERATIVELY, INC.**

David Boehm (Reg. No. 0021881)
Michael Kurtz (Reg. No. 0033350)
Jody Kyler Cohn (Reg. No. 0085402)
Boehm, Kurtz & Lowry
36 East Seventh St., Suite 1510
Cincinnati, OH 45202
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
jkylercohn@BKLawfirm.com

COUNSEL FOR THE OHIO ENERGY GROUP

Rebecca L. Hussey (Counsel of Record)
(Reg. No. 0079444)
Counsel of Record
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
Hussey@carpenterlipps.com

COUNSEL FOR THE KROGER COMPANY

Samantha Williams
Staff Attorney
Natural Resources Defense Council
20 N. Wacker Drive, Suite 1600
Chicago, IL 60606
swilliams@nrdc.org

**COUNSEL FOR NATURAL RESOURCES
DEFENSE COUNCIL**

Trent A. Dougherty (Reg. No. 0079817)
(Counsel of Record)
Managing Director of Legal Affairs
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
TDougherty@theOEC.org

**COUNSEL FOR THE OHIO ENVIRONMENTAL
COUNCIL**

Justin Vickers
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
jvickers@elpc.org

Madeline Fleisher
Staff Attorney
Environmental Law & Policy Center
1207 Grandview Avenue, Suite 201
Columbus, OH 43212
mfleisher@elpc.org

**COUNSEL FOR THE ENVIRONMENTAL LAW &
POLICY CENTER**

Katie Johnson
John Jones
Assistant Attorney General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215
Katie.johnson@puc.state.oh.us
john.jones@puc.state.oh.us

**COUNSEL FOR THE STAFF OF THE PUBLIC
UTILITIES COMMISSION OF OHIO**

Christine 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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