

**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 its Cost Recovery Mechanism :
for Energy Efficiency Programs Through :
2016. :

REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

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**On behalf of the Staff of
The Public Utilities Commission of Ohio**

September 8, 2015

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INTRODUCTION

Staff submits this reply brief in response to the parties' initial briefs filed in this case. If a particular issue is not addressed in this reply, Staff believes its initial brief adequately articulates Staff's position on the issue.

DISCUSSION

- A. The Commission has authority to approve the Company's incentive mechanism for 2016 and the 2016 incentive mechanism should include Staff's recommendations.**
- 1. S.B. 310 does not limit the Commission's authority to approve the Company's application, but the approved application should include Staff's recommendations.**

Section 7(A) of S.B. 310 states the Commission "shall neither review nor approve *an application for a portfolio plan* if the application is pending on the effective date of

this section.”¹ Kroger and OPAE argue that this provision prevents the Commission from reviewing the Company’s application because the application was pending on the effective date of S.B. 310.² The Company did not file an application for a portfolio plan in this case. The Company filed an application for “approval to continue [its] cost recovery mechanism for energy efficiency programs through 2016.”³ The Commission is by no means reviewing an entire portfolio plan in this case. The Company last filed an application for a portfolio plan in 2013 in Case No. 13-431-EL-POR. It has not done so here. Therefore, this provision of S.B. 310 does not apply and it is irrelevant whether the Company’s application was pending on the effective date of S.B. 310. The Commission has the authority to review and approve the Company’s application.

Second, Section 7(B) of S.B. 310 provides the Commission “shall not take any action with regard to any portfolio plan or application regarding a portfolio plan” except it may take “actions necessary to administer the implementation of existing portfolio plans.”⁴ OPAE and Kroger argue that this provision prevents the Commission from deciding this case because it is unnecessary for the Commission to do so to administer the implementation the Company’s portfolio plan.⁵ This is false. The Commission must act in

¹ S.B. 310 section 7(A). (emphasis added).

² See OPAE Initial Brief at 8; See Kroger Initial Brief at 3.

³ Company Application at 1 (Sep. 9, 2014).

⁴ S.B. 310 section 7(B).

⁵ See OPAE Initial Brief at 9; Kroger Initial Brief at 4.

this case to administer the Company's plan. The stipulation in Case No. 11-4393-EL-RDR makes clear that the incentive mechanism expires at the end of 2015.⁶ It then sets forth a procedure for the parties to assess the reasonableness of the incentive mechanism and consider whether they support its use for 2016.⁷ In this case, the Company requested authority from the Commission to continue its incentive mechanism for 2016 as a component of the Company's cost recovery mechanism.⁸ Parties in this case object to the Company's request. If the Commission does not decide the issue it will remain unresolved and create uncertainty regarding the implementation of the Company's portfolio plan in 2016. The Commission must decide this matter; it must act to administer the Company's portfolio plan and has the authority to do so.

2. The Company's cost recovery mechanism for its energy efficiency program does not expire at the end of 2015.

OMA argues that the Company's entire cost recovery mechanism, including program costs, lost distribution revenues, and an incentive, must expire at the end of 2015.⁹ This argument fails to recognize the nuances of the stipulations that distinguish between the cost recovery mechanism and the incentive mechanism and the different expiration dates for the two mechanisms.

⁶ Case No. 11-4393-EL-RDR, (Stipulation and Recommendation at 5) (Nov. 18, 2011).

⁷ *Id.*

⁸ *See* Company Application at 1 (Sep. 9, 2014).

⁹ *See* OMA Initial Brief at 1-2.

The stipulation in Case No. 11-4393-EL-RDR authorizes Duke to recover program costs, lost distribution revenues, and an incentive from its energy efficiency programs through the cost recovery mechanism. This cost recovery mechanism was intended to be in effect for the duration of the plan, through 2016.¹⁰ Admittedly, the stipulation in Case No. 13-0431-EL-POR creates confusion as to the cost recovery mechanism's expiration date. That stipulation states,

the mechanism for recovering costs from the Company'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 and Recommendation agreed to in Case No. 11-4393-EL-RDR, and adopted and approved by the Commission on August 15, 2012.¹¹

Even though the stipulation provides that the cost recovery mechanism expires at the end of 2015, it specifically notes that the stipulation in Case No. 11-4393-EL-RDR controls.

The stipulation in Case No. 11-4393-EL-RDR did not state the entire cost recovery mechanism would expire at the end of 2015. It provided that "the *incentive mechanism* shall expire at the end of 2015, and be reevaluated by all interested parties..."¹²

Furthermore, the stipulation in Case No. 13-0431-EL-POR states, "nothing in this Stipulation and Recommendation should be construed to alter, amend, or supersede the

¹⁰ As the Commission stated in Case No. 11-4393-EL-RDR, Commission rules "require the portfolio filings to be a total package of programs and a cost recovery mechanism." Case No. 11-4393-EL-RDR, (Opinion & Order at 18) (Aug. 15, 2012).

¹¹ Case No. 13-0431-EL-POR, (Amended Stipulation & Recommendation at 5) (Sept. 9, 2013)

¹² Case No. 11-4393-EL-RDR, (Stipulation & Recommendation at 5) (Nov. 18, 2011) (emphasis added).

terms, conditions, and/or responsibilities contained in the Stipulation and Recommendation...in Case No. 11-4393-EL-RDR.”¹³ The stipulation in Case No. 11-4393-EL-RDR states that the *incentive mechanism* will expire at the end of 2015 and be reassessed, not that the entire cost recovery mechanism will expire.¹⁴ Because the stipulation in Case No. 11-4393-EL-RDR governs, the Commission should find the entire cost recovery mechanism expires at the end of 2016 and that the Commission may determine whether the incentive mechanism should be implemented for the year 2016.

Furthermore, it would be nonsensical for the entire cost recovery mechanism to expire at the end of 2015. The Company would receive no recovery for a Commission-approved program for the year 2016. As the Commission stated in Case No. 11-4393-EL-RDR, Commission rules “require the portfolio filings to be a total package of programs and a cost recovery mechanism.”¹⁵ Consequently, the Commission need not find that the

¹³ Case No. 13-0431-EL-POR, (Amended Stipulation & Recommendation at 6) (Sept. 9, 2013).

¹⁴ Furthermore, in its Opinion & Order approving the stipulation in Case No. 11-4393-EL-RDR, the Commission made clear that when Duke filed its next portfolio case by April 15, 2013, it must “update its cost recovery mechanism in such a way that it will have a cost recovery mechanism in place for the full duration for which it is seeking program approval, which would be through the April 15, 2016, filing.” Case No. 11-4393-EL-RDR, (Opinion and Order at 7) (Aug. 15, 2012).

The Company noted in the stipulation in Case No. 13-0431-EL-POR that “it proposed a cost recovery mechanism in its Application in this proceeding, to align cost recovery from its customers with duration of program approval per Duke Energy Ohio’s understanding of the Commission’s Order in Case No. 11-4393-EL-RDR. The cost recovery mechanism recommended herein aligns with program duration except with respect to the shared savings incentive which is only approved to continue through 2015.” Case No. 13-0431-EL-POR, (Amended Stipulation & Recommendation at 6 fn. 7) (Sept. 9, 2013).

¹⁵ Case No. 11-4393-EL-RDR, (Opinion & Order at 18) (Aug. 15, 2012).

entire cost recovery mechanism, including program costs, lost distribution revenue, and an incentive mechanism, expires in 2016.

As demonstrated here and in Staff's initial post-hearing brief, the Company's EE Portfolio Plan established the procedure to reconsider, modify, and approve the Company's incentive mechanism for 2016. Furthermore, nothing in S.B. 310 prohibits the Commission from approving that plan with Staff's recommendations. Therefore, Staff believes the Commission should approve the Company's incentive mechanism for 2016 with Staff's recommendations.

B. The Company's argument that Staff did no analysis to justify its recommendations is unfounded and mischaracterizes Staff testimony.

1. The Commission should allow the Company to use banked savings to satisfy its energy efficiency requirements, but not to earn shared savings incentive revenues in a future year.

Staff believes that the Company should be able to use banked savings to satisfy its energy efficiency requirements, but not to earn shared savings incentive revenues. As explained in Staff's initial brief, this position is grounded in Commission precedent and Ohio law.

The Company asserts that Staff is advocating for a change in how the Company applies banked savings towards shared savings.¹⁶ This is not true. The Commission has never found that the Company should be able to use banked savings to earn shared savings revenues. Similarly, the Commission has never approved a calculation that sets

¹⁶ Company Initial Brief at 12.

forth how Duke should apply banked savings towards shared savings. Therefore, Staff is not arguing that the Commission change its calculation or its position. Rather, Staff is requesting that the Commission follow its precedent and find that the Company cannot use banked savings to earn shared savings revenues.

The Company also argues that if the Commission does not allow the Company to use banked savings to earn shared savings revenues it would leave “the Company in a position such that there is no opportunity to earn an incentive, either for the past two years or for the duration of this portfolio.”¹⁷ Staff understands that it is possible the Company will not earn an incentive in 2015 or 2016 if the Company is unable to use banked savings to earn shared savings revenues.¹⁸ However, Staff believes the Company can still earn an incentive if it applies itself and its programs perform better than expected, which has happened in the past.¹⁹ Therefore, Staff believes the Company still has an opportunity to earn an incentive during the duration of the portfolio plan.

Finally, the Company asserts that Staff Witness Scheck was “not sure whether the other utilities were permitted to use historical bank for future shared savings.”²⁰ The Company misquotes Witness Scheck.²¹ Instead, he explained in testimony that a

¹⁷ *Id.*

¹⁸ Tr. at 187.

¹⁹ Tr. at 187; Tr. at 205.

²⁰ Company Initial Brief at 13 (the Company alleges Mr. Scheck stated this at Tr. p. 188).

²¹ *See* Tr. at 188.

Commission order prohibits FirstEnergy from using banked savings to earn shared savings revenues and that it is unclear whether the stipulations in DP&L and AEP's portfolio cases would allow banked savings to be used to earn shared savings revenues in the future.²²

The Commission has never allowed a Company to use banked savings to receive a shared savings incentive in a future year. The Commission should follow its precedent and decline the Company's invitation to do so now.

b. The Commission should place a \$6.5 million cap after tax on the amount of shared savings revenues the Company can earn annually.

Staff calculated this recommended \$6.5 million annual cap by taking the weighted average of the shared savings caps of FirstEnergy, AEP Ohio, and DP&L based on the adjusted baseline sales for FirstEnergy, AEP Ohio, and DP&L for 2013.²³ Staff's calculation produces a cap that takes into consideration the amounts of the Commission-approved caps for the other three EDUs in the state. It then adjusts that cap so it is proportional to the size of the Company. Staff's recommendation promotes consistency among the four EDUs in the state by imposing a shared savings revenue cap on each of them.²⁴ Furthermore, it limits customers' potential exposure to unlimited shared savings

²² Tr. at 188. Staff would like to note that the Commission has not interpreted the relevant language of those stipulations because neither DP&L nor AEP have sought authority to use banked savings to earn shared savings revenues.

²³ Direct Testimony of Gregory Scheck at 3 (Jun. 30, 2015).

²⁴ *Id.* at 2.

recovery by the Company.²⁵ Staff's proposed cap is not a penalty as alleged by Duke.²⁶ Staff's proposed cap is fair and reasonable and should be adopted by the Commission.

CONCLUSION

Previous Commission-approved stipulations provided that the Commission can reconsider and modify the Company's shared savings incentive mechanism for 2016. Furthermore, no provision of S.B. 310 prevents the Commission from doing so. Therefore, Staff believes the Commission should implement the Company's portfolio plan by approving the Company's application to continue its incentive mechanism through 2016 with Staff's recommendations.

Respectfully submitted,

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²⁵ Staff Reply Comments at 6-7 (Jan. 9, 2015).

²⁶ See Company Initial Brief at 13.

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**On behalf of the Staff of
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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Reply Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served via email upon the following Parties of Record, this 8th day of September, 2015.

/s/ Katie L. Johnson

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