

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

REPLY BRIEF OF OHIO PARTNERS FOR AFFORDABLE ENERGY

I. INTRODUCTION

Ohio Partners for Affordable Energy (“OPAE”) hereby respectfully submits to the Public Utilities Commission of Ohio (“Commission”) this reply brief regarding the application of Duke in this matter.

This case is not about whether to continue a “cost recovery mechanism” of an existing “portfolio of energy efficiency and peak demand reduction programs....” Initial Post Hearing Brief of Duke Energy Ohio, Inc. at 1 (August 21, 2015), (“Duke Brief”). [Emphasis in original.] It is about whether to continue a *shared savings* mechanism, a component of Duke’s current portfolio, which explicitly expires at the end of 2015. Cost recovery for the programs is not at issue in this case; the Commission has made clear that cost recovery continues into 2016 regardless of whether a shared savings incentive exists during that program year. Under the terms of two stipulations, it is the shared saving incentive that expires at the end of 2015 and cannot be extended for another year.

II. THE EXTENSION OF DUKE ENERGY OHIO'S SHARED SAVINGS MECHANISM IS PROHIBITED BY AMD. SB 310.

Amd. SB 310 ("SB 310") does not permit the amendment to the portfolio plan Duke is requesting. The application in this case should be dismissed.¹

SB 310 clearly defined the options available to utilities during and after the two year freeze of the energy efficiency benchmarks. A utility could continue its existing portfolio with no amendments. The Commission was prohibited from acting on any application to amend a portfolio plan that was pending on the effective date of SB 310. If a utility wanted to amend its plan, it had to file the amendment in the first 30 days after the effective date of the legislation, October 12, 2014.

Taking these options in reverse order, Duke did not file to amend its plan during the first 30 days after the effective date of the law. Duke did file to amend its portfolio plan prior to the effective date of SB 310, but the Commission is prohibited from acting on that request. That left Duke with the option taken by AEP Ohio and The Dayton Power & Light Company -- to leave its portfolio in place with no amendments. Had Duke wanted to amend its portfolio as permitted under SB 310 it could have. It did not.²

Staff argues that the shared savings incentive is somehow part of program cost recovery and that extending some type of shared savings mechanism was contemplated in the stipulations in Case Nos. 11-4393-EL-RDR and 13-431-EL-POR ("*2011 Rider Case*" and "*2013 Portfolio Case*," respectively). This is not correct. In the *2011 Rider*

¹ Ohio Partners for Affordable Energy filed a Motion to Dismiss on September 30, 2014.

² The argument of the Industrial Energy Users – Ohio ("IEU-OH") that this application was an attempt to amend the portfolio, albeit illegally, and should be construed as an application for the purposes of triggering Sec. 8 of SB 310 is defective on its face. If the application fails to meet statutory requirements it should be dismissed, not rewritten by the Commission to achieve an outcome sought by IEU-OH.

Case, Rider EE/PDR, a rider which included program cost recovery and a shared savings component, was established because the prior cost recovery and incentive mechanisms had expired. *2011 Rider Case*, Opinion and Order at 5 (November 15, 2012). Parties agreed to continue cost recovery through 2015, and provided for a separate shared savings incentive that also expired at the end of 2015. Both are recovered through Rider EE/PDR. *Id.* at 4.

After the Commission ordered Duke to comply with the rules on energy efficiency portfolios (*Id.* at 5-6), and Duke filed the *2013 Portfolio Case* to garner the Commission's approval of a three year plan, the parties explicitly reaffirmed the provision in the 2011 stipulation under which the shared savings mechanism expired at the end of 2015. The prior Commission approvals are cited in the Finding and Order in Case No. 14-457-EL-RDR ("*2014 Rider Case*"):

The incentive mechanism expires at the end of 2015, unless the interested parties decide the incentive is reasonable and effective and should continue for another year. By Opinion and Order issued December 4, 2013, in ...Case No. 13-431-EL-POR..., the Commission adopted a stipulation that approved Dukes portfolio application and maintained the cost recovery mechanism as permitted in the (2011) *Rider Case*. *2014 Rider Case*, Finding and Order at 1-2.

This was a key component of the stipulation, which contemplated a discussion among parties regarding whether the shared saving incentive would continue. There have been disagreements among the parties over the lack of a cap; what incentive percentages were appropriate; and subsequently there has been a dispute on the interpretation of how the Duke shared savings mechanism works. SB 310 renders this discussion moot because the Commission is prohibited from considering this application and Duke failed to file an application which complies with SB 310.

The Commission has the authority to oversee the administration of the Duke portfolio plan, but the shared savings incentive either exists or it does not. Put another way, utilities must have programs and the ability to recover the cost of those programs through adjustments in a rider, but shared savings is an option, not a requirement. Duke's shared savings incentive expires per the terms of two stipulations. The stipulations makes clear that parties viewed the shared savings incentive as something separate and distinct from cost recovery. The plain language of SB 310 requires the dismissal of this application to amend the 2014-2016 energy efficiency portfolio plan.

III. DUKE ENERGY OHIO'S PAST PERFORMANCE IS IRRELEVANT TO THE EXTENSION OF THE SHARED SAVINGS MECHANISM.

Duke asserts that it has demonstrated its energy efficiency programs are a success and thus justify Commission approval of an illegal amendment to its current portfolio plan. This assertion does not square with the facts in evidence. Duke, as allowed by Ohio law, counted and banked energy savings resulting from programs in place prior to 2009: this totaled 206,670 MWh, more than the savings required by the benchmarks in 2012, 2013, or 2014. This balance was augmented by savings that exceeded the benchmarks from 2009 through 2012. However, in 2013 the Duke programs failed to achieve savings equal to the benchmark, meeting only 53.1% of the benchmark with banked savings accounting for the balance necessary for minimum compliance. See Case No. 14-457-EL-RDR, Direct Testimony of James E. Ziolkowski, Revised Attachment JEZ-1 at 1 (April 17, 2014). In 2014 Duke had the same results – a failure to meet the mandates – achieving only 75% of the benchmark. See Case No. 15-534, Direct Testimony of James E. Ziolkowski, Attachment JEZ-1 at 1 (March 30, 2015). Failure to meet savings benchmarks is not the hallmark of a successful program. Using banked savings to obtain 13% of customers' savings is simply unfair. Most of the parties

in this case were also parties in the AEP-Ohio proceeding. The understanding among parties – apparently other than Duke – was that failure to exceed benchmark with current year program savings would not trigger shared savings. There is no reason why parties would agree to a shared savings provision that Duke was guaranteed to meet given its large bank of savings, some with a vintage dating back to 2006.

The relevance of the relative success of a utility's energy efficiency portfolio is not at issue in this case. The General Assembly froze the efficiency benchmarks despite the wealth of information filed by utilities with the PUCO documenting the success of the programs. Legislators did not care whether programs were successful or not, so the efficacy of Duke's program portfolio has not impact on a provision of state law that prohibits the amendment of portfolios unless requested by a utility following the procedures dictated by SB 310.

Still, at time when every other utility is exceeding benchmarks with annual programming, Duke's record is less than impressive. In order to align the interests of the utility and its customers, shared savings incentives should only be provided when a utility achieves a level of savings that exceeds the benchmark in the current program year. Otherwise, customers are paying incentives for savings paid for long ago.

IV. IF THE COMMISSION DETERMINES THAT THE SHARED SAVINGS MECHANISM SHOULD BE CONTINUED, IT SHOULD PROHIBIT THE USE OF BANKED SAVINGS TO TRIGGER SHARED SAVINGS.

The Commission has already ruled that Duke cannot use banked savings to trigger the recovery of shared savings from customers. *2014 Rider Case*, Opinion and Order at 5 (May 20, 2015). This is good public policy and consistent with the understanding of signatories to the stipulations that involved the shared savings mechanism at issue in this case, and is consistent with the views articulated by Staff in its initial brief. Post Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio at 4-5. In

testimony supporting the stipulation which approved the cost recovery mechanism, Duke's witness Duff characterized the shared savings mechanism at issue in this case as being identical to that of AEP Ohio, with the exception of the cap as agreed to in the AEP Ohio portfolio. *2011 Portfolio Case*, Second Supplemental Testimony of Timothy J. Duff on Behalf of Duke Energy Ohio, Inc. at 11-13 (May 30, 12), referencing Case Nos. 11-5568-EL-POR and 11-5569-EL-POR, Opinion and Order at 7-9 (March 21, 2012), ("AEP-Ohio will only be eligible for shared savings if it exceeds the benchmarks of section 4928.66(A)(1)(a) and (A)(1)(b), Revised Code for a particular calendar year.")

This is consistent with the Commission ruling in the only litigated portfolio case, that of the FirstEnergy operating companies. Case No. 12-2190-EL-POR, et.al. ("*2012 FirstEnergy Portfolio Case*"), Opinion and Order at 15-17. If the Commission chooses to extend Duke's shared savings provision it should follow the policy established in, and the understanding of the parties to this case, limiting shared savings to years when single-year savings exceed the benchmark, not cumulative savings.

Duke alleges that it designed its most recent portfolio to meet the statutory benchmarks and trigger shared savings through the use of banked savings, planning annual programs that failed to meet the mandates. (Duke Brief at 2-3.) This is contrary to the application for portfolio approval filed by Duke in Case No. 13-431-EL-POR:

Implementation of Duke Energy Ohio's portfolio of programs is expected to enable Duke Energy Ohio to meet or exceed the statutory benchmarks for peak demand reduction and energy efficiency for the timeframe of this portfolio, January 1, 2014 – December 31, 2016. (Duke Exhibit 2 at 5. See also, Opinion and Order at 4 (December 14, 2013).

The Commission should follow precedent and deny recovery of shared savings when annual savings fail to meet the benchmark. Duke's performance is less than stellar, and the performance is irrelevant to whether the shared savings incentive can be continued.

V. IF THE COMMISSION EXTENDS THE SHARED SAVINGS PROVISIONS IT SHOULD LIMIT THE INCENTIVE AS RECOMMENDED BY PARTIES TO THIS CASE.

If the Commission accepts the argument of Staff that continuation of the shared savings mechanism does not violate SB 310, the Commission should act to limit the amount of the incentive. The General Assembly made clear during the consideration of SB 310 that it was concerned with protecting customers from higher bills resulting from investments in energy efficiency regardless of whether those programs were successful and cost-effective as most are, or the middling programs of Duke. Preventing Duke from diverting 13% of the of customer benefits to its shareholders' pockets, and the resulting increase in the recovery rider, is appropriate. Dollars spent on actual programs produce savings that benefit customers; shared savings only benefit the Company.

Kroger, the Ohio Manufacturers Association ("OMA"), the Office of the Ohio Consumers Counsel ("OCC"), Industrial Energy Users – Ohio, the Ohio Energy Group, and the Commission staff, along with OPAE, all call for a cap on shared savings. A cap should be adopted. OMA also urges that shared savings not be permitted merely if the benchmark is met. This is also a responsible modification.

Beyond enacting a cap, there are additional changes that would reduce the impact of energy efficiency portfolio costs on customer bills. OCC witness Gonzalez makes a series of recommendations regarding shared savings incentives. These proposals are consistent with the legislative intent of SB 310 and should be adopted. The Total Resource Cost test should be used to calculate net benefits as opposed to the Utility Cost Test. This will reduce the amount of savings Duke can collect. Shared savings should be awarded based on the net savings rather than gross savings to prevent over-recovery of

incentives. Shared savings should also be awarded on a pre-tax basis. An incentive is not the equivalent of base rates; Duke should be responsible for the taxes associated with the incentive. Direct Testimony of Wilson Gonzalez at 10-11 (June 30, 2015). All these recommendations would better align the interests of customers and utilities by tying shared savings to the amount of money customers actually save as a result of efficiency programs.

These modifications are appropriate. Duke is seeking to extend a shared savings mechanism. This is the first modification of this type to be considered by the Commission since the passage of SB 310. The General Assembly's intent in passing SB 310 was clear: reduce the cost of complying with the energy efficiency benchmarks. This justifies further limitation of incentives compared to those established in the *2012 FirstEnergy Portfolio Case*. The changes to the shared savings mechanism proposed by the parties are consistent with this intent. If the Commission chooses to extend the shared savings mechanism it should do so in a manner that minimizes the cost to customers, better aligning the interests of the utility with its customers..

V. Conclusion

The Commission should act in a manner consistent with the intent of the General Assembly in passing SB 310. This application should be dismissed. Should the Commission choose to extend the shared savings incentive, it should be modified as suggested by the Commission staff, OCC and the other consumer parties to conform with the legislative intent of the General Assembly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was served electronically upon the persons identified below in this case on this 8th day of September, 2015.

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