BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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. 16-664-EL-RDR Case No. 17-781-EL-RDR

APPLICATION FOR REHEARING OF DUKE ENERGY OHIO, INC.

Pursuant to Section 4903.10, Ohio Revised Code (R.C.), and Rule 4901-1-35, Ohio Administrative Code (O.A.C.), Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company) respectfully submits this Application for Rehearing of the Public Utilities Commission of Ohio's (Commission) May 15, 2019, Finding and Order (Order). The Commission's Order is unreasonable and unlawful in the following respects:

1. Paragraph 16 of the Commission's Order is unreasonable and unlawful in that inappropriately and unlawfully excludes incentive pay from recovery in the rider contrary to Commission precedent and established law.

A memorandum in support of this Application for Rehearing is attached.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

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MEMORANDUM IN SUPPORT

Duke Energy Ohio appreciates the Commission's Order in these proceedings that approves the Company's Application for recovery of program costs, lost distribution revenue and performance incentives in both the cases. However, the Company hereby requests that the Commission reconsider one element of its Order that appears to represent a departure from Commission precedent.

The Staff in these cases, after conducting its prudency review of the Company's Application, recommended as follows with respect to incentive pay, performance awards and restricted stock units:

> Staff historically has not recommended recovery of financial incentives to be recovered from ratepayers. Therefore, Staff recommends a deduction of $276,290 comprised of $15,480 for executive short-term incentives, $232,633 for incentives allocated, $6,570 for performance awards, and $21,607 for restricted stock units.[1]
>
> Staff discovered within Rider EE-PDR, expenses related to incentive pay, performance awards, and restricted stock units linked to the financial performance of the Company. Consistent with past practices, Staff does not normally support the recovery of financial incentives, based upon a utility's financial goals being passed on to its ratepayers. Therefore, Staff recommends a deduction from the Company's proposed cost recovery amount of $299,822, which is comprised of $16,348 (80% of executive short-term incentives), $250,340 for incentives allocated, $7,300 for performance awards, and $25,834 for restricted stock units.[2]

As the above confirms, the Staff recommended a disallowance of incentive pay that Staff apparently believed was only tied to the achievement of financial goals of the Company. However, in prior cases, it has been the policy of Staff to support and recommend recovery of incentive pay that is not tied to achieving a utility's financial goals, such as incentives tied to safety and operations. The Commission Order in this case represents a significant departure from past cases as discussed below. The Staff and the Commission appear to misunderstand the policies related

[1] Case No.16-664-EL-RDR, Staff Report of Investigation, November 13, 2017, at pg.2.
[2] Case No.17-781-EL-RDR, Staff Report of Investigation, September 11, 2018, at pg.2.

to Duke Energy Ohio's incentive plans but the Commission's Order establishes a precedent that all incentive pay is to be borne by shareholders, regardless of whether the incentives are tied to safety, to operational efficiency, or to enhancing the shareholder interests. In its Order, the Commission notes that "[w]hile not all of the performance goals may be explicitly tied to financial obje ctives, they are correlated with Duke's bottom line and meeting shareholder interests." Thus, the Commission finds that Staff appropriately excluded these expenses." [3]

There is no question that there is a correlation between expenses, of any kind, and the Company's bottom line. Following the Commission's logic, all utility expenses could be excluded from recovery because all expenses "correlate to Duke's bottom line and meeting shareholder interests." As a matter of fact, all costs incurred by the Company correlate with the Company's bottom line and with meeting its shareholders' interests while also correlating with the provision of safe and reliable electric utility service. The Commission's notion that costs correlating to the Company's bottom line and with meeting shareholder interests is reason enough to exclude recovery of costs would essentially mean that any cost incurred by the Company could be disallowed since all costs incurred by the Company affect the Company's bottom line and affect its ability to meet its shareholders' interests. If Company's may recover costs only to the extent they do not correlate in any way to Company's bottom line and shareholder interest, then arguably there are no costs that the utility would be allowed to recover.

The Staff only recommended that incentive pay tied to financial goals should be excluded; therefore, Staff made no recommendation that incentive pay tied to non-financial goals should be excluded. Since the Staff made no finding that incentive pay tied to non-financial goals was imprudent or unreasonable, the Commission, absent any record to rely upon, decided that because even incentive pay not tied to financial goals is "correlated to the Company's bottom line" it should be disallowed. That is the only rationale offered by the Commission in its Order to exclude this

[3] Finding and Order at pg. 6.

component of incentive pay. Consequently, the Commission made no finding in its Order that the incentive costs included for recovery in the Company's rider application were 'unreasonable' or 'imprudent.' Absent such a finding, there is no legal basis for disallowing recovery of the costs a utility incurs to provide service under R.C. 4909.15. To the extent the Commission is suggesting that any incentive pay for any utility is categorically not allowed for recovery, there must be a basis for such an exclusion other than the assertion that such an expense correlates to the bottom line because, as mentioned above, all expenses incurred by the utility 'correlates to the bottom line.'

Utilities face significant challenges in providing safe and reliable service to customers, while still being able to provide shareholders with reasonable rates of return, consistent with the long-standing principles of *Hope and Bluefield*.[4] For many years, the Commission had approved recovery of costs for incentive pay so long as it aligned with and supported the Company's work on behalf of its customers to provide safe and reliable service. For example, in a rate case submitted by The Cincinnati Gas & Electric Company in 1996, OCC sought disallowance of wage expenses related to incentive compensation. The Commission responded to this issue by agreeing with the Staff's recommendation in that case and allowing inclusion of incentive compensation in base rates.[5]

Similarly, in a 2009 rate proceeding filed by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, OCC again sought disallowance of any portion of incentive compensation that related to the attainment of financial goals. Staff found that twenty percent of the incentives in that proceeding were paid for achieving financial goals and recommended disallowance. In that case, the Commission found that "Staff

[4] *Federal Power Com. v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333, 1944 U.S. LEXIS 1204; *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n*, 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176, 1923 U.S. LEXIS 2676.

[5] *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Its Rates for Gas Service to All Jurisdictional Customers*, Case No.95-656-GA-AIR, Opinion and Order, (December 12, 1996) at pg.15.

has struck the proper balance regarding incentive compensation."[6] Accordingly, the Commission agreed with Staff and allowed recovery of eighty percent of the financial incentive cost included in the application.[7]

In an Ohio American Water rate proceeding, in an Entry on Rehearing, the Commission addressed OCC's assignment of error with respect to incentive compensation. The Commission again reiterated its support for recovery of incentive compensation in a rate proceeding. The Commission explained its rationale as follows:

> Under the company's incentive compensation plan, incentive compensation is not automatic. Rather, incentive compensation will only kick in once the parent company, through the overall performance of all regulated subsidiaries meets certain financial health goals. Once the demonstration of a financial healthy company has been made, then the basis of the award centers around three components (*i.e.*, financial, operational, and individual), only one of which is related to financial achievements.

The Commission in the Ohio America Water rate proceeding permitted recovery of sixty percent of incentive compensation tied to operational and individual goals.[8]

In addition to this Commission's history of permitting recovery of costs associated with incentive compensation in Ohio, other states likewise permit recovery where compensation is properly tied to corporate goals aligning with safety and reliability. For example, the Massachusetts Department of Public Utilities has allowed financial performance as a "threshold component" of variable pay, so long as the metrics used to determine the amount of payout focus on customer interests.[9] The California Public Service Commission has allowed recovery in rates of fifty percent of short-term incentives.[10] The Illinois Commerce Commission has identified as

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[6] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices, and For Tariff Approval*, Case No.07-551-EL-AIR, et al., Opinion and Order, (January 21, 2009) at pg.17.
[7] *Id.* at pg.12.
[8] *In the Matter of the Application of Ohio American Water Company to Increase its Rates for Water and Sewer Services Provided to its Entire Service Area*, Case No.09-391-WS-AIR, Entry on Rehearing, (June 23, 2010) at pg.7.
[9] *Boston Gas Co.*, 2010 WL 4391332 (Mass D.P.U. Nov.2, 2010)
[10] *Southern California Edison Co.*, 2009 WL 801553 (Ca. PUC Mar.12, 2009).

acceptable goals for incentive compensation, including "OSHA Recordable Injuries, Energy Efficiency, Gas Leak Response Objectives and Gas Compliance.[11]

In these cases, the Commission's wholesale disallowance of any incentive compensation cost recovery represents a significant departure from past practices. Furthermore, the Commission provided no legal basis for such disallowance as there was no finding that the costs were unreasonable or imprudent. The Company respectfully requests that the Commission reconsider its overall disallowance of incentive compensation and, at a minimum, allow recovery of that compensation that relates to safety, operations, and reliability, consistent with prior Commission precedent.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

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CERTIFICATE OF SERVICE

[11] Central Illinois Light Co., 2010 WL 1868345 (Ill. Comm. Comm'n. April 29, 2010)

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal delivery, or electronic mail, on this 14th day of June, 2019, to the following parties.

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Summary: Application for Rehearing of Duke Energy Ohio, Inc. electronically filed by Carys Cochern on behalf of Duke Energy