BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of its Energy Efficiency and Peak Demand Reduction Portfolio of Programs.	))))	Case No.16-576-EL-POR

DUKE ENERGY OHIO, INC.'S MEMORANDUM IN OPPOSITION TO THE MOTION OF THE OFFICE OF CONSUMERS' COUNSEL TO ELIMINATE SHARED SAVINGS AND REQUEST FOR EXPEDITED TREATMENT

I. Introduction

The Office of the Ohio Consumers' Counsel (OCC) wishes to persuade the Public Utilities Commission of Ohio (Commission) to ignore its own administrative rules for energy efficiency cost recovery in favor of an implausible statutory interpretation. OCC argues that R.C. 4928.66(F)(3)'s reference to increasing a "[portfolio] ***plan's*** budget" (emphasis added) should be interpreted as equivalent to increasing a "program budget," despite the difference in verbiage and the well-known canon against surplusage.[1] Even if OCC's statutory interpretation was remotely plausible, it would still not permit the Commission to categorically exclude—as OCC seeks to do—shared savings from cost recoverability in energy efficiency programs. Indeed, the Commission already approved the inclusion of shared savings when it approved the stipulation in this case. For reasons stated below, the Commission must reject OCC's Motion and permit Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company) to recover shared savings as explicitly provided for in O.A.C. 4901:1-39-07(A), consistent with both Ohio law and Commission precedent.

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[1] *See Cheap Escape Co. v. Haddox, L.L.C.*, 120 Ohio St.3d 493, 497, 900 N.E.2d 601, 2008-Ohio-6323, ¶¶ 15-16 (refusing to interpret "within its territory" as equivalent in meaning to "original jurisdiction within its territory" to avoid rendering statutory language "mere surplusage").

II. Discussion

A. The term "plan's budget" in R.C. 4928.66 must be interpreted to include all portfolio plan expenditures, unlike a "program budget," which only includes program costs.

1. R.C. 4928.66(F) refers to a "*plan's* budget," and not a "program budget," and therefore anticipates that all *plan* expenditures will be included.

OCC claims that "under the PUCO's rule, shared savings is not part of the utility's 'budget,'" but in support it cites the filing requirement of a "***program*** budget,"[2] hoping that the Commission will not notice that R.C. 4928.66(F)(3) refers to a "***plan's*** budget." Equating the two would render both modifiers "mere surplusage," which the Ohio Supreme Court avoids.[3]

R.C. 4928.66(F)(3) provides the terms for extending a portfolio plan using an "existing [portfolio] plan's budget" (emphasis added):

> If a portfolio plan is extended beyond its commission approved term by division (F)(2) of this section, ***the existing plan's budget shall be increased*** for the extended term to include an amount equal to the ***annual average of the approved budget for all years of the portfolio plan*** in effect as of the effective date of the amendments to this section by H.B. 6 of the 133rd general assembly.

By contrast, the rule cited by OCC for defining "budget" in the statute to exclude shared savings uses the term "program budget," which is a very specific and narrow filing requirement. O.A.C. 4901:1-39-04(C) lists the five items that a utility must submit in its portfolio plan, including a "description of proposed programs," which in turn must contain twelve items, only one of which is a "program budget":

> **4901:1-39-04 Program portfolio plan and filing requirements.**
> . . . .

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[2] Motion to Modify Duke's 2020 Energy Efficiency Plan to Eliminate Charges to Consumers for Utility Profits and Request for Expedited Treatment by the Office of the Ohio Consumers' Counsel, pg. 3 (December 9, 2019) (OCC Motion).

[3] *See Cheap Escape Co. v. Haddox, L.L.C.*, 120 Ohio St.3d 493, 497, 900 N.E.2d 601, 2008-Ohio-6323, ¶¶ 15-16 (refusing to interpret "within its territory" as equivalent in meaning to "original jurisdiction within its territory" to avoid rendering statutory language "mere surplusage").

> (C) Content of filing. An electric utility's program portfolio plan shall include, but not be limited to, the following:
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> . . . .
>
> (5) A description of proposed programs. An electric utility shall describe each program proposed to be included within its program portfolio plan with at least the following information:
>
> . . . .
>
> (i) A ***program budget*** with projected expenditures, identifying program costs to be borne by the electric utility and collected from its customers, with customer class allocation, if appropriate.

Although OCC ignores it, this difference in modifiers ("plan's" vs. "program") is highly significant. It is well-established in Ohio that the statutory text is the stopping point for any statutory interpretation, whenever it is sufficiently clear.[4] In construing provisions of the Revised Code, Section 1.2 states that [w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage."[5] And, "when construing a statute, "none of the language employed therein should be disregarded."[6] Thus, simply ignoring the legislature's choice to require an increase in a "plan's budget" (rather than a program's budget) would be contrary to Ohio law. By comparison, the fact that the Commission once said "budget" (without a modifier) to refer to program costs in an isolated instance in a stipulation summary—when the Commission was not considering or questioning the availability of shared savings[7]—carries no weight.

When OCC claims that Duke Energy Ohio itself defines "budget" as excluding shared savings in its applications, OCC likewise omits that these are "***[p]rogram*** budget[s],"[8] given as

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[4] *Wayt v. DHSC, L.L.C.*, 155 Ohio St. 3d 401, 2018-Ohio-4822, ¶ 15, 122 N.E.3d 92 ("When a statute is plain and unambiguous, we apply the statute as written, . . . and no further interpretation is necessary.") (citation omitted).

[5] *In the Matter of the Complaint of WorldCom, Inc.; AT&T Corp.; KMC Telecom III, LLC; and LDMI Telecommunications, Inc., v. City of Toledo, et al.*, Case No.02-3207-AU-PWC, Opinion and Order, (May 14, 2003) at pg.11.

[6] *Layman v. Woo*, 78 Ohio St. 3d 485, 487, 678 N.E.2d 1217 (1997).

[7] OCC Motion, pg. 3-4.

[8] *See, e.g.*, Amended Application, Appendix A, pg. 14 (emphasis added).

one line-item in a thirteen-item table that contains the required elements of a "description of proposed program[]." They are not intended to signal a comprehensive budget for the overall portfolio plan or to communicate the total amount that ratepayers will have to pay. A single portfolio plan may contain numerous program budgets; indeed, the one portfolio plan in the instant case contains fourteen program budgets.[9] However, these are not ***plan*** budgets.

Both of the dictionary meanings of "budget" provided by OCC[10] demonstrate perfectly why any sensible definition of a "[portfolio] plan's budget" would include all of the expenditures authorized under the plan, and not merely program expenditures. The first definition is "a plan for the coordination of resources and expenditures." Any responsible coordination of resources and expenditures for an energy efficiency portfolio ***plan*** must take into account all moneys expended under the ***plan***, which would include shared savings paid to the utility. The second definition is "a sum of money allocated to a particular purpose or project." In R.C. 4928.66, the reference to a "plan's budget" clearly indicates that the "purpose or project" in question is the entire portfolio plan, not merely a single program within it. And in the definition, itself, a "sum" implies a comprehensive total, not a mere line item. Thus, even using OCC's own dictionary definitions, a portfolio plan's budget must include monetary quantities for all components of the plan, including shared savings. For this reason, the Commission should deny OCC's motion.

B. Categorically Barring The Company From Recovering Shared Savings Directly Conflicts With O.A.C. 4901:1-39-07(A), Which Explicitly Authorizes Utilities To Recover Shared Savings, And Remains Unchanged By HB 6.

OCC argues that HB 6 permits the Commission to eliminate cost recovery of shared savings from utility portfolios because shared savings are not part of the utility's "budget."[11] However, OCC overlooks the fact that O.A.C. 4901:1-39-07(A) explicitly authorizes utilities to

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[9] Id., Appendix A, pg. 1-14.
[10] OCC Motion, pg. 4. For purposes of this brief, Duke Energy Ohio assumes without checking that OCC is accurately quoting these dictionaries.
[11] OCC Motion, pg. 2-6.

recover shared savings and remains unchanged by HB 6. Even if the term "plan's budget" could reasonably be defined to only include programming costs—which it cannot, *see* Section A *supra*—shared savings would remain recoverable under the Commission's own rules, which have remained unchanged by HB 6.

O.A.C. 4901:1-39-07 explicitly authorizes the recovery of shared savings for energy efficiency programs:

> **4901:1-39-07 Recovery mechanism**
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> (A) With the filing of its proposed program portfolio plan, ***the electric utility may submit a request for recovery*** of an approved rate adjustment mechanism, . . . of costs due to electric utility peak-demand reduction, demand response, energy efficiency program costs, appropriate lost distribution revenues, ***and shared savings***.

Not only is there no indication that HB 6 sought to alter this rule, which authorizes utilities to recover shared savings, but HB 6 actually adopted it by reference. HB 6 explicitly stated in the new section R.C. 4928.66(F) that "portfolio plan" would, for purposes of that section, have "the same meaning as in" R.C. 4928.6610(C)(1). And the latter section, in turn, explicitly defines a portfolio plan as the plan "required under rules adopted by the public utilities commission and codified in Chapter 4901:1-39 of the Administrative Code."

Contrary to OCC's contention,[12] R.C. 4928.66(F)(3)'s reference to a "[portfolio] plan's budget" does not authorize the complete exclusion of shared savings from recovery. This provision states that, if a portfolio plan is extended beyond its term under R.C. 4928.66(F)(2), then "the existing ***plan's budget*** shall be increased for the extended term to include an amount equal to the annual average of the approved budget for all years of the portfolio plan in effect," (emphasis added). This provision does nothing to eliminate the explicit dictate in O.A.C. 4901:1-39-07(A) that shared savings are considered recoverable.

[12] OCC Motion, pg. 2-4.

Likewise, OCC misreads R.C. 4928.66(F)(4), when it argues that this provision permits the Commission to categorically eliminate shared savings from cost recoveries of individual utilities on the basis of generic arguments that shared savings are bad policy.[13] Because O.A.C. 4901:1-39-07(A) makes shared savings recoverable, the wholesale elimination of shared savings is not a "term[]" or "condition[]" that the Commission may change case by case. Even if the term "plan's budget" was interpreted to exclude shared savings—which it should not be, because it is different than a "program budget"—this would, at most, authorize the Commission to adjust the amount of shared savings for the duration of a portfolio plan extension from the annual average described in the statute. For the Commission to eliminate shared savings entirely for policy reasons, a rule change would be required.

Neither HB 6 nor, ultimately, the definition of "budget" changes the fact that the Commission's current rules permit the recovery of shared savings. Accordingly, the Commission should deny OCC's motion to eliminate shared savings from the Company's energy efficiency cost recovery.

C. Shared savings are well-established and sound policy, not merely "utility profits."

Given the text of the statute and the applicable rule on cost recovery, there is no need to defend shared savings on policy grounds in this proceeding. However, it is quite easy to do so. Contrary to OCC's unfounded assertions, shared savings are both well-established practice and sound policy for Ohio. They have always been, part of the costs included in cost recovery mechanisms for Duke Energy Ohio and other Ohio electric distribution utilities. Indeed, shared savings is an integral part of such mechanisms, as the inclusion of shared savings incentivizes the utility to not only achieve but to exceed and continue to work toward increased levels of energy

[13] OCC Motion, pg. 4-6.

savings while such savings are cost effective. This has long been the "win-win" proposition in the mechanism since the inception of these programs in 2009.

Referring to the Table that OCC included in its Motion,[14] the Total column demonstrates $271,700,522 of avoided costs over this period of the program, which is only costing customers $140,687,402.[15] Since the inception of energy efficiency programs in Ohio, the concept of avoided cost has been an indicator of value and success since the inception of energy efficiency programs. Ohio customers have had the advantage of such programs in Duke Energy Ohio's service territory since 1992. Contrary to OCC's assertions, Duke Energy Ohio's energy efficiency and peak demand reduction programs have been enormously successful, have provided good value to customers and continue to do so.

D. The Commission has already approved the inclusion of shared savings in Duke Energy Ohio's energy efficiency portfolio.

In early 2016, Duke Energy Ohio, Inc. (Duke Energy Ohio) submitted an application for approval of an energy efficiency and peak demand portfolio of programs, to be approved by the Commission and effective for the years 2017 through 2019. That proceeding culminated in a settlement that was adopted, modified, and approved by the Commission in late 2017 and included provisions for shared savings, among other things.[16]

Although the Commission has reopened consideration on certain aspects of the stipulation, the inclusion of shared savings was not one of them. The imposition of an overall annual cap (on both program costs and shared savings) remains an open subject pursuant to a pending application for rehearing that had been granted by the Commission for further consideration.[17] But the very existence of the cap itself simply further demonstrates that the

[14] OCC Motion, pg. 9 (second of two tables on page).
[15] These two numbers are the sums of the first and last rows in the table, respectively.
[16] Opinion and Order, pg. 18, 23 (September 27, 2017) (Opinion and Order).
[17] *See* Opinion and Order, pg. 18; Entry on Rehearing, pg. 2 (November 21, 2017).

Commission recognized that shared savings was included in cost recovery as called for in the stipulation.

The Commission referred to shared savings a number of additional times in its Opinion and Order. Indeed, the Commission stated that the primary issue in the case was "whether to adopt Staff's proposal to cap Duke's recovery of EE/PDR program costs ***and shared savings*** at 3.5 percent of the Company's annual operating revenues reported in line 10 on page 300, of Duke's 2015 FERC Form 1."[18] Ultimately, the Commission stated that "the Stipulation will be modified to limit Duke's annual recovery of EE/PDR program costs and shared savings for calendar years 2018 and 2019 to not exceed four percent of the Company's 2015 operating revenues as reported on FERC Form 1."[19]

There is no ambiguity about whether or not the Company's most recent approved cost recovery mechanism included shared savings. It clearly did, for 2018 and 2019. Insofar as shared savings were not a part of the Company's 2017 cost recovery, that was for a completely different reason: in 2017, the Company's program costs alone had substantially exceeded the overall annual cap (on both program costs and shared savings) that the Commission had imposed, and the Commission conditioned waiver of that cap on (among other things) the Company foregoing any recovery of shared savings that year.[20] However, the Commission never even came close to implying that shared savings ought to be eliminated from cost recovery altogether. And even the cost cap which occasioned—indirectly—the absence of shared savings in 2017, may not stand. The practice of cost-capping recovery under the portfolio plans was recently recognized as "unlawful[]" by the Ohio Supreme Court,[21] and the Commission is

[18] Opinion and Order, pg. 15.
[19] Id., pg. 15-16.
[20] *See* Entry on Rehearing, pg. 2 (November 21, 2017).
[21] *See In re Ohio Edison co.*, 2019-Ohio-4196, ¶ 15.

reconsidering it in the instant case currently.[22] Thus, altogether, the recent stipulation and subsequent orders in this proceeding only affirm the legitimacy of shared savings as a category of cost recovery under the portfolio plans.

C. The Company correctly calculated its portfolio plan budget (including shared savings).

OCC contends that, if the Commission permits the Company to include shared savings for recovery of 2020 energy efficiency costs, the budget proposed by the Company will be inaccurately calculated.[23] First, because OCC contends that an incorrect federal corporate income tax rate was applied and second, because program costs and overhead for the three years differ in the Company's Attachment JEZ-1[24] from the amount to be recovered from customers.

Regarding the inclusion of the correct federal income tax rate, OCC's contention seems to rely upon the fact that the calculation of the 2020 proposed portfolio budget was based on the three-year budgets included in the Company's approved Portfolio filing. The income tax rates used to calculate the projected annual shared savings incentive reflected a 35% federal income tax rate, because the portfolio filing was made prior to any changes in income tax rates.

OCC overlooks that all of the dollar amounts in the portfolio plan are ***projected*** numbers, utilized only to project a 2020 budget, and that the federal income tax rate would be more properly updated during the annual reconciliation. In fact, if OCC contends that the budget needs to be updated for actual tax rate in the shared savings projections, then the achievement levels would also need to be updated to 12 percent instead of 10 percent, which would increase the overall projected budget more than an update for changes in the after-tax gross up rate to

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[22] *See* Duke Energy Ohio Inc.'s Application for Rehearing, pg. 1 (October 27, 2017); Entry on Rehearing (November 21, 2017).
[23] OCC Motion, pg. 7-10.
[24] *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its 2017-2019 Energy Efficiency Portfolio Plan and to Establish the Associated Cost Recovery and Incentive Mechanism to be Recovered through its Energy Efficiency Rider*, Case No.15-576-EL-RDR, Supplemental Direct Testimony of Trisha A. Haemmerle, Attachment JEZ-1, (October 14, 2016)

reflect the new federal tax rate. The Company has and will continue to reflect actual numbers (including the appropriate tax rate) in the reconciliation of its projections for each plan year.

Additionally, it is worth mentioning that OCC's analysis of the proposed adjustment to account for the lower federal tax rate is flawed because OCC applies the lower tax rate to 2017 when the tax change did not become effective until 2018. For all of these reasons, OCC's argument to adjust the proposed 2020 plan year budget is in error.

Regarding supposed discrepancy between the program costs and overhead numbers, OCC claims that Duke Energy Ohio made this "error" for all three years.[25] But this argument demonstrates OCC's inability to understand the overall cost recovery mechanism and underlying support. The number shown as program costs and overhead for 2017 ($36,401,147) is correct.[26] However, the calculation of shared savings is avoided costs minus program costs, which also include M&V costs. The total subtracted from the avoided costs in 2017 was $38,055,540.[27] OCC refers to $37,469,679 program costs and overhead and claims Duke Energy Ohio made an error in the calculation. This is not so. OCC's number includes additional dollars for mercantile self-direct projects that are not eligible to be subtracted from the avoided costs to calculate the eligible amount of shared savings. As can be seen, OCC misunderstands the calculation and is therefore wrong in recommending an adjustment.

III. Conclusion

Effectively, OCC implores the Commission to ignore both the plain text of the Revised Code and the Administrative Code, and to eliminate shared savings because OCC thinks they are bad policy. This proceeding is not the proper forum; OCC should take its policy arguments to the legislature. Furthermore, OCC's assertion that the Company miscalculated its portfolio plan

[25] OCC Motion, pg. 9.
[26] Id. (see second of two tables on page) (taken from Company's attachment).
[27] This is the sum of both (1) program costs and overhead, $36,401,147 and (2) M&V costs $1,654,393.

budget is incorrect. In the instant case, the Commission should heed the applicable statutory text and rules and deny OCC's motion in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 16th day of December 2019, by U.S. mail, postage prepaid, or by electronic mail upon the persons listed below.

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Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum in Opposition to the Motion of the Office of the Ohio Consumers' Counsel to Eliminate Shared Savings and Request for Expedited Treatment electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Rocco D'Ascenzo and Watts, Elizabeth H.