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. 19-622-EL-RDR

REPLY COMMENTS OF DUKE ENERGY OHIO, INC.

I. INTRODUCTION

This case concerns the recovery, by Duke Energy Ohio, Inc. (Duke Energy Ohio or Company), of costs related to energy efficiency and demand response programs. Staff of the Public Utilities Commission of Ohio (Commission) reviewed the Company's application and, on December 12, 2019, issued its Staff Review and Recommendation. Comments were filed by the Office of the Ohio Consumers' Counsel (OCC) on December 26, 2019.

The following are the Company's reply comments.

II. COMMENTS

A. OCC Misrepresents Past Years' EE Proceedings and Omits Crucial Context.

OCC misrepresents the events in past proceedings in order to cast the Company in a negative light and create a false impression that the Company blithely disregarded Commission dictates. Among other things:

- OCC omits the crucial factor of timing – OCC's narrative implies that the Company had the benefit of the Commission's opinion for all prior years at the time it submitted each application, but that is **not** the case; and

- OCC attempts to conflate Staff recommendations with the Commission's position – as if submitting costs that Staff has recommended be excluded is equivalent to disregarding Commission commands.

A year-by-year review demonstrates that OCC has no basis to accuse the Company of "continued cat and mouse tactics" or "creative bookkeeping," either today or in the past[1] and no basis to allege a violation of R.C. 4905.54.

1. Duke Energy Ohio's 2014 EE Rider Case[2] (Case No. 15-534-EL-RDR).

OCC claims that "[t]he PUCO . . . **ruled that Duke could not charge customers for these types** of expenses," referring to categories of expenses disallowed by Staff,[3] but the Commission did not say anything—as OCC implies—about any "types of expenses" in its ruling. In the paragraph cited by OCC, the Commission merely recaps Staff's recommendation, noting that the recommended disallowance "includes expenses associated with pay incentives, meals and entertainment, and other miscellaneous charges that Staff found were outside of the scope of the EE/PDR program."[4] However, when giving its **ruling**, the Commission merely concluded—without giving any particular rationale—that "that the $409,096 in operations and maintenance costs identified by Staff as inappropriately expensed should be deducted."[5]

Indeed, the Commission pointedly declined Staff's request—much more modest than that of OCC in this case—that "Duke be ordered to improve upon its accounting practices to be more descriptive and to ensure availability."[6] The Commission implied that the natural consequence of failing to obtain cost recovery would be sufficient to motivate the Company to substantiate expenses more thoroughly:

> As to Staff's concerns regarding Duke's accounting practices, we note that the Company has the burden of proof in demonstrating that its expenses were appropriate. If, upon review. Staff believes Duke is not meeting its burden, Staff's audit should reflect that.[7]

[1] OCC Comments, p. 8.
[2] *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 for 2014*, Case No. 15-534-EL-RDR (2014 EE Rider Case).
[3] OCC Comments, p. 7.
[4] 2014 EE Rider Case, Opinion and Order, ¶ 20.
[5] 2014 EE Rider Case, Opinion and Order, ¶ 44.
[6] 2014 EE Rider Case, Opinion and Order, ¶ 22.
[7] 2014 EE Rider Case, Opinion and Order, ¶ 44.

This clearly demonstrates that the Commission did not see anything resembling disobedience in the Company's inclusion of certain "types of expenses" in its application.

Even if the Commission had categorically prohibited certain "types of expenses" in the 2014 EE Rider Case—which it certainly did not—the Company would not have been aware of this (as OCC's narrative suggests by misleading omission) at the time it chose which expenses to include in its 2015 application. The Commission did not issue its order in the 2014 EE Rider case until October 26, 2016. By that point, the Company had already submitted its application for 2015 costs; in fact, it had submitted its application for 2015 costs nearly seven months earlier, on March 30, 2016.[8] That application was over 2,000 pages long; its compilation and submission had begun considerably before its filing date. There was no way for the Company to anticipate in March of 2016 what the Commission might say in a future order.

2. Duke Energy Ohio's 2015 EE Rider Case[9] (Case No. 16-664-EL-RDR) and Duke Energy Ohio's 2016 EE Rider Case[10] (Case No. 17-781-EL-RDR).

In an attempt to illustrate what it believes is the Company's alleged recalcitrance, OCC catalogues these two cases as two separate decision points by the Company in a manner that suggests the Company had the benefit of the Commission's decision in the 2015 EE Rider Case when it filed its application in the 2016 EE Rider Case.[11] That is not the case – these cases were consolidated and the Commission issued a single decision ruling on both years' expenses **after** the Company had already submitted its application for 2017 costs. (2015 and 2016 EE Order)[12]

[8] 2014 EE Rider Case, Application of Duke Energy Ohio (March 30, 2016).
[9] *In the Matter of the Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenues and Performance Incentives Related to its Energy Efficiency & Demand Response Rider*, Case No. 16-664-EL-RDR (2015 EE Rider Case).
[10] *In the Matter of the Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenues, and Performance Incentives Related to its Energy Efficiency and Demand Response Programs*, Case No. 17-781-EL-RDR (2016 EE Rider Case).
[11] OCC Comments, pp. 3-4.
[12] *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 Nos. 16-664-EL-RDR, 17-781-EL-RDR, Finding and Order (May 15, 2019).

Thus, at the time that the Company submitted its 2015 EE costs, it had (as described above) not yet seen the Commission's order in the 2014 EE Rider Case. And, at the time the Company submitted its 2016 EE costs, it had only the Commission's opinion from the 2014 EE Rider Case, in which the Commission did not rule to exclude any particular "types of expenses," but only indicated generally that the Company bore the burden of proof to substantiate its expenses as recoverable.

As for the substance of the 2015 and 2016 EE Order, OCC misrepresents that too. Regarding both years' expenses, OCC writes that the Commission "ruled that Duke could not charge customers for these types of expenses," referring to categories disallowed by Staff and including "utility employee incentive pay" as one of the supposedly prohibited types.[13] But the only "type" of expense that the Commission even arguably "ruled" on was cell phone reimbursements, which the Commission said were "either not directly associated with Rider EE-PDRR or not beneficial to Ohio ratepayers."[14] As for employee incentive pay, the Commission appeared to acknowledge the long-established distinction between employee incentive pay tied to financial objectives (non-recoverable) and employee incentive pay tied to non-financial performance goals (recoverable), and specifically approved the exclusion of what Staff identified as "financially motivated incentives."[15] Representing the 2015 and 2016 Order as categorically prohibiting recovery of "utility employee incentive pay," as OCC does,[16] is fundamentally misleading.

OCC also omits that the Commission ignored entirely its request in the 2016 EE Rider Case to "direct[]" the Company "to stop including" certain expenses, such as "incentive pay" and

[13] *See* OCC Comments, pp. 3-4.
[14] 2015 and 2016 Order, ¶ 16.
[15] 2015 and 2016 Order, ¶ 16.
[16] OCC Comments, pp. 3-4.

others.[17] Surely, if the Commission believed—as OCC implies in its Comments—that the Company was disregarding its directives, it would have at least commented on this, especially after the issue was already raised.

Even if the 2015 and 2016 Order was everything that OCC describes—which it was not—the Commission did not issue it until May 15, 2019, **after** the Company had already submitted its application for both 2017 and 2018 EE costs.[18] Thus, construing **anything** in such submissions as disobediences of the 2015 and 2016 Order would be ludicrous and violate basic due process principles.

3. Duke Energy Ohio's 2017 EE Rider Case[19] (Case No. 18-397-EL-RDR).

As with the earlier cases, OCC states that the Commission in this case "ruled that Duke could not charge customers for these types of expenses," referencing a list that includes "utility employee incentive pay."[20] But, regarding incentive pay, the Commission ruled specifically that "we agree with Staff's exclusion of incentive pay **tied to financial goals**."[21] The Commission did not purport to exclude all incentive pay from recovery. The Commission's long-standing precedent has been to permit recovery of incentive pay tied to operational, safety, and other non-financial goals. Although Duke Energy Ohio and other utilities have argued in past cases that all incentive pay should be recoverable in utility rates, the Commission has generally limited recovery to achievement of non-financial goals. Nevertheless, nothing should prevent utilities from arguing in administrative or legal proceedings that certain costs, such as incentive pay, are reasonable and prudent expenses recoverable under R.C. 4909.15(A)(4). It would be unprecedented, and

[17] 2015 and 2016 Order, ¶ 15.
[18] 2017 EE Rider Case, Application (March 29, 2018); Application (March 29, 2019).
[19] *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. 18-397-EL-RDR (2017 EE Rider Case).
[20] OCC Comments, p. 4.
[21] 2017 EE Rider Case, Finding and Order, ¶ 17.

potentially illegal, for the Commission to assess financial penalties against a utility for simply making an argument that it believes certain costs are recoverable under the Ohio Revised Code.

Furthermore, the Staff report in the 2017 EE Rider Case effectively acknowledged that non-financial incentives were recoverable. Staff explained that Staff recommended the exclusion of all of the incentive pay requested because the Company "did not provide the full information required to isolate non-financial incentives from financial incentives."[22] Thus, the issue was inadequate documentation by the Company for the purpose of categorizing the type of incentive pay. Staff was not advocating, and the Commission did not adopt, any sort of wholesale exclusion of all incentive pay. Indeed, the Company should be permitted to recover costs that it is able to support in its Applications and has endeavored to do so.

As for other categories of expenses whose exclusion the Commission "adopt[ed] Staff's recommendations to exclude," the Commission did not state that such expenses were categorically ineligible for recovery in the future.[23] Just as "incentive pay" was in this list despite some types of incentive pay being recoverable under Commission precedent, so too could other items in the list be recoverable under different circumstances and with better substantiation of their relevance to the EE programs. There is no indication in the order that the Commission was directing the Company to forevermore exclude all similar expenses from future applications.

Finally, even if the order in the 2017 EE Rider Case said what OCC claims—which it does not—the Commission did not issue it until July 31, 2019. By that point, the application for 2018 costs that is at issue in the instant case had been submitted.[24]

[22] 2017 EE Rider Case, Staff Review and Recommendations, p. 2.
[23] 2017 EE Rider Case, Finding and Order, ¶ 17.
[24] Application (March 29, 2019).

B. There Is No Basis Here for Finding a Violation of R.C. 4905.54, which Requires Violation of an "Officially Promulgated" Order, Direction, or Requirement, and only "after Due Notice."

As described above, the Commission has not issued any explicit directive to the Company to exclude categories of expenses from its applications and, in fact, has passed up numerous invitations to issue any such directive or even to issue milder directives. And yet, OCC argues that the Commission should find the Company in violation of directives that exist only in OCC's imagination.[25] Although the statutory text typically appears prominently in a brief as the starting point of proving a statutory claim or offense, OCC tucks the statute away in a footnote. Presumably, this is because the statutory text demonstrates that OCC's request is improper.

R.C. 4905.54 provides that the Commission may assess a forfeiture against a public utility "that **after due** notice fails to comply with an order, direction, or requirement of the commission **that was officially promulgated**" (emphasis added). OCC contends that the Commission's orders "disallowing these charges for 2014 to 2017" constitute "adequate[] warn[ing]" that the Company was violating the prior orders.[26] But, as described above, the Commission's rulings in those orders were limited in scope and did not articulate the categorical prohibition on the "types of" excluded costs that OCC claims they did. The Commission's approval of the exclusions in a particular case should not be construed as the adoption of a particular standard or rationale for future cases (especially when Staff's own exclusion of incentive pay in the most recently decided case, the 2017 EE Rider Case, was based on inadequate documentation and not a categorical bar). And, certainly, such a tenuous construction should not be the basis for forfeiture penalties under R.C. 4905.54, which statute is meant to address deliberate non-compliance (as evidenced by the "due notice" requirement).

[25] OCC Comments, pp. 7-8.
[26] OCC Comments, p. 7.

OCC cites no precedent for such broad interpretation of R.C. 4905.54; *i.e.*, to permit sanctions against a public utility for merely submitting costs in its application that it believes are recoverable under its interpretation of regulations and Commission precedent. Applying R.C. 4905.54 this way would place public utilities in a Catch-22. If the Company does not submit debatable costs in its application, OCC will say it failed to preserve its right to recover those costs if it later turns out that the Commission agrees with the Company. But if the Company submits them and the Commission disagrees, then the Company will be vulnerable to sanctions. As the Commission observed in the 2014 EE Rider Case, the burden of proof is already on the Company. Should the Company fail to meet it, it will not recover costs. There is no reason to create an unprecedented chilling effect, by threatening utilities with sanctions for submitting costs they believe in good faith under existing precedent[27] to be recoverable.

C. The Company Properly Included Non-Financial Employee Incentives in its Application, Consistent with Commission Precedent.

The Commission has previously concluded that incentive pay tied to financial goals of the Company should not be recoverable through the energy efficiency rider.[28] Staff too believes that the Company should not be allowed to recover incentives that are "based upon a utility company's financial goals . . .."[29] The application of this standard to specific instances may be viewed differently by different people; it is not a black-and-white issue.

OCC, however, asserts that the Company should be sanctioned for its inclusion of incentive pay—apparently for including any incentive pay at all.[30] Alternatively, OCC believes the Company needs to be stopped from seeking recovery of categories of incentive pay that may or

[27] *See infra* Sections C and D.
[28] *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. 18-397-EL-RDR, Finding and Order, p. 5 (July 31, 2019).
[29] Staff Report, p. 1.
[30] *See* OCC Comments, p. 4.

may not fall within the recoverable categories. Of course, if it is unclear whether a given part of incentive compensation is financial in nature, or is otherwise impermissible, then the Company cannot be condemned for seeking such recovery.

The Company's inclusion of incentive pay in the rider was intended to comply with the Commission's precedent.

D. Duke Energy Ohio Has Attempted in Good Faith to Include only Recoverable Expenses in its Filings.

OCC claims, in its Comments, that the Company "tries to include" improper charges in its energy efficiency rider.[31] OCC goes even further, alleging that, in this case, "Duke has found additional (but equally inappropriate) ways to try to overcharge customers."[32]

However, although some improper charges have accidentally been included, the Company in no way makes any effort to insert such items in the rider, and OCC does not even suggest that it has any proof to support its allegations of willful misconduct. Indeed, the Company spends a great deal of internal time, attempting to sift through charges to be recovered, in order to ensure that such items are identified and removed before filing its annual applications. That some are missed is not evidence that the Company intends to overcharge customers.

It should also be recognized that employee incentive pay is in a different category than the other items. With regard to incentive pay, the Company has attempted to demonstrate to Staff and the Commission that many aspects of incentive pay are not tied to the Company's financial performance and should, therefore, be allowed in the rider. The Company's good faith should not be questioned, simply because it continues to make this argument and continues to attempt to demonstrate the differences in the various aspects of incentive pay.

[31] OCC Comments, p. 2.
[32] OCC Comments, p. 5.

Duke Energy Ohio attempts, in good faith, to file applications that include only items that are appropriate for recovery in this rider

III. CONCLUSION

For the reasons set forth above, Duke Energy Ohio respectfully requests that the Commission (1) decline the request by OCC that the Commission order the Company to stop asking for the types of costs that are disallowed, (2) decline the request by OCC that the Commission assess forfeitures on the Company, and (3) establish a procedural schedule to permit filing comments on the Company's recently filed Amended Application.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 3rd day of January, 2020, to the parties listed below.

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