THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF OHIO POWER COMPANY FOR APPROVAL OF ITS ENERGY EFFICIENCY AND PEAK DEMAND REDUCTION PROGRAM PORTFOLIO PLAN FOR 2017 THROUGH 2020.	**CASE NO. 16-574-EL-POR**
IN THE MATTER OF THE APPLICATION OF DUKE ENERGY OHIO, INC. FOR APPROVAL OF ITS 2017-2019 ENERGY EFFICIENCY AND PEAK DEMAND REDUCTION PROGRAM PORTFOLIO PLAN.	**CASE NO. 16-576-EL-POR**
IN THE MATTER OF THE APPLICATION OF THE OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR APPROVAL OF THEIR ENERGY EFFICIENCY AND PEAK DEMAND REDUCTION PROGRAM PORTFOLIO PLANS FOR 2017 THROUGH 2019.	**CASE NO. 16-743-EL-POR**
IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY FOR APPROVAL OF ITS ENERGY EFFICIENCY AND PEAK DEMAND REDUCTION PROGRAM PORTFOLIO PLAN FOR 2018-2020.	**CASE NO. 17-1398-EL-POR**

THIRD ENTRY ON REHEARING

Entered in the Journal on November 18, 2020

I. SUMMARY

{¶ 1} The Commission grants in part and denies in part the applications for rehearing filed separately by Duke Energy Ohio, Inc., the Ohio Consumers' Counsel, and jointly by the Environmental Law & Policy Center, the Natural Resources Defense Council, the Ohio Environmental Council, and the Environmental Defense Fund Environmental Intervenors on October 27, 2017, and denies the application for rehearing filed by Duke Energy Ohio, Inc. on March 27, 2020.

II. DISCUSSION

A. Applicable Law

{¶ 2} Ohio Power Company, d/b/a AEP Ohio (AEP Ohio), Duke Energy Ohio, Inc. (Duke), The Dayton Power and Light Company (DP&L), Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy) are electric distribution utilities (EDUs) as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02 and, as such, are subject to the energy efficiency and peak demand reduction (EE/PDR) requirements under R.C. 4928.64 and 4928.66.

{¶ 3} Ohio Adm.Code Chapter 4901:1-39 provides rules for the Commission's review of each electric utility's EE/PDR program portfolio plan that consists of cost-effective programs to encourage innovation and market access for all customer classes, achieve the statutory benchmarks for peak-demand reduction, and meet or exceed the statutory benchmarks for energy efficiency.

{¶ 4} R.C. 4903.10 states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.

B. Procedural History

{¶ 5} On September 27, 2017, in Case No. 16-576-EL-POR, the Commission issued an Opinion and Order approving Duke's 2017-2019 Portfolio Plan, as modified by the Amended Stipulation (Stipulation) filed January 27, 2017, and subject to an annual cap (4 percent cost cap) on the Company's recovery from customers of EE/PDR program costs and shared savings *In re Duke Energy Ohio, Inc.,* Case No. 16-576-EL-POR, Opinion and Order (Sept. 27, 2017).

{¶ 6} On October 12, 2017, Duke filed a motion for a waiver to allow recovery of EE/PDR program costs incurred for 2017, pursuant to the Commission's directive that it may not exceed its EE/PDR program budget for 2017 without first obtaining a waiver.

September 27, 2017 Order at ¶ 47.

{¶ 7} On October 27, 2017, applications for rehearing of the September 27, 2017 Order were filed by Duke, OCC, and jointly by the Environmental Law & Policy Center, the Natural Resources Defense Council, the Ohio Environmental Council, and the Environmental Defense Fund (Environmental Intervenors, collectively). Memoranda contra were filed by Duke, OCC, IGS Energy, Inc., the Environmental Intervenors, and the Ohio Hospital Association (OHA) on November 6, 2017.

{¶ 8} On November 21, 2017, the Commission issued an Entry granting the applications for rehearing of the September 27, 2017 Order for the purpose of further consideration of the matters specified in the applications for rehearing and granting Duke's motion for a waiver of the 4 percent cost cap to allow recovery of $56 million in EE/PDR program costs reasonably incurred for 2017, subject to a prudence review in the appropriate proceeding. The Commission granted the waiver to honor commitments made prior to the issuance of the September 27, 2017 Order, and Duke was directed to use its best efforts to minimize actual expenditures for 2017. As a condition of the waiver, Duke would not recover any shared savings for 2017, and the waiver did not extend to the 2018 or 2019 Portfolio Plan years. September 27, 2017 Order at ¶ 47; *In re Duke Energy Ohio, Inc.,* Case No. 16-576-EL-POR (*First EOR*), Opinion and Order (Sept. 27, 2017) at ¶ 6.

{¶ 9} On December 21, 2017, OCC filed an application for rehearing of the *First EOR* objecting to the waiver of the 4 percent cost cap for 2017. On January 10, 2018, the Commission denied OCC's application for rehearing of the *First EOR*.

{¶ 10} Am. Sub. House Bill 6 (H.B. 6), which became effective on October 22, 2019, terminates Ohio's annual energy efficiency savings requirements on December 31, 2020, and reduces the total cumulative savings requirement to a statewide collective benchmark of 17.5 percent.

{¶ 11} In response to H.B. 6, on February 26, 2020, the Commission ordered a wind-down of the statutorily required energy efficiency programs to commence on September 30, 2020, and that those programs should terminate on December 31, 2020. Among other things, the Commission also granted Duke's request to extend its existing portfolio plan as approved in 16-743-EL-POR through December 31, 2020. *In re Ohio Power Co.*, Case No. 16-574-EL-POR, et al., Opinion and Order (*Wind Down Order*) (Feb. 26, 2020).

{¶ 12} On March 27, 2020, Duke filed an application for rehearing of the *Wind Down Order*. On April 6, 2020, the Ohio Consumers' Counsel filed a memorandum contra Duke's application for rehearing.

{¶ 13} By Entry issued on April 22, 2020, the Commission granted the application for rehearing filed by Duke on March 27, 2020, for further consideration of the matters specified therein.

C. Duke's October 27, 2017 Application for rehearing

{¶ 14} In its October 27, 2017 application for rehearing, Duke asserts that the September 27, 2017 Order is unreasonable and unlawful on three grounds: (1) the Order modified the Stipulation without any factual cause or basis to do so; (2) there is no basis in the record to support either the cap recommended by Staff or the cap as untimely ordered by the Commission; and (3) the application of a cap on energy efficiency and peak demand reduction is inefficient and causes additional costs to customers.

{¶ 15} In support of its first assignment of error, Duke argues that the Commission wrongly modified the Stipulation, signed by the majority of the parties to Case No. 16-576-EL-POR, by imposing a cap on program costs and shared savings incentives. Duke states that the cap, suggested by Staff, had no rational basis and was unsupported by the record in the proceeding, contrary to R.C. 4903.09. Duke states that it agreed to a cap on its eligibility to earn shared savings in the amount of $8.0 million, after tax and conceded to limits on statutorily permissible shared savings. Duke argues that the Commission

recognized the merits of the Stipulation by applying the three-pronged test endorsed by the Ohio Supreme Court; notwithstanding, the Commission imposed a cap that Duke believes cannot be reconciled with the evidence in the proceeding. Thus, Duke argues that the Commission significantly altered the terms of the Stipulation that were reached after lengthy negotiations. As a result of the cap implementation, Duke avers that all of the other provisions agreed to in the Stipulation will also be impacted.

{¶ 16} In OCC's memorandum contra Duke's application for rehearing, OCC argues that the Commission lawfully and reasonably modified the Stipulation to give consumers protections that the Stipulation lacked; the Commission's 4 percent cost cap is an appropriate and reasonable way to limit utility charges to customers for EE/PDR program costs and utility profits; and Duke is not entitled to cherry-pick provisions from other EDU Commission proceedings and insist that they be applied to the Company. OCC argues that Duke's first assignment of error – that the Commission modified the Stipulation without cause to do so – fails because it is vague. OCC believes that Duke's attempt to argue this assignment of error simply restates the point of the 4 percent cost cap, which is to require Duke to reduce spending on EE/PDR under the approved-as-modified Stipulation. Additionally, OCC argues that Duke fails to identify the purported consequences the Company claims have occurred as a result of the Commission's September 27, 2017 Order. OCC believes that Duke's first assignment of error conveys a generalized pronouncement that Duke simply does not like the Commission's 4 percent cost cap and requests that the Commission reject this assignment of error.

{¶ 17} With respect to its second assignment of error, Duke believes that the imposition of the 4 percent cost cap creates a disincentive and is inefficient. Duke argues that Staff's recommended cap was based upon a fundamentally flawed premise in that Staff proposed to base the cap off Duke's 2015 operating revenues in conformity with what was required for other Ohio electric distribution utilities (EDUs). However, Duke states that this number varies significantly among the EDUs based upon the level of shopping that occurs in their respective territories. Duke concluded that the resulting recommended cap fails to

provide an equitable starting point. Duke reiterates its initial hearing brief arguments for why any cap on energy efficiency spending is illogical. Lastly, Duke points out that, while the Commission's September 27, 2017 Order recognizes the value inherent in the terms of Stipulation, it neglects to support the Stipulation by imposing the 4 percent cost cap without any explanation.

{¶ 18} OCC believes that Duke's second assignment of error is nothing more than reasserted arguments that Duke made in its post-hearing briefs. Specifically, OCC believes that Duke mischaracterizes the purpose and effect of the cost cap when the Company argues that the 4 percent cost cap forces the Company to discontinue programs when it reaches a designated dollar cap so as not to exceed the limit, regardless of the success of the program. OCC believes that the purpose and effect of the 4 percent cost cap is consumer protection. OCC opines that Duke should never find itself in the position of exceeding the cap, given that the Company has been running EE/PDR programs for years, and as such, bears the responsibility of managing its budget to ensure that the Company does not overspend on programs. OCC points out that Duke would need to adhere to a program budget regardless of whether there is a cost cap. Furthermore, OCC argues that there is no basis for Duke to argue that the 4 percent cost cap will require the Company to pursue less cost-efficient programs and states that Staff Witness Patrick Donlon testified that the cost cap requires Duke to pick the most effective and efficient means of achieving its benchmarks and subsequently avoiding unnecessary charges to customers. In response to Duke's contention that the 4 percent cost cap undermines the Company's ability to earn shared savings, OCC states that the 4 percent cost cap is designed to reduce the amount that customers pay for EE, which includes program costs and shared savings. OCC believes that, if the 4 percent cost cap will result in an abrupt suspension of programs and customer's participation therein, then this abrupt suspension will be Duke's fault through mismanagement and not the Commission's. Lastly, OCC believes Duke's argument that Staff witness Patrick Donlon provided no transparency with respect to any rationale behind his proposed methodology is false and states that Mr. Donlon explained the rationale behind his methodology in his

testimony and at the evidentiary hearing during cross-examination. OCC recommends that the Commission reject Duke's second assignment of error.

{¶ 19} In its third assignment of error, Duke argues that the imposition of the cap is inequitable to the Company. In support of this belief, Duke states that the Commission's September 27, 2017 Order referred to annual caps on energy efficiency programs that were recently adopted by the Commission for AEP Ohio and DP&L. See *In re Ohio Power Co. Energy Efficiency Portfolio Plan,* Case No. 16-574-EL-POR, Opinion and Order (Jan. 18, 2017) and *In re Dayton Power and Light Co. Energy Efficiency Portfolio Plan,* Case No. 16-649-EL-POR, Opinion and Order (Sep. 27, 2017). Duke states that those two cases were stipulated and that the 4 percent cost cap is not appropriate for Duke. Duke believes that equal treatment of the various EDUs should not be justification to apply a 4 percent cost cap given that there are drastically different program budgets for each EDU. Duke believes that setting the cap to be equal in percent, but unequal in dollars spendable per MWH results in the Company having a lower budget for supporting energy efficiency spending.

{¶ 20} With respect to Duke's third and final assignment of error, OCC argues that Duke cannot and should not cherry-pick provisions from other Ohio utilities' Commission proceedings and insist that they be applied to Duke. Specifically, OCC points out that Duke complains about not being treated as well as AEP Ohio and DP&L and states that Duke's argument is irrelevant with respect to how other EDUs are being treated. OCC believes that Duke's argument wrongly presumes that all Ohio EDUs must be treated identical before the Commission. OCC argues that, while consistency is important, each EDU is different and should be treated accordingly to its own unique characteristics. Furthermore, OCC states that nothing in the Ohio Revised Code or the Ohio Administrative Code require the Commission, in adjudicating its proceedings, to provide the exact same treatment to all utilities. Additionally, OCC argues that both AEP Ohio and DP&L agreed to a 4 percent cost cap through settlements that were supported by Staff and unopposed by OCC. Duke, in this case, did not agree to include any cost cap in its filed Stipulation. OCC states that the Commission should not permit Duke to litigate a case and then, when it loses, demand

identical treatment to utilities that agreed to a cost cap as part of negotiations between Staff and intervenors. Lastly, by Duke's own analysis, OCC points out that the Company ranks third out of six Ohio EDUs using the Company's preferred metric, and thus renders Duke's assertion that it is being treated unfairly compared to other Ohio EDUs false.

D. OCC's October 27, 2017 Application for rehearing

{¶ 21} OCC argues four assignments of error with respect to the September 27, 2017 Order. First, OCC states that the Order is unreasonable because it allows Duke to charge customers an excessive amount for utility profits on energy efficiency programs. Specifically, OCC argues that the Order authorizes Duke to charge customers up to $12.5 million in shared savings and with a total cost cap of $38.6 million, Duke can spend up to $26.1 million on programs, while maximizing its profits, and the shared savings could represent a 48 percent markup on program costs. OCC posits that, from 2012-2015, Duke consistently overestimated the amount it would spend on programs while underestimating the amount of energy that its programs would save. OCC suggests that allowing a utility to increase the costs of its energy efficiency programs by 48 percent or more is unreasonable and does not benefit the customers or the public interest. Rather, OCC argues that the focus of utility-run energy efficiency programs should be on energy savings and cost savings for the consumers. In support of its position, OCC states that the Commission has consistently found that it is appropriate to limit the amount that utilities can charge for their customers for utility profits. Specifically, OCC requests that the Commission modify the Stipulation to include a pre-tax shared savings cap and cites to OCC witness Shutrump's recommendation of an annual shared savings cap of $7.8 million. OCC believes that, under Ms. Shutrump's proposal, Duke could spend up to $30.8 million per year on program costs while customers pay a 25 percent surcharge on energy efficiency programs.

{¶ 22} In Duke's memorandum contra OCC's application for rehearing, the Company argues that OCC misunderstands the case and fails to understand the value of EE/PDR for Duke's customers. Specifically, Duke avers that OCC characterizes shared

savings as "profit"; however, the proposed spending for EE/PDR and demand reduction includes three categories: program costs, shared savings, and lost distribution revenues. Duke represents that for each dollar included in the shared savings category, the customer benefit is approximately 90 percent and the Company benefit is up to approximately 10 percent. Duke cites to a prior proceeding in which OCC witness Wilson Gonzalez recognized the aforementioned shared savings calculation. *See In re Duke Energy Ohio, Inc.*, Case No. 14-457-EL-RDR, Direct Testimony of Wilson Gonzalez (March 4, 2016), at 16. Duke opines that the Company incentive is calculated as a percentage of the net system benefits – avoided costs less the program costs – generated by the Company's portfolio of EE/PDR and demand response.

{¶ 23} Duke believes OCC previously argued that the Commission should not have permitted the Company to exceed the cap for program costs only for 2017 in its memorandum contra Duke's October 12, 2017 motion for a waiver. Duke points out that the Commission's decision in this case was issued on September 27, 2017, and by the time the Commission ruled, the Company was 10/12ths done with its program spending for 2017. Duke believes that the Commission correctly recognized that it would unfair to impose a cap on spending for a year when spending has already occurred as well as correctly provided the opportunity for the Company to seek a waiver. Duke believes that OCC's argument bares no relationship to the facts of this case and should be disregarded.

{¶ 24} The Environmental Intervenors argue that OCC failed to show that the Commission acted unreasonably or unlawfully in deciding not to retroactively apply a strict cost cap for 2017, stating that the cost cap is a wholly new policy that the Commission imposed on Duke almost ten full months into the year, and Duke had little to no opportunity to cut back on program spending enough to avoid exceeding the cost cap. Additionally, the Environmental Intervenors point out that Duke acted consistently with the Commission's directive to avoid suspending its programs. As a final point, the Environmental Intervenors point out that OCC can contest the prudency of Duke's expenditures in the Company's annual rider filing for 2017, and that the current forum is inappropriate for such arguments.

The Environmental Intervenors recommend rejecting OCC's arguments regarding application of a cost cap to Duke's 2017 programs.

{¶ 25} Second, OCC believes that the Order is unreasonable because it allows Duke to exceed the cost cap for 2017 by seeking a waiver from the Commission to exceed its 2017 program budget. OCC states that Duke has already demonstrated an inability or unwillingness to limit spending and points to Duke's request to charge customers $56 million in program costs for 2017 in its October 12, 2017 waiver. OCC believes this request defies the intent of the Commission's Order for Duke to control spending. OCC recommends that the Commission amend the Order to eliminate the provision allowing Duke to exceed the cost cap in 2017, and that the 4 percent cost cap should apply to 2017, 2018, and 2019, without exception.

{¶ 26} In response to OCC's contention that the potential for the Company to earn up to $8 million after-tax of a shared savings incentive results in excessive profits for Duke, the Company states that OCC overlooks the fact that Duke is only eligible to earn a shared savings if it meets the statutory energy efficiency benchmark, and OCC has not provided any analysis to show that Duke could meet, let alone exceed, the statutory EE/PDR benchmark while spending on $26.1 million on program costs. Duke illustrates that, based on the actual spending and actual EE/PDR achievement from 2013 - 2015, the Company would not be able to hit its projected 2018 benchmark while spending only $26.1 million on program costs. Furthermore, Duke states that OCC also fails to understand that even meeting the statutory benchmark does not guarantee that the Company will earn the maximum shared savings incentive possible because the shared savings incentive is based on a percentage of the net benefit realized by customers. Duke argues that, if Duke's programs delivered energy savings that allowed the company to exceed the 12 percent mandate, which would entitle the Company to earn a 12 percent shared savings incentive, the portfolio of programs would have to generate net benefits of over $130 million in order to earn its maximum of $8 million after-tax shared savings incentive. Additionally, in response to OCC's belief that Duke's maximum shared savings of $8 million after-tax

savings is exorbitant, Duke points to AEP Ohio's after-tax shared savings incentive of $20 million, that has been in effect since 2013.

{¶ 27} OHA recommends that the Commission deny OCC's second assignment of error stating that the Commission's decision to allow Duke to exceed the cost cap for 2017 is reasonable and fair. OHA interprets OCC's argument – that the Commission should penalize Duke for exceeding the cost cap for 2017 because there is no evidence that Duke has made any attempt to scale back its programs – to mean that the Commission's Order required Duke to scale back its programs *before* the Commission even issued its Order. OHA argues that OCC's reading of the Order is unreasonable because it would result in the Commission retroactively imposing new requirements on Duke's past conduct. OHA points out that OCC fails to cite any authority which would allow the Commission to retroactively require Duke to scale back its programs *before* the issuance of the Order. To support its argument, OHA cites to *Discount Cellular, Inc v. Pub. Util. Comm.,* 112 Ohio St.3d 360, 2007-Ohio-53, ¶ 51, to illustrate that the Commission lacks authority to alter the legal significance of a party's past conduct. Furthermore, OHA argues that an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests. *See E. Ohio Gas Co. v. Limbach*, 26 Ohio St.3d 63, 65 (1986); *Heckler v. Community Health Serv.*, 467 U.S. 51, 61 n.12 (1984). OHA believes that it is apparent, from the history of this proceeding and the Order, that the Commission intended for Duke to scale back its programs after the Order was issued. OHA, similarly to IGS and the Environmental Intervenors, opines that it was appropriate for Duke to continue implementing its current programs during the pendency of this case, and given that the Order was not issued until September 27, 2017, the Commission was reasonable in allowing Duke to exceed the cost cap for 2017. Lastly, OHA indicates that Staff did not oppose Duke's motion for waiver to exceed the projected budget amount for 2017. OHA believes that, while Staff does not speak for the Commission, it is important to note Staff's correspondence regarding Duke's request to modify its budget. Accordingly, OHA requests that the Commission deny OCC's second assignment of error.

{¶ 28} Third, OCC suggests that the Order is unreasonable because it allows Duke to charge customers for new programs that the Commission has not properly vetted. OCC takes issue with the fact that the Stipulation purportedly includes a proposal for two new programs with no information about how these programs will run, what types of incentives will be offered, how much the programs will cost, how much energy the programs might save, whether the programs will be cost-effective, requirements for participating in the programs, costs that participants might incur with respect to these programs, or how the projects will be evaluated. OCC suggests that the Commission should modify the Stipulation to provide that Duke cannot charge customers for the smart thermostat and space heating programs unless they are cost effective under the total resource cost test.

{¶ 29} With respect to OCC's argument that the Commission should not have approved two new EE/PDR programs, Duke argues that the new programs approved for inclusion in the Company's portfolio, the Smart Thermostat Program and the Space Heating Program, will benefit customers. Duke references the Stipulation which requires that the Smart Thermostat Program will be developed with ELPC, IGS, and any other interested party, including OCC. Additionally, the Company is required to assess the cost-effectiveness of both the Smart Thermostat Program and Space Heating Program and present the assessment to the Duke EE/PDR Collaborative, which also includes OCC. Duke believes that there are adequate safeguards and pledges in place to work with interested parties for both programs, and the Commission was correct to approve them.

{¶ 30} IGS takes issue with OCC's claim that the Smart Thermostat Program lacks detail and cites and summarizes several points of the Smart Thermostat Program outlined in the Stipulation to illustrate why the Smart Thermostat is sufficiently detailed. Additionally, IGS argues that the Smart Thermostat Program will be cost effective pursuant to the Stipulation which commits Duke to ensure that the Smart Thermostat Program passes the total resource cost (TRC) test. This commitment, IGS argues, is more restrictive than the Commission's rules require adding that, under Ohio Adm.Code 4901:1-39-04, Duke is required to demonstrate that its program portfolio plan is cost-effective on a portfolio basis,

and while programs within the portfolio plan must also be cost effective, each measure within the program need not be cost-effective. Ohio Adm.Code 4901:1-39-04(B). IGS represents that Duke must evaluate the results of the cost-effectiveness of the thermostat program on a standalone basis and set incentive levels appropriately. In response to OCC's contention that CRES providers should be prohibited from providing discounted thermostats—at their own risk—between the time the Commission authorizes the program and the time the rebate level is established, IGS states that this argument undermines the interest of the customer OCC represents. IGS points out that it already addressed this particular argument in its reply brief and the Commission's September 27, 2017 Order did not rule in OCC's favor. Additionally, IGS argues that the Signatory Parties agreed that CRES providers and retails may at their own risk provide customers with an instant discount before the incentive level is ultimately determined with the understanding that the compensation they receive from Duke may not ultimately cover the discount provided to the customer. IGS opines that the only beneficiaries of any windfall would be distribution customers in Duke's service territory. Accordingly, IGS recommends that the Commission deny OCC's third assignment of error.

{¶ 31} Fourth, OCC argues that the Order is unreasonable because it will require customers to pay thermostat rebates to marketers and retailers for thermostats sold before the new thermostat program begins. OCC believes that, if the smart thermostat program is permitted to go forward, the Commission should prohibit Duke from using customer money to pay rebates retroactively to marketers and retailers for thermostats that they sold to customers before the program began. OCC argues that the charges should be prospective only and should incentivize customers to be more energy efficient than they otherwise would be.

{¶ 32} As a final matter, Duke avers that the Smart Thermostat Program, which is included in the Stipulation, provides that a retailer or competitive supplier may, at their own risk, provide a customer with an instant discount prior to the full implementation of the Smart Thermostat Program. Duke clarifies that the Stipulation does not require

customers to pay thermostat rebates for thermostats sold before the program begins. Duke states that the Company must first analyze the program, the terms and the cost effectiveness of the program, and vet the program through the Duke EE/PDR Collaborative prior to development, and only after the aforementioned actions occur, can the retailers of competitive supplies have an opportunity to be reimbursed for the instant discount that has been extended to customers. Duke believes that OCC should support the idea that customers, who relied upon the possibility of receiving a rebate, are made whole. Duke recommends that OCC's arguments should be disregarded.

{¶ 33} The Environmental Intervenors argue that OCC is factually incorrect in asserting that the Commission's approval of provisions in the January 27, 2017 Amended Stipulation and Recommendation regarding the Smart Thermostat and Space Heating Programs may result in implementation of non-cost-effective programs. The Environmental Intervenors state that OCC's concerns regarding the details of isolated EE/PDR programs is inconsistent with OCC's apparent lack of consideration regarding the impacts of a cost cap on Duke's EE/PDR programs. Furthermore, the Environmental Intervenors point out, as do Duke and IGS, that the Stipulation specifically provides that Duke will not undertake either program until it has completed an analysis indicating that each program is likely to be cost-effective. The Environmental Intervenors recommend rejecting OCC's arguments regarding the Smart Thermostat and Space Heating Programs of the Stipulation.

E. The Environmental Intervenors' October 27, 2017 Application for rehearing

{¶ 34} The Environmental Intervenors argue in their October 27, 2017 application for rehearing that the September 27, 2017 Order was unlawful and unreasonable for three reasons: (1) the Commission failed to justify the amount of the cost cap, setting it at the same percentage of operating revues as other Ohio utilities; (2) the Commission failed to consider the overall impact of the cap on customers' bills or the impact of other riders by focusing solely and exclusively on the EE-PDR rider amount; and (3) the Commission failed to

provide any process for consideration of the reasonableness of Duke's plan once amended to comply with the cost cap.

{¶ 35} In its first assignment of error, the Environmental Intervenors argue that the Order arbitrarily applies a methodology in setting the amount of the cost cap that leaves Duke customers with fewer energy efficiency savings opportunities than customers of other EDUs. The Environmental Intervenors state that four percent of Duke's operating revenues is not the equivalent of four percent of the operating revenues for AEP Ohio or DP&L because the number of customers who shop for generation services varies significantly by utility. The Environmental Intervenors suggest that, under a four percent cost cap, AEP Ohio will be able to spend 25.8 cents for each kWh it must save (16.1 cents where the utility earns maximum shared savings) and DP&L will be able to spend 23.9 cents per first-year kWh saved (16.4 cents where it earns maximum shared savings) while Duke will be able to spend 19.2 cents per first-year kWh saved and 11.6 cents if the Company maximizes shared savings. The Environmental Intervenors conclude that applying a four percent cap on energy efficiency spending for Duke's customers leaves them with less available funding for its programs than customers of AEP and DP&L. Because of this disparity, the Environmental Intervenors believe that Duke is likely to shift spending toward programs that are cheaper in the short term and away from programs that are more cost-effective over the long-term. Additionally, the Environmental Intervenors argue that the Commission's decision to impose the same cost cap on Duke that it applied to AEP in inconsistent with its own previous commitment to evaluate the cost cap issue independent of its decision in AEP Ohio's energy efficiency case, *see In re Ohio Power Co.,* Case No. 16-574-EL-POR, Opinion and Order (Jan. 18, 2017) at 8. The Environmental Intervenors believe that the Commission has relied directly on the approval of the four percent cost cap in the AEP case as a basis for its approval of the 4 percent cost cap in Duke's case.

{¶ 36} On reply, OCC posits that the Environmental Intervenors' first assignments of error is substantively the same as Duke's third assignment of error – that the 4 percent cost cap for Duke is unreasonable because it does not allow Duke to spend as much per kWh

saved as AEP Ohio and DP&L. OCC reiterates its argument relating to Duke's third assignment of error *supra.*

{¶ 37} In its second assignment of error, the Environmental Intervenors argue that the Order fails to address concerns raised in the record that the cost cap may have the opposite effect of what the Commission intends. Specifically, the Environmental Intervenors point to the fact that the cost cap may result in high bills for customers in the long run while leaving other riders with greater costs untouched.

{¶ 38} With respect to the Environmental Intervenors' second assignment of error, OCC contends that the Commission should protect consumers by supporting policies that reduce bills—including reductions to fixed customer charges; reductions to variable rate distribution charges; and elimination, reduction, or caps on other riders. That being said, OCC does not believe that reducing bills is the issue at hand; rather, OCC posits that the question in this case is whether the Commission, as a matter of policy, should place limits on the EE/PDR rider charge that customers pay. OCC argues that the fact that other charges on customers' bills remain high does not mean that the Commission should forgo the current step toward consumer protection by limiting the amount charged to customers through the EE/PDR rider.

{¶ 39} In its third and final assignment of error, the Environmental Intervenors argue that it is unreasonable that there is no requirement for Duke to file a new program portfolio compliant with the cost cap for Commission review and approval.

{¶ 40} On reply, OCC argues that the Commission should reject the Environmental Intervenors' suggestion to order Duke to file a new portfolio plan. OCC posits that this argument fails because it relies on the presumption that Duke cannot implement its portfolio of programs while staying within the 4 percent cost cap. OCC believes that the Environmental Intervenors' wrongly assume that Duke will be able to reduce the scope of its programs from its proposed $38 million in program costs to about $26 million, while still maximizing the amount of shared savings. OCC suggests that Duke will be unlikely to

achieve maximum shared savings if it spends just $26 million on programs given that Duke would need to achieve energy savings at a cost of 11.6 cents per kWh saved to maximize profits. Historically, Duke has spent between 15.4 and 20.1 cents per kWh saved and Duke's proposed programs all have a projected cost of above 11.6 cents per kWh except for one program. Additionally, OCC posits that if Duke does achieve the maximum shared savings while staying under the 4 percent cost cap, then Duke's programs achieved savings at a cost of 11.6 cents per kWh and Duke will reduced the amount that it charges customers for its EE/PDR programs fulfilling the goal of the cost cap.

F. Duke's March 27, 2020 Application for rehearing

{¶ 41} On March 27, 2020, Duke filed an application for rehearing of the Commission's *Wind Down Order*. Therein, Duke argues that the *Wind Down Order* is unlawful and unreasonable because it purportedly fails to address: (1) how Duke (and any other impacted EDU) will, after December 31, 2020, complete true-ups for the year 2020 for the costs associated with the EE/PDR programs; and (2) how Duke (and any other impacted EDU) will, after December 31, 2020, recover lost distribution revenues and shared savings associated with EE/PDR programs for up through December 31, 2020.

{¶ 42} Duke avers that the existing cost-recovery mechanism approved for the Company's current portfolio, which contemplates a true-up for 2020 programs and recovery of lost distribution revenues associated with 2020 programs, cannot occur until after 2020 and until after all prior years' updates have been resolved by the Commission. Duke represents that the process of reconciling program costs, shared savings, and lost distribution revenues takes time and an update filing for a given period year is often not resolved until years after December 31 of the program year, citing prior Duke cases. Additionally, Duke points out that complete recovery of lost distribution revenues associated with an EE/PDR measure is not achieved until over three years after the measure is installed. Duke opines that the Company must be allowed to complete cost recovery of its lawfully approved portfolio stating that the Commission has already approved the

existing cost recovery framework for Duke's EE/PDR programs and already approved the current portfolio for both 2017 through 2019, via the September 27, 2017 Order, and through 2020 via the *Wind Down Order*.

{¶ 43} Additionally, Duke argues that the *Wind Down Order is* unreasonable and unlawful because it does not address how the Company will complete its required true-up for program costs for 2020. Duke states that, while the *Wind Down Order* permitted the Company to continue the current portfolio through December 31, 2020, with an increased budget of $46,895,800, in order to continue the existing programs through December 31, 2020 and to complete all of the required reconciliation under existing cost recovery mechanisms and in accordance with previously approved processes, the Company will need to be able to make adjustments to Rider EE-PDR past December 31, 2020. Duke believes that the Commission's omission to state that existing cost recovery mechanisms, such as riders, will continue for as long as necessary to complete the required program costs true-up for calendar year 2020 portfolios, is inconsistent with its precedent in the Company's energy efficiency cases.

{¶ 44} As a final matter, Duke argues that the *Wind Down Order* is unreasonable and unlawful because it does not address how the Company will true-up for lost distribution revenues and shared savings associated with 2020 programs. The Company reasserts its arguments *supra* with respect to lost distribution revenues and shared savings associated with 2020 programs. In addition, Duke believes it may need to make adjustments to Rider EE-PDR past December 31, 2020, and at least until early 2023 (depending on when the Commission issues its final order) in order to continue the existing programs through the December 31, 2020 time period and to complete all of the requirement reconciliation of lost distribution revenues and shared savings under existing cost recovery mechanisms and in accordance with previously approved processes. Duke believes that the lost distribution revenues associated with the energy efficiency measures installed in 2020 will not be completely known until early 2023, due to the assumed three-year life of the installed EE/PDR measures. Duke urges the Commission to modify the *Wind Down Order* to address

how, after December 31, 2020, Duke will complete its true-up for 2020 program costs, shared savings, and recover the three-years' worth of lost distribution revenues for periods up to and including calendar year 2020.

{¶ 45} On reply, OCC argues that Duke's application for rehearing violates R.C. 4903.10 because Duke requests the Commission to address new issues that are not matters determined in the proceeding. Specifically, OCC points out that the Commission specifically sought comments on two issues: (1) whether the Commission should terminate the EE/PDR programs once the statutory cap of 17.5 percent has been met; and (2) whether it is appropriate for the EDUs to continue to spend ratepayer provided funds on EE/PDR programs after the statutory cap has been met. OCC avers that the *Wind Down Order* includes the Commission's ruling on those two issues. OCC believes that Duke's application for rehearing is an attempt to expand the scope of the case considering Duke did not raise any of these issues in its comments. Accordingly, OCC requests that the Commission deny Duke's March 27, 2020 application for rehearing because it violates R.C. 4903.10. However, OCC contends that if the Commission were to rule on the issues raised in Duke's March 27, 2020 application for rehearing, then a violation of R.C. 4903.09 would occur given that there is no record in this case on Duke's assignment of errors. OCC restates that the new issues that Duke raises in its application for rehearing are beyond the scope of the case. Furthermore, OCC, nor any other party, was given an opportunity to introduce facts or file comments on these new issues. Accordingly, OCC argues that there can be no such findings of fact, and the Commission cannot rule on Duke's assignments of error.

{¶ 46} In response to Duke's first assignment of error – that the Commission erred because the *Wind Down Order* fails to address how Duke will, after December 31, 2020, complete true-ups for the year 2020 for the costs associated with EE/PDR programs – OCC believes that Duke's concern is premature. Specifically, OCC argues that the Commission will determine, sometime after December 31, 2020, whether the mandates of H.B. 6 have been met, and at that point, the Commission will also need to determine whether it is necessary to continue Duke's EE/PDR rider to reconcile its revenues collected from

customers and costs incurred running these programs under R.C. 4928.66(G)(3). However, at this time, OCC opines that there is no need for the Commission to specify the precise manner in which such reconciliation might occur. Accordingly, OCC recommends that the Commission reject Duke's first assignment of error.

{¶ 47} OCC believes that Duke's second assignment of error fails for similar reasons as the first. Specifically, OCC argues that it is unclear why Duke believes this issue needs to be addressed now instead of in 2021 when the Commission will need to address the final reconciliation of all Ohio EDU EE/PDR riders. OCC believes that the omission of AEP Ohio, FirstEnergy, and DP&L to file similar applications for rehearing suggests that Duke's concerns are immaterial. OCC states that the determination of any reconciliation of Duke's revenues collected from customers through the EE/PDR rider and costs it incurred to run these programs can be made in 2021 and not now. Additionally, OCC believes that Duke's argument that the Commission should have addressed how the Company will be able to recover lost distribution revenues and shared savings associated with EE/PDR programs for up through December 31, 2020, is premature because it assumes that Duke will be entitled to charge customers for lost revenues and shared savings for its 2020 programs. With respect to shared savings, OCC represents that Duke is only allowed to charge customers for shared savings if it exceeds the annual statutory mandate and it generates net benefits for customers, and neither of those facts are known at this present time. Similarly, OCC avers that Duke's eligibility for lost revenues depends on its ability to run programs that save money for customers in the classes that pay lost revenues – something that cannot be determined yet. Accordingly, OCC recommends that the Commission reject Duke's second assignment of error.

{¶ 48} As a final matter, OCC argues that Duke lacks standing to challenge the *Wind Down Order* as it applies to AEP Ohio, FirstEnergy, and DP&L. Specifically, OCC notes that Duke filed its application for rehearing in four separate dockets: Case No. 16-574-EL-POR (AEP Ohio's portfolio), Case No. 16-576-EL-POR (Duke's portfolio), Case No. 16-743-EL-POR (FirstEnergy's portfolio), and Case No. 17-1398-EL-POR (DP&L's portfolio). OCC

opines that, under R.C. 4903.10, Duke is not a party to AEP Ohio's portfolio, FirstEnergy's portfolio, or DP&L's portfolio cases, and the Commission did not consolidate the four portfolio cases into one case.

G. Commission Conclusion

{¶ 49} On October 19, 2019, the Supreme Court of Ohio struck down a Commission imposed cost cap on appeal in Case No. 16-743-EL-POR. *In re Ohio Edison Co.,* 2019-Ohio-4196, ¶ 11, 158 Ohio St.3d 27 (*FirstEnergy Decision*). In the *FirstEnergy Decision*, the Supreme Court held that the Commission lacked authority under R.C. 4928.66 to impose a cost-recovery cap in Case No. 16-743-EL-POR and remanded the case for approval of the portfolio plans without the cap on cost recovery.

{¶ 50} In light of the Supreme Court's issuance of the *FirstEnergy Decision*, we will now address the October 27, 2017 applications for rehearing as well as Duke's March 27, 2020 application for rehearing. To the extent that an assignment of error, or argument in support of an assignment of error, has not been specifically addressed in this Third Entry on Rehearing, it has been rejected.

1. COST CAP FOR 2018-2020

{¶ 51} With respect to Duke's and the Environmental Intervenors' respective applications for rehearing filed on October 27, 2017, the Commission finds that rehearing on the first and second assignment of error alleged by Duke and the first assignment of error alleged by the Environmental Intervenors should be granted. In the *FirstEnergy Decision*, the Supreme Court held that there was no express or implied authorization in the language of R.C. 4928.66 that would allow the Commission to preemptively impose a limitation on FirstEnergy's recovery of costs incurred in order to meet its statutory benchmarks. *FirstEnergy Decision* at ¶ 16. The cost cap in this case is identical to the cost cap at issue in the *FirstEnergy Decision*. *In re the Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.,* Case No. 16-743-EL-POR, Opinion and Order (Nov. 21, 2017) at ¶ 56.

Accordingly, the 4 percent cost cap imposed by the September 27, 2017 Order should be removed consistent with the *FirstEnergy Decision*.

{¶ 52} In light of our decision to remove the 4 percent cost cap and the termination of the energy efficiency programs mandated by R.C. 4928.66, we find that Duke's third assignment of error and the Environmental Advocates' second and third assignments of error are moot.

2. SHARED SAVINGS FOR 2017-2020

{¶ 53} With respect to OCC's October 27, 2017 application for rehearing, the Commission grants OCC's first assignment of error regarding shared savings. Notwithstanding the Supreme Court's decision in the *FirstEnergy Decision*, we continue to be concerned with the overall cost of the EDUs' energy efficiency riders. September 27, 2017 Order at ¶¶ 39, 46. We further note that shared savings are not a "cost" to the EDU and that nothing in R.C. 4928.66 requires that shared savings be provided in any amount. In fact, the Commission has consistently found that it is appropriate to reduce or limit the amount that a utility may charge their customers for shared savings. *See In re Ohio Power Co.,* Case No. 16-574-EL-POR, Opinion and Order (Jan. 18, 2017) at ¶ 33; *In re Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co.* Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶ 326; and *In re Dayton Power and Light Co.,* Case No. 13-833-EL-POR, Opinion and Order (Dec. 4, 2013) at 8-9, 13, 14. Upon review, we are persuaded by the testimony of OCC Witness Shutrump and agree that charges to customers for EE/PDR should be more for programs and less for shared savings. Ms. Shutrump recommends an annual shared savings cap of $7.8 million (pre-tax). Under her proposal, the Commission notes that Duke could spend up to $30.8 million per year on program costs while customers pay a 25 percent surcharge on EE/PDR programs. (OCC Ex. 13 at 12). We believe that this is a reasonable balance. Accordingly, the Commission finds it appropriate, and within its authority, to modify the Stipulation and direct that shared savings for 2017 through 2020 be adjusted to a modified shared savings maximum of $7.8 million (pre-tax) annually. We find that the reduction in shared savings in order to limit the impact on customers does not

violate the state policies under R.C. 4928.02, the statutory mandates under R.C. 4928.66, R.C. 4928.64, or past Commission precedent.

3. Duke's Program Portfolio Plan

{¶ 54} With respect to OCC's second, third and fourth assignments of error, the Commission finds that OCC has not raised any new issues on rehearing and that the Commission thoroughly addressed these issues in the September 27, 2017 Order. September 27, 2017 Order at ¶¶ 48-50, 53-54. Accordingly, rehearing on these assignments of error should be denied.

4. The Wind Down Order

{¶ 55} As a final matter, Duke's March 27, 2020 application for rehearing should be denied in its entirety. Although the Commission must conduct the final review contemplated by R.C. 4928.66(G)(1) to confirm that the cumulative statutory cap has been met, the Commission determined in the *Wind Down Order* that the energy efficiency programs must be terminated effective, December 31, 2020. *Wind Down Order* at ¶ 43. R.C. 4928.66(G)(3) states:

> Upon the date that full compliance with division (A)(1)(a) of this section is deemed achieved under division (G)(2)(a) or (b) of this section, any electric distribution utility cost recovery mechanisms authorized by the commission for compliance with this section shall terminate except as may be necessary to reconcile the difference between revenue collected and the allowable cost of compliance associated with compliance efforts occurring prior to the date upon which full compliance with division (A)(1)(a) of this section is deemed achieved. No such cost recovery mechanism shall be authorized by the commission beyond the period of time required to complete this final reconciliation.

{¶ 56} As the Supreme Court of Ohio has stated numerous times, the Commission "is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute." *Penn Central Transportation Co. v. Pub. Util. Comm.*, 35 Ohio St.2d 97, 298 N.E.2d 97 (1973)." In construing a statute, our paramount concern is legislative intent. In determining legislative intent, the Commission first looks to the plain language in the statute and the purpose to be accomplished. If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary. *WorldCom, Inc. v. City of Toledo,* Case Nos. 02-3207-AU-PWC, 02-3210-EL-PWC, Opinion and Order (May 14, 2003), *citing State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Ed.,* 74 Ohio St. 543, 660 N.E.2d 463 (1996).

{¶ 57} The plain language of R.C. 4928.66(G)(3) is clear and unambiguous. Once the cumulative saving cap has been met on December 31, 2020, Duke's energy efficiency rider must "terminate." The sole exception to this termination is the reconciliation between "revenue collected" and "the allowable cost of compliance associated with compliance efforts" occurring prior to December 31, 2020, the date upon which full compliance with the cumulative savings cap will be met. We are not persuaded that lost distribution revenue is a "cost of compliance" with the energy efficiency mandates that may be collected after December 31, 2020 as part of the final reconciliation. Further, there is no language in R.C. 4928.66(G)(3) which supports Duke's claim that it may continue to collect lost distribution revenue through 2023. Therefore, under the plan language of the statute, Duke may not continue to recover lost distribution revenue after December 31, 2020, even if the lost distribution revenue is attributed to energy savings achieved in 2018, 2019 or 2020. Rehearing on this assignment of error should be denied.

III. ORDER

{¶ 58} It is, therefore,

{¶ 59} ORDERED, That the applications for rehearing filed separately by Duke, the Environmental Intervenors, and OCC on October 27, 2017, be granted in part and denied in part. It is, further,

{¶ 60} ORDERED, That the Stipulation approved by the Commission on September 27, 2017, be modified to authorize shared savings in an annual amount not to excess $7.8 million (pre-tax) in accordance with Paragraph 52. It is, further,

{¶ 61} ORDERED, That the application for rehearing filed by Duke on March 27, 2020, be denied. It is, further,

{¶ 62} ORDERED, That a copy of this Third Entry on Rehearing be served upon each party of record.

COMMISSIONERS:
Approving:
M. Beth Trombold
Daniel R. Conway
Dennis P. Deters
Recusal:
Lawrence K. Friedeman

LLA/mef

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

11/18/2020 2:56:15 PM

in

Case No(s). 16-0574-EL-POR, 16-0576-EL-POR, 16-0743-EL-POR, 17-1398-EL-POR

Summary: Entry granting in part and denying in part the applications for rehearing filed separately by Duke Energy Ohio, Inc., the Ohio Consumers' Counsel, and jointly by the Environmental Law & Policy Center, the Natural Resources Defense Council, the Ohio Environmental Council, and the Environmental Defense Fund Environmental Intervenors on October 27, 2017, and denies the application for rehearing filed by Duke Energy Ohio, Inc. on March 27, 2020 electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio