BEFORE
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 2018 Through 2020.	)	Case No. 16-574-EL-POR
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of Its 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

DUKE ENERGY OHIO, INC.'S
APPLICATION FOR REHEARING

Pursuant to Section 4903.10, Ohio Revised Code and Rule 4901-1-35, O.A.C., Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) hereby seeks rehearing of the Third Entry on Rehearing issued in this proceeding by the Public Utilities Commission of Ohio (Commission) on November 18, 2020 (Third Entry) and the Finding and Order issued in this proceeding on November 18, 2020 (Order). As demonstrated in the attached Memorandum in Support, the Third Entry and Order are unreasonable and unlawful on the following grounds:

1. The Third Entry is unreasonable and unlawful because it imposed a cap on the Company's shared savings, which was beyond the Commission's statutory authority, inconsistent with the Ohio Supreme Court's decision in *In re Ohio Edison Co.*, 2019-Ohio-4196, ¶ 11, 158 Ohio St. 3d 27

(*FirstEnergy Decision*), and inconsistent with the Commission's own past precedent.

2. The Third Entry is unreasonable and unlawful in that it forbids the Company to collect the full amount of lost distribution revenues associated with programs already approved through December 31, 2020, and the Order should also be clarified to correct that lost distribution revenues may be collected in the final reconciliation.

3. The Third Entry and Order are unreasonable and unlawful in that they fail to clarify that the Company may recover all shared savings that are authorized under its portfolio for programs through December 31, 2020, and the Order should be modified to clarify that shared savings may be collected in the final reconciliation application.

4. The Third Entry and Order are unreasonable and unlawful insofar as they may purport to interpret H.B. 6's limitations on post-2020 recovery to preclude full recovery on applications filed prior to December 31, 2020.

5. The Third Entry and Order are unreasonable and unlawful insofar as they may purport to apply H.B. 6 retroactively to reduce amounts recoverable for program years 2018 and 2019.

As demonstrated in the attached Memorandum in Support, the Commission should grant Duke Energy Ohio's Application for Rehearing and make the requested modifications to the Third Entry and Order.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

/s/ Larisa M. Vaysman

Rocco D' Ascenzo (0077651)
Deputy General Counsel
Larisa M. Vaysman (0090290) (Counsel of Record)
Senior Counsel
Duke Energy Business Services LLC
139 East Fourth Street
1303-Main
Cincinnati Ohio 45202
513-287-4320 (telephone)
513-287-4385 (facsimile)
Rocco.dascenzo@duke-energy.com (e-mail)
Larisa.vaysman@duke-energy.com
Willing to accept service via email
Attorneys for Duke Energy Ohio, Inc.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

In the Third Entry, the Commission, pursuant to Ohio Supreme Court precedent, eliminated the cost cap it imposed in its September 27, 2017, Opinion and Order. Unfortunately, the Commission promptly replaced it with an equally unlawful cap on the Company's shared savings recovery, stating openly that this new cap was seeking to address "the overall cost" of the Company's EE/PDR rider and acknowledging that this action was occurring "[n]otwithstanding the Supreme Court's decision."[1] The Commission sought to distinguish the two caps by declaring that shared savings was "not a 'cost,'" even though its own precedent said otherwise and the Ohio Supreme Court had likewise treated shared savings as part of the overall portfolio cost in the *FirstEnergy* decision. Additionally, the Commission erroneously held in the Third Entry that the "pla[i]n language" of R.C. 4928.66(G)(3) precluded the Company from "recover[ing] lost distribution revenue after December 31, 2020, even if the lost distribution revenue is attributed to energy savings achieved in 2018, 2019 or 2020."[2] The Commission justified this by reasoning that lost distribution revenues previously approved by the Commission as part of the Company's portfolio offered in compliance with the energy efficiency statutory mandates were not a "cost of compliance" with the mandates. Additionally, although the Company does not believe the Commission had such intent, the Third Entry and the Order could be interpreted to reduce the available recoveries in the Company's already-pending applications for programs delivered in 2018 and 2019, because the orders in these cases will not issue until after December 31, 2020.

To correct the above-described errors, the Third Entry should be modified to eliminate the newly imposed unlawful cap on shared savings, restore the stipulated $8.0 million after-tax shared savings cap, and permit the Company to recover all of its approved lost distribution revenues and

[1] Third Entry, p. 22.
[2] Third Entry, p. 24.

shared savings associated with programs that have been authorized to continue through 2020. If, however, the Commission continues to interpret H.B. 6 to preclude the complete recovery of lost distribution revenues, the Commission should at least clarify its Third Entry and Order to specify that, in the final application authorized by the Order, the Company will be permitted to include recovery for ***all*** program costs, shared savings, and lost distribution revenues that will have accrued as of December 31, 2020 under the Company's approved portfolio. Finally, even if the Commission erroneously interprets H.B. 6 to exclude all lost distribution revenues and/or shared savings from the Company's final reconciliation application authorized by the Order, it should at the very least clarify that the recoveries ordered for the Company's pending applications in Case Nos. 19-622-EL-RDR and 20-613-EL-RDR, which were filed before December 31, 2020, will include all components of the approved portfolio: program costs, shared savings, and lost distribution revenues.

II. BACKGROUND

The Company's current portfolio was filed in 2016 for years 2017 through 2019 in Case No. 16-576-EL-POR, pursuant to the energy efficiency requirements set forth in Amended Substitute Senate Bill 221 and subsequently modified by Senate Bill 310, codified in Revised Code 4928.66. In a stipulation with the majority of intervening parties, the Company stipulated to, among other things, an annual $8.0 million after-tax cap on the Company's recovery of shared savings.[3] On September 27, 2017, the amended stipulation was approved by the Commission, but the Commission imposed an additional annual cap: an annual cap on the Company's combined

[3] *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, Amended Stipulation and Recommendation, p.5 (September 27, 2017).

recovery of program costs and shared savings, to be set at four percent of Duke Energy Ohio's reported 2015 revenues.[4]

The only reasoning the Commission provided for the imposition of this cost cap was a desire to limit the charges to customers. The Commission justified the cost cap as "an appropriate limitation on the EE/PDR costs to be recovered from Duke's customers" and supported its reasoning by noting in testimony that such a cap "constitutes a reasonable measure to limit customer exposure to future bill increases."[5] The Commission provided no other justification. The Company timely challenged the imposition of the cost cap on rehearing.[6]

With that request for rehearing pending before the Commission in this case, the Ohio Supreme Court struck down a virtually identical cost cap in the *FirstEnergy Decision*.[7] In that case, the Commission had imposed what it repeatedly called a "cost cap" on the subject utility's combined recovery of program costs and shared savings, to be set at four percent of the utility's 2015 total revenues.[8] The Supreme Court soundly rejected this "cost cap" on appeal, concluding that "the commission lacked statutory authority to impose a cap on FirstEnergy's recovery of program costs."[9]

Also, during the period rehearing was pending, the General Assembly enacted H.B. 6, took effect on October 22, 2019, and eliminated the energy efficiency requirements previously imposed

---

[4] *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, Opinion and Order, pp. 15-16 (September 27, 2017).

[5] Id., p. 15.

[6] *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of Its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan*, Case No. 16-576-EL-POR, Duke Energy Ohio, Inc.'s Application for Rehearing, p. 1 (October 27, 2017).

[7] *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, Notice of Additional Authority Submitted by Duke Energy Ohio, Inc., pp. 1-2 (December 16, 2019); *FirstEnergy Decision*, ¶ 11.

[8] *See 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, Opinion and Order, pp. 23, 28 (November 21, 2017).

[9] *FirstEnergy Decision*, ¶11.

by R.C. 4928.66, after December 31, 2020. On February 26, 2020 (February Order), the Commission granted the Company's request to extend the current portfolio through December 31, 2020, with an increased budget of $46,895,800.[10] This amount was requested by the Company based on the stipulated shared savings cap of $8.0 million after-tax and the elimination of the cost cap previously imposed by the Commission.

The Company sought rehearing of the February Order to clarify how the final true-ups for programs through the end of 2020 would be completed, and especially how the previously approved lost distribution revenues would be handled.[11] Under its Commission-approved portfolio, the Company is entitled to recover lost distribution revenues for the assumed three-year life of the installed energy efficiency measures,[12] which means that lost distribution revenues for 2020 programs will not be completely known until 2023.

In the November 18, 2020, Third Entry, the Commission properly removed the "4 percent cost cap" as it was "consistent with the *FirstEnergy Decision*,"[13] but then proceeded to circumvent the *FirstEnergy Decision* by imposing a cap on the Company's shared savings that was far lower than the previously stipulated cap of $8.0 million after-tax which the Commission itself had approved. The new shared savings cap was $7.8 million pre-tax,[14] equivalent to slightly less than $6.1 million after-tax. Additionally, in the Third Entry, the Commission held that "Duke may not

---

[10] Order, pp. 3, 17.
[11] *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of Its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan*, Case Nos. 16-576-EL-POR, *et al.*, Duke Energy Ohio, Inc.'s Application for Rehearing (March 27, 2020).
[12] *See 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, Opinion and Order, p. 22 (September 27, 2017) (noting that the Stipulation "allow[s] for the deferral and subsequent recovery of EE/PDR costs recovery of program costs, lost revenues, and shared savings"); Supplemental Testimony of Trisha A. Haemmerle, Attachment JEZ-1, pp. 4-5 (June 15, 2016) (depicting three-year calculation of lost distribution revenues).
[13] Third Entry, p. 22.
[14] Id.

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."[15]

The Order, issued on the same day as the Third Entry, directed all utilities to set their EE/PDR riders to zero, effective January 1, 2021, and to file an application for "final reconciliation" of these riders when "full information for such final reconciliation is available."[16] The Order specified that the "sole exception" to H.B. 6's requirement to terminate the EE/PDR riders was "the reconciliation between 'revenue collected' and 'the allowable cost of compliance associated with compliance efforts' occurring prior to December 31, 2020," without specifying whether such "cost of compliance" included lost distribution revenues or shared savings accrued prior to December 31, 2020.

III. DISCUSSION

A. The Third Entry is unreasonable and unlawful because it imposed a cap on the Company's shared savings, which was beyond the Commission's statutory authority, inconsistent with the Ohio Supreme Court's *FirstEnergy Decision*, and inconsistent with the Commission's own past precedent.

In its initial order approving the Company's portfolio in 2017, the Commission had explicitly found that the stipulated $8.0 million after-tax shared savings cap was reasonable and beneficial to customers:

> We agree with Duke that the $8 million after-tax cap on Duke's shared savings under the Stipulation ***is reasonable***. This cap does ***provide a benefit to customers because it limits the amount of potential costs to be borne by customers***, while still allowing an incentive for the Company to exceed its statutorily mandated EE/PDR targets.[17]

On rehearing, in the Third Entry, the Commission did not say that this initial determination had been mistaken or erroneous.

---

[15] Id., p. 24.
[16] Order, p. 4.
[17] *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, Opinion and Order, p. 18 (September 27, 2017) (emphasis added).

Indeed, in the Third Entry, the Commission tacitly acknowledged that it was reducing the shared savings cap in order to accomplish the same aim that the *FirstEnergy Decision* had held to be beyond its statutory authority: to reduce the "overall cost" of the portfolio. The Commission stated that "***[n]otwithstanding*** the Supreme Court's decision in the *FirstEnergy Decision*, we continue to be concerned with ***the overall cost*** of the EDUs' energy efficiency riders."[18] The Commission did not cite any Ohio Supreme Court support for proceeding "[n]otwithstanding" the Court's most recent on-point precedent, but only pre-*FirstEnergy Decision* Commission cases.

The Commission sought to distinguish the Third Entry's shared savings cap from the cost cap struck by the Court in the *FirstEnergy Decision* on the basis that "shared savings are not a 'cost' to the EDU," but this runs contrary to the *FirstEnergy Decision* where the Court indicated that it considered shared savings to be a category of costs. The cap at issue in the *FirstEnergy Decision* applied to the utility's total recovery, including shared savings, and yet both the Commission and the Court referred to it as a "cost cap." In rejecting the cap, the Court called it "a cap on FirstEnergy's recovery of ***program costs***," and later "a limitation on FirstEnergy's recovery of ***costs incurred in order to meet its statutory benchmarks***."[19] By these descriptions, the Court clearly indicated that shared savings, which it described as "an incentive payment . . . to the utility"[20] constituted a portion of the costs of compliance with the statutory benchmarks, and not some entirely separate category as the Third Entry suggests. The Third Entry's replacement of a broad "cost cap" with an equally arbitrary cap on what the Court considered a subset of compliance costs is therefore unlawful and likewise beyond the Commission's statutory authority.

[18] Third Entry, p. 22 (emphasis added).
[19] *FirstEnergy Decision*, ¶¶ 11, 16 (emphasis added).
[20] Id., ¶ 2.

The Court's treatment of shared savings as one of the "costs incurred in order to meet … statutory benchmarks" was consistent with the Commission's own past precedent, which had firmly rejected attempts to introduce the same distinction in the past. The Commission itself has explained:

> [T]he Commission finds that the costs of shared savings, when included in the EE/PDR rider, are ***actual costs being paid by customers that are directly related to EDUs' compliance with the EE and PDR requirements***. The Commission finds that, if an EDU over complies with the statutory EE and PDR requirements as a result of budgeted and approved EE and PDR programs, causing a shared savings expense, ***it is reasonable to count that shared savings expense as part of the cost of compliance in the year it is incurred***. Additionally, the Commission emphasizes that EDUs are permitted to use banked savings from overcompliance toward future years' compliance, as it causes no additional cost to ratepayers during the year it is used. Therefore, the Commission finds that ***shared savings are, in fact, related to compliance with the EE and PDR requirements.***[21]

In the Third Entry, the Commission neither recognizes this precedent nor attempts to grapple with it.

Because the *FirstEnergy Decision* precludes the cap imposed on the Company's shared savings in the Third Entry and the reasoning supporting the cap is also inconsistent with Commission precedent, the Commission should eliminate the new cap and restore the lawfully stipulated shared savings cap of $8.0 million after-tax.

B. The Third Entry is unreasonable and unlawful in that it forbids the Company to collect the full amount of lost distribution revenues associated with programs already approved through December 31, 2020 and the Order should also be clarified to correct that lost distribution revenues may be collected in the final reconciliation.

[21] *In the Matter of the Amendment of Chapters 4901:1-10 and 4901:1-21, Ohio Administrative Code, Regarding Electric Companies and Competitive Retail Electric Service, to Implement 2014 Sub.S.B. No. 310*, Case No. 14-1411-EL-ORD, Finding and Order, p. 19 (December 17, 2014); *see also id.*, Second Entry on Rehearing, p. 9 (July 1, 2015) (reiterating same).

The Third Entry reads R.C. 4928.66(G)(3) to flatly preclude the Company from "recover[ing] lost distribution revenue after December 31, 2020, even if the lost distribution revenue is attributed to energy savings achieved in 2018, 2019 or 2020."[22] However, this is a misreading.

R.C. 4928.66(G)(3) requires the previously approved cost mechanisms for compliance to 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 . . . is deemed achieved." (emphasis added). The bolded language indicates that the General Assembly clearly intended the utilities to complete any previously authorized recoveries for compliance efforts pre-dating December 31, 2020. In its Amended Application for portfolio approval, the Company specified that it sought to recover, among other things, "the costs and any ***lost revenues incurred to deliver*** energy efficiency and peak demand reduction."[23] The loss of the revenues in question is directly attributable to measures installed to comply with the EE/PDR statutory mandates and funded at least partially through the EE/PDR programs, and therefore should be considered a cost of compliance and "associated with compliance efforts" for reconciliation purposes, even if the Commission has not always viewed it as such.[24]

Accordingly, the Commission should grant rehearing of the Third Entry and hold that the Company may require its already-authorized lost distribution revenues for the full assumed three-year life of measures installed through December 31, 2020, as provided for in the Company's

---

[22] Third Entry, p. 24 (emphasis added).
[23] Duke Energy Ohio, Inc.'s Amended Application for Energy Efficiency and Peak Demand Reduction Portfolio of Programs, p. 13 (October 14, 2016).
[24] *See In the Matter of the Amendment of Chapters 4901:1-10 and 4901:1-21, Ohio Administrative Code, Regarding Electric Companies and Competitive Retail Electric Service, to Implement 2014 Sub.S.B. No. 310*, Case No. 14-1411-EL-ORD, Finding and Order, p. 20 (December 17, 2014).

portfolio case and the approved Amended Stipulation.[25] In order to comply with the directive in the Order to make one final application for reconciliation and avoid maintaining the EE/PDR rider through 2023 or longer, the Company could calculate the lost distribution revenues for the full three-year life in a single final reconciliation application.

If, however, the Commission continues to interpret H.B. 6 to preclude the ***complete*** recovery of lost distribution revenues previously approved by the Commission (including lost distribution revenues to accrue in 2021 to 2023), the Commission should at least clarify its Third Entry and Order to specify that, in the final reconciliation application authorized by the Order, the Company will be permitted to include recovery for all program costs, shared savings, and lost distribution revenues that will have ***accrued*** as of December 31, 2020 under the Company's approved portfolio. In other words, even if the Commission stands by its reading of the statute in the Third Entry (that lost distribution revenues cannot continue to be collected past December 31, 2020 because they are not costs of compliance), it must clarify its language in the Third Entry to specify that, even if no additional lost distribution revenues may be added past December 31, 2020, all previously authorized but uncollected lost distribution revenues ***that have accrued by December 31, 2020***, will be recoverable in the final reconciliation application.

To refuse even such a clarification is unreasonably prejudicial to the Company. The Company's cost recovery applications for portfolio years 2018 and 2019 are still currently pending. For portfolio year 2020, the Company will not be able to submit for cost recovery until 2021, including lost distribution revenues. To prohibit the Company from collecting ***any*** lost distribution revenues in its final reconciliation filing, would deprive the Company of amounts that accrued

[25] *See 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, Opinion and Order, p. 22 (September 27, 2017) (noting that the Stipulation "allow[s] for the deferral and subsequent recovery of EE/PDR costs recovery of program costs, lost revenues, and shared savings"); Supplemental Testimony of Trisha A. Haemmerle, Attachment JEZ-1, pp. 4-5 (June 15, 2016) (depicting three-year calculation of lost distribution revenues).

before December 31, 2020, which are associated with measures installed prior to December 31, 2020, and some as early as 2017. These amounts remain unrecovered solely because of the filing timeline and the extended process of audit and review. H.B. 6 could not possibly have intended that the time required for audit and Commission review of the Company's cost recoveries result in eliminating from recovery a substantial portion of the allowable costs submitted. Furthermore, it would not be equitable to permit large non-residential customers (that are charged for the lost distribution revenues) to evade this charge while residential and small commercial customers continue to pay lost distribution revenues through the Company's Rider DDR.[26]

For these reasons, even if the Commission believes that lost distribution revenues must stop accruing as of December 31, 2020, it should clarify the Third Entry and the Order to specify that any lost distribution revenues accrued prior to December 31, 2020 may still be collected.

C. The Third Entry and Order are unreasonable and unlawful in that they fail to clarify that the Company may recover all shared savings that are authorized under its portfolio for programs through December 31, 2020, and the Order should be modified to clarify that shared savings may be collected in the final reconciliation application.

The Third Entry and Order do not directly address the Company's ability to recover after December 31, 2020, the applicable shared savings associated with portfolio years 2018, 2019, and 2020. But the combined reading of the Third Entry's pronouncement that shared savings are not a "cost," the exclusion of lost distribution revenues from post-December 31, 2020 recovery, and the Order's repetition of the statutory language cited by the Third Entry could be read to imply doubts about the post-December 31 recoverability of previously-approved shared savings associated with portfolio years 2018, 2019, and 2020. The Commission should modify both the Third Entry and the Order to clarify that utilities' final reconciliation applications will be

[26] *See generally* Case No. 11-5905-EL-RDR.

permitted to include any reconciliation necessary to assure the recovery of shared savings authorized for portfolio years 2018, 2019, and 2020.[27]

D. The Third Entry and Order are unreasonable and unlawful insofar as they may purport to interpret H.B. 6's limitations on post-2020 recovery to preclude full recovery on applications filed prior to December 31, 2020.

As written, the Third Entry combined with the Order, could be interpreted to prohibit the inclusion of lost distribution revenues and/or shared savings in the final approval orders of the Company's two currently pending applications for cost recovery. The Company's pending applications for recovery in Case Nos. 19-622-EL-RDR (2018 Case) and 20-613-EL-RDR (2019 Case) were filed on March 29, 2019, and April 14, 2020, respectively. No substantive filings have been made in the 2018 Case in over 11 months, but there has not been a final order that would permit the Company to update rates. In the 2019 case, discovery is ongoing and there is no procedural schedule or deadline for a Staff report or recommendation. The time required for the Commission's audit and review will, almost certainly at this point, delay the final orders in these cases beyond December 31, 2020.

In the context of EE/PDR programs conducted pursuant to the mandates of R.C. 4928.66, there has, for years, been considerable lag time between the Company's implementation of the programs and the Company's ultimate recovery. For example, for EE/PDR programs implemented in calendar year 2016, the Company filed its application for recovery on March 31, 2017, and did not receive a final order until May 15, 2019.[28] Updated rates were not put into effect until July 1, 2019, more than two and a half years after the last day of the subject programming had concluded. The audit and review process is extensive, after which briefing and

---

[27] This clarification would be necessary regardless of how the Commission determines the separate issue of the shared savings cap.

[28] *See 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, *et al.*, Finding and Order, pp. 2, 8 (May 15, 2019).

Commission review require additional time. The time required for review and deliberation should not be used to deprive the Company of cost recoveries for which it has already applied.

Even if the Commission interprets H.B. 6 to prohibit utilities from including any lost distribution revenue and/or shared savings dollars in their final reconciliation applications filed pursuant to the Order, the Commission must clarify that its orders on applications already pending prior to December 31, 2020 will permit recovery of all portfolio components: program costs, lost distribution revenues, and shared savings (subject, as always, to review for prudency and accuracy). The Company does not believe that the Commission intended in either the Third Entry or the Order to reduce the recoveries available in the 2018 Case and the 2019 Case, but only intended to limit the scope of recovery that utilities may seek in their final reconciliation applications filed after December 31, 2020. But herein, the Company respectfully requests that the Commission clarify this ambiguity.

E. The Third Entry and Order are unreasonable and unlawful insofar as they may purport to apply H.B. 6 retroactively to reduce amounts recoverable for program years 2018 and 2019.

H.B. 6 took effect in October 22, 2019, and therefore cannot be used to retroactively reduce the Company's vested right to recovery in amounts accrued prior to that date. The Company currently has pending applications in the 2018 Case and the 2019 Case. The General Assembly did not intend H.B. 6, which took effect near the end of 2019, to have retroactive effect on cost recovery for the programs conducted in those years—almost all of which occurred prior to the H.B. 6 effective date—nor would any retroactive effect on the Company's recoveries for already-implemented and already-approved programs be constitutional, even if it had been intended.

Section 28, Article II of the Ohio Constitution states that "[t]he general assembly shall have no power to pass retroactive laws."[29] This clause "prohibits the General Assembly from passing retroactive laws and protects vested rights from new legislative encroachments."[30] Additionally, R.C. § 1.48 provides that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." In reviewing a statute for unconstitutional retroactivity, the Court conducts a two-step inquiry:

> [W]e must first determine whether the General Assembly expressly intended the statute to apply retroactively. Only if we find that the General Assembly intended the statute to apply retroactively do we then consider whether the statute is substantive, rendering it unconstitutionally retroactive, rather than merely remedial.[31]

Additionally, "[e]very statute which . . . creates a new obligation, imposes a new duty, or ***attaches a new disability, in respect to transactions or considerations already past***, must be deemed retrospective."[32]

There is nothing in H.B. 6 that indicates that revisions to R.C. 4928.66 were intended to have retroactive effect. Thus, H.B. 6 could not be interpreted to impact any substantive rights that the Company had prior to the effective date of October 22, 2019, and even if it did, such impact would be unconstitutional.

When the Commission approved the as-modified Stipulation in 2017, it described it as "allow[ing] for the deferral and subsequent recovery of EE/PDR costs recovery of program costs, lost revenues, and shared savings from the beginning of 2017 through Duke's EE/PDR rider mechanism."[33] In all of calendar year 2018 and the vast majority of 2019 (through October 22), the Company conducted its EE/PDR programming in reliance on its right to recover. The

---

[29] Ohio Constitution, Article II, Section 28.
[30] *Discount Cellular, Inc. v. PUCO*, 112 Ohio St.3d 360, 370, 2007-Ohio-53, ¶ 41.
[31] Id.
[32] *Safford v. Metro. Life Ins. Co.*, 119 Ohio St. 332, 336 164 N.E. 351 (1928) (emphasis added); *see also Perk v. Euclid*, 17 Ohio St.2d 4, 244 N.E.2d 475 (1969).
[33] 2017 Order, p. 22.

approval of the Company's portfolio was, in effect, a transaction wherein the Company acquired an obligation to conduct EE/PDR programming in exchange for recovery of its program costs, lost distribution revenues, and shared savings. Reducing the amount of recovery after the Company had fulfilled its end of the obligation (implementing the programming) would be retroactive and unconstitutional. Thus, even if the Commission does not permit the Company to fully recover all of its lost distribution revenues and shared savings to which it is entitled as laid out in the first, second, and third assignments of error—which is the correct course of action—Section 28, Article II precludes the Commission from removing either lost distribution revenues or shared savings from the Company's recoveries in the 2018 Case and 2019 Case. The Third Entry and Order should be clarified accordingly.

IV. CONCLUSION

The Commission should grant rehearing of the Third Entry and Order so that it may restore the stipulated cap on the Company's shared savings and clarify that, in its final true-up application, the Company may recover all of the lost distribution revenue approved under the portfolio as well as all shared savings amounts authorized under the portfolio.

Respectfully submitted,
DUKE ENERGY OHIO, INC.

<u>/s/ Larisa M. Vaysman</u>

Rocco D' Ascenzo (0077651)
Deputy General Counsel
Larisa M. Vaysman (0090290) (Counsel of Record)
Senior Counsel
Duke Energy Business Services LLC
139 East Fourth Street
1303-Main
Cincinnati Ohio 45202
513-287-4320 (telephone)
513-287-4385 (facsimile)
Rocco.dascenzo@duke-energy.com (e-mail)
Larisa.vaysman@duke-energy.com
Willing to accept service via email
Attorneys for Duke Energy Ohio, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal delivery, or electronic mail, on this 18th day of December 2020, to the parties listed below.

/s/ Larisa M. Vaysman
Larisa M. Vaysman

stnourse@aep.com
Bojko@carpenterlipps.com
mpritchard@mcneeslaw.com
joliker@igs.com
mleppla@theoec.org
callwein@keglerbrown.com
john.jones@ohioattorneygeneral.gov
Natalia.messenger@ohioattorneygeneral.gov
paul@carpenterlipps.com
tdougherty@theOEC.org
rdove@keglerbrown.com
cendsley@ofbf.org
lcurtis@ofbf.org
amilam@ofbf.org
christopher.healey@occ.ohio.org
mwarnock@bricker.com
dborchers@bricker.com
dparram@bricker.com
mdortch@kravitzllc.com
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
msmckenzie@aep.com
gmille7@uic.edu
ccox@elpc.org
rkelter@elpc.org
mfleisher@dickinsonwright.com
nhromalik@mwalliance.org
abrink@nhtinc.org
snix@ohioenergy.org
kelly@ceres.org
eostrowski@firstenergycorp.com
kjklaw@yahoo.com
mrgladman@jonesday.com
swilliams@nrdc.org
rendris@firstenergycorp.com
Michael.schuler@aes.com
eakhbari@bricker.com
williams@dgardiner.com

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

12/18/2020 2:52:52 PM

in

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

Summary: Application Duke Energy Ohio Inc.'s Application for Rehearing electronically filed by Mrs. Debbie L Gates on behalf of Duke Energy Ohio Inc. and D'Ascenzo, Rocco O. Mr. and Vaysman, Larisa