BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matters of the Applications of Ohio Power Company, Duke Energy Ohio, Inc., Ohio Edison Company, the Cleveland Electric Illuminating Company, the Toledo Edison Company, and the Dayton Power and Light Company for Approval of their Energy Efficiency and Peak Demand Reduction Programs.	)	
	)	Case No. 16-574-EL-POR
	)	Case No. 16-576-EL-POR
	)	Case No. 16-743-EL-POR
	)	Case No. 17-1398-EL-POR

MEMORANDUM CONTRA DUKE ENERGY'S
APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Public Utilities Commission of Ohio ("PUCO") protected consumers in its Third Entry on Rehearing[1] by reducing the amount of profits ("shared savings") that Duke can charge them for energy efficiency from about $10.1 million to $7.8 million per year.[2] Duke challenges this ruling on rehearing, claiming, among other things, that the PUCO lacks authority to limit its charges to customers for utility profits.[3] (For full consumer protection, the PUCO should not allow utilities to charge consumers for any profits on energy efficiency programs.)

The PUCO should deny Duke's Application for Rehearing because the PUCO had the authority to reduce the amount that customers pay to Duke for utility profits on energy efficiency.

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[1] Third Entry on Rehearing (Nov. 18, 2020) (the "Entry on Rehearing").

[2] The PUCO previously approved shared savings in the amount of $8.0 million per year, plus a gross-up for taxes. At a tax rate of 21%, Duke would be allowed to charge customers about $10.1 million. The Entry on Rehearing reduced the shared savings cap to $7.8 million with no tax gross-up.

[3] Duke Energy Ohio, Inc.'s Application for Rehearing (Dec. 18, 2020) (the "Application for Rehearing").

I. ARGUMENT

A. The PUCO's reduction of the cap on Duke's profits ("shared savings") charged to customers is lawful and reasonable.

In its first assignment of error, Duke argues that the PUCO's reduction of Duke's profits ("shared savings") was unlawful and unreasonable because it violates Ohio Supreme Court and PUCO precedent.[4] Duke is incorrect. The PUCO had authority to limit charges to customers for utility profits on energy efficiency.

In *In re Ohio Edison Co.*,[5] the Supreme Court of Ohio ("Court") considered whether the PUCO has authority to impose a "cost cap" on a utility's charges to customers for complying with energy efficiency mandates. In the *Ohio Edison* case, the PUCO had imposed a 4% cap on such charges, thereby limiting the amount that FirstEnergy could recover from customers.[6] FirstEnergy agued that this 4% cost cap was unlawful because there was no statutory authority for it. Namely, while R.C. 4928.64 (which applies to renewable energy mandates) explicitly allowed the PUCO to impose a cost cap, R.C. 4928.66 (which applies to energy efficiency mandates) does not. Thus, argued FirstEnergy, the General Assembly did not intend for the PUCO to have authority to impose a cost cap on energy efficiency charges.[7]

The Court agreed: "[n]either the commission's order nor its rehearing entry cites any language in R.C. 4928.66 that would authorize the commission to impose a cost-recovery cap in this case."[8]

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[4] *See* Application for Rehearing at 7-9 (citing *In re Ohio Edison Co.*, 158 Ohio St.3d 27 (2019) and *In re Amendment of Chapters 4901:1-10 and 4901:1-20*, Case No. 14-1411-EL-ORD).

[5] 158 Ohio St.3d 27 (2019).

[6] *Id.* at 28.

[7] *Id.* at 31.

[8] *Id.* at 31.

In its Application for Rehearing, Duke attempts to extend this Supreme Court ruling to mean that not only can the PUCO not approve an overall cost cap on energy efficiency costs, but that it cannot separately cap the amount of profit that Duke charges customers in the form of "shared savings."[9] Duke is wrong for several reasons.

First, and most fundamentally, a utility does not have an unequivocal right to shared savings. Shared savings is a PUCO creation, not a statutory right. As the PUCO recently ruled—in a case involving Duke Energy, but not cited in Duke's Application for Rehearing—"the shared savings provision has no statutory basis."[10] The statute on energy efficiency mandates, R.C. 4928.66, mentions shared savings just once—to explicitly provide that certain types of energy savings shall *not* be counted for purposes of shared savings. Duke cites no statute or law guaranteeing it a right to charge customers for shared savings, because there is none. In other words, the PUCO could have rejected Duke's shared savings proposal altogether and ruled that shared savings shall be zero. By simple logic, then, if the PUCO could have rejected Duke's request for shared savings in its entirety, it can certainly impose a limit on such charges.

Second, contrary to Duke's assertion, the PUCO's limit on Duke's shared savings is consistent with *Ohio Edison*. Under the *Ohio Edison* ruling, the case was remanded to the PUCO "for approval of the portfolio plans without the cap on cost recovery."[11] The Entry on Rehearing accomplishes this.

Under the PUCO's Entry on Rehearing, Duke will be able to collect from consumers every cent of prudently-incurred costs —with no cap—plus $7.8 million (pre-tax) for utility

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[9] Application for Rehearing at 7-9.

[10] *In re Application of Duke Energy Ohio, Inc. for Approval of its 2021 Energy Efficiency and Demand Side Management Portfolio of Programs & Cost Recovery Mechanism*, Case No. 20-1013-EL-PDR, Finding & Order § 8 (June 17, 2020).

[11] *Ohio Edison* at 32.

profits. Further, Duke claims in its Application for Rehearing that the Court "clearly indicated that shared savings ... constituted a portion of the costs of compliance with the statutory benchmarks."[12] The Court did no such thing. It accurately described shared savings as: "an incentive payment from customers to the utility."[13] It said nothing whatsoever about shared savings being a statutory cost of compliance with energy efficiency because, as explained, it is not.

Third, shared savings cannot be a cost of complying with mandates because it is not a "cost" that Duke incurs at all (though of course, when customers pay it, it is a cost to those customers). Shared savings is a form of utility profits. When customers pay shared savings to Duke, they are not paying for any cost or expense that Duke has incurred. In other words, 100% of shared savings goes directly to Duke's shareholders in the form of profits.

Fourth, the PUCO has previously found that shared savings is designed to give the utility an incentive to achieve energy savings *above* the statutory minimum.[14] Indeed, Duke (like other utilities) only earns shared savings in the first place if it exceeds the statutory minimum, not simply for meeting it.[15] Thus, it is not associated with the utility meeting the statutory benchmark for purposes of compliance.

On rehearing, the PUCO should reaffirm that customers cannot pay more than $7.8 million (pre-tax) for utility profits on energy efficiency.

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[12] Application for Rehearing at 8.

[13] *Ohio Edison* at fn. 1.

[14] *In re Application of Duke Energy Ohio, Inc. for Approval of its 2021 Energy Efficiency and Demand Side Management Portfolio of Programs & Cost Recovery Mechanism*, Case No. 20-1013-EL-PDR, Finding & Order § 8 (June 17, 2020) ("The shared savings provision previously contained in the portfolio plans to implement the EE programs mandated by statute were intended to provide utilities with an incentive to exceed the statutory benchmarks in any given year.").

[15] *See* Stipulation & Recommendation at 5 (Jan. 27, 2017) (shared savings is equal to zero for any achievement less than or equal to 100% of the statutory benchmark).

B. Duke should not be allowed to charge customers for so-called "lost revenues" that occur after 2020.

Duke claims that despite its programs ending in 2020, and despite the legislative prohibition on continuing charges to customers for its energy efficiency programs, it should nonetheless be allowed to continue charging customers for so-called "lost revenues" for three more years (2021-2023).[16] For example, if a customer installs an LED light bulb in December 2020, Duke would assume that the customer saves energy for three years and charge all customers for the difference between the energy that the customer actually used (*i.e.*, the lower amount used by an LED bulb) and the amount the customer would have used otherwise (*i.e.*, the higher amount used by a halogen or incandescent bulb).

The law does not allow this. Under R.C. 4928.66(G)(3), Duke's charges to customers for energy efficiency "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" full compliance with the law's statutory mandates. Under this statute, Duke would have to establish that its so-called lost revenues—which would not even occur until 2021-2023—are somehow a "cost of compliance associated with" mandates that ended in 2020. This cannot possibly be the case. Once the mandates have been met—which will occur by year end 2020—it would be logically impossible for Duke to incur costs in 2021, 2022, and 2023 to meet such mandates. The PUCO should reject Duke's claim that it can continue accrue new lost revenues in 2021, 2022, and 2023 and charge customers for those reductions in usage. This would violate R.C. 4928.66(G)(3). Duke's rehearing request should be denied.

[16] Application for Rehearing at 10.

C. The PUCO should rule that any final reconciliation under R.C. 4928.66(G)(3) includes, where applicable, credits to customers for overcollections, including overcollection of utility profits.

Under R.C. 4928.66(G)(3), energy efficiency charges are required to end after 2020, "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 the prior statutory energy efficiency mandates.

In its Application for Rehearing,[17] Duke asks the PUCO to clarify that when the PUCO performs this final reconciliation, it be allowed to collect all shared savings (utility profits) that it earned through the end of 2020. As an initial matter, a request for clarification is not permitted under R.C. 4903.10, which allows a party to apply for rehearing only if the order is "unreasonable or unlawful." Duke, in asking for the PUCO to clarify its order, is not asserting that the order was unreasonable or unlawful, as required by R.C. 4903.10.[18]

But if the PUCO deems such a clarification necessary, it should similarly state that as part of the final reconciliation, customers will receive a credit for any overcollection by Duke. This should include any charges for shared savings that exceed the amount approved in the Entry on Rehearing and any other amounts that the PUCO finds were imprudently incurred.

[17] Application for Rehearing at 12-13.

[18] *See In re Application of Duke Energy Ohio, Inc. for Recovery of Program Costs*, Case No. 14-457-EL-RDR, Entry on Rehearing ¶ 8 (July 8, 2015) (denying party's application for rehearing because it sought a request for clarification instead of alleging that the order was unlawful or unreasonable); *Accord In re Review of Chapters 4901-1, 4901-3, & 4901-9 of the Ohio Admin. Code*, Case No. 06-685-AU-ORD, Finding & Order ¶ 59 (Dec. 6, 2006) (motions for clarification not allowed).

D. Duke's Application for Rehearing is unlawful as applied to the other electric distribution utilities.

Duke filed its Application in four separate dockets: Case No. 16-574-EL-POR (AEP's energy efficiency 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).

By law, Duke may seek rehearing only with respect to its own case, Case No. 16-576-EL-POR. Under R.C. 4903.10, only a "party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing." Duke is not a party to Case No. 16-574-EL-POR (AEP's case), Case No. 16-743-EL-POR (FirstEnergy's case), or Case No. 17-1398-EL-POR (DP&L's case). It never moved to intervene in any of those cases. Thus, Duke lacks standing to challenge the Entry on Rehearing as part of AEP, Duke, and DP&L's cases.[19] Duke's rehearing request in the dockets where Duke is not a party should be denied.

II. CONCLUSION

For the reasons described above, and to protect consumers from unwarranted charges, the PUCO should deny Duke's Application for Rehearing.

[19] *In re Proper Procedures & Process for the Commission's Operations & Proceedings during the Declared State of Emergency*, Case No. 20-591-AU-UNC, Entry on Rehearing ¶ 17 (Aug. 12, 2020) (parties lacked standing to apply for rehearing because they were not parties to the case).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served on the persons stated below via electronic transmission, this 28th day of December 2020.

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Summary: Memorandum Memorandum Contra Duke Energy's Application for Rehearing by The Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of Healey, Christopher