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

MEMORANDUM CONTRA DUKE ENERGY OHIO, INC.'S
APPLICATION FOR REHEARING
OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

I. INTRODUCTION

On November 18, 2020, the Public Utilities Commission of Ohio (Commission) issued its Finding and Order (Order)[1] and Third Entry on Rehearing (Third Entry)[2] in the above-captioned proceeding. In its Third Entry, in light of a decision issued by the Supreme Court of Ohio on October 19, 2019,[3] the Commission removed a cost cap of $38.6 million that it previously imposed on Duke Energy Ohio, Inc.'s (Duke) recovery from customers for its 2018 and 2019 Energy Efficiency/Peak Demand Reduction (EE/PDR) costs.[4] The Commission also reduced Duke's maximum allowable shared savings to $7.8 million (pre-tax) annually from $12.5 million.[5] Lastly, the Commission prohibited Duke from recovering lost distribution revenue after December 31, 2020, even if the lost distribution revenue is attributed to energy savings achieved in 2018, 2019, or 2020, and ordered all electric distribution utilities' (EDUs) EE/PDR riders to terminate, effective January 1, 2021.[6]

Subsequently, Duke filed its Application for Rehearing and asserted that the Commission's Third Entry and Order were unlawful and unreasonable to the extent that the decisions imposed a cap on Duke's shared savings and prohibited Duke from collecting lost distribution revenue and shared savings after December 31, 2020.[7]

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1 *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 Nos. 16-576-EL-POR, et al., Third Entry on Rehearing (November 18, 2020) (hereinafter, "Third Entry").

2 *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 Nos. 16-576-EL-POR, et al., Opinion and Order (November 18, 2020) (hereinafter, "Order ").

3 *In re Application of Ohio Edison Company*, 158 Ohio St. 3d 27, 2019-Ohio-4196 139, N.E.3d 27 (hereinafter, "*FirstEnergy* Decision").

4 Third Entry at ¶¶ 49-51.

5 Id. at ¶ 53.

6 Id. at ¶ 57; Order at ¶¶ 8, 11.

7 Duke's Application for Rehearing at 1-2 (December 18, 2020).

The Ohio Manufacturers' Association Energy Group (OMAEG) has actively participated in the underlying proceeding and opposes Duke's attempt to collect lost distribution revenue and shared savings from customers beyond December 31, 2020, in violation of the plain text of Am. Sub. H. B. 6 (H.B. 6.), which was enacted subsequent to the Amended Stipulation and Recommendation filed in Case No. 16-576-EL-POR on September 27, 2017. Accordingly, the Commission should deny Duke's Application for Rehearing regarding the continuation of its EE/PDR rider beyond December 31, 2020 to collect lost distribution revenue and shared savings for the reasons further explained below.

II. ARGUMENT

The Commission Should Deny Duke's Application for Rehearing as R.C. 4928.66(G)(3) Prohibits Duke's Recovery of Lost Distribution Revenue and Shared Savings After December 31, 2020.

In its Application for Rehearing, Duke attempts to collect from customers lost distribution revenue and shared savings after December 31, 2020, purportedly pursuant to R.C. 4928.66(G)(3).[8] But R.C. 4928.66(G)(3) provides that:

> upon the date that full compliance…is deemed achieved…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… is deemed achieved….

The foregoing language is clear and unambiguous. As the Commission correctly acknowledged, the General Assembly expressly instructed utilities' cost recovery mechanisms (the EE/PDR riders) to terminate once full compliance is achieved, except for final reconciliation between

[8] See, e.g., Duke's Application for Rehearing at 10.

revenue collected and the cost of compliance efforts.[9] As a creature of statute,[10] the Commission must adhere to the plain language of R.C. 4928.66(G)(3). Nonetheless, Duke impermissibly reads words into the statute that simply are not there and insists that R.C. 4928.66(G)(3) permits it to recover lost distribution revenue and shared savings through its EE/PDR rider after full compliance is achieved. If the General Assembly intended such a result, it would have included Duke's preferred language in the revised statutory section (R.C. 4928.66(G)(3)) in H.B. 6, but it did not do so.[11]

However, even if R.C. 4928.66(G)(3) was ambiguous, in the absence of statutory guidance the Commission is owed deference in its implementation of a statute.[12] The Commission specifically determined that lost distribution revenues are not a cost of compliance and therefore cannot be recovered under R.C. 4928.66(G)(3) once the EE/PDR riders terminate.[13] Notably, the Commission has previously determined "that certain other costs, including lost distribution revenue and interruptible tariff credits, although included in some EDUs' EE/PDR riders, *are not related to EDUs' compliance with the EE and PDR requirements*" and that "[t]he Commission believes that lost distribution revenue is a rate design issue related to how an EDU recovers its distribution costs, *rather than EE and PDR costs*."[14] Duke's interpretation is inconsistent with

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9 Third Entry at ¶ 57; Order at ¶¶ 8, 11.

10 *Penn Central Transportation Co. v. Pub. Util. Comm.*, 35 Ohio St.2d 97, 298 N.E.2d 97 (1973).

11 See *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 45 ("we cannot generally add a requirement that does not exist in the Constitution or a statute"); *Wachendorf v. Shaver*, 149 Ohio St. 231, 237, 78 N.E.2d 370, 374 (1948) ("it is a general rule that courts, in the interpretation of a statute, may not take, strike or read anything out of a statute, or delete, subtract or omit anything therefrom.").

12 *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 68 (citing *Payphone Assn. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio 2988, 849 N.E.2d 4, ¶ 25).

13 Third Entry at ¶ 57.

14 *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 at ¶ 27 (December 17, 2014).

both the Commission's precedent and traditional canons of statutory interpretation and should be rejected.

The same rationale can and should be applied to shared savings as it is profit and not an EE/PDR cost or a cost of compliance. There is no statutory basis to allow Duke to collect shared savings after December 31, 2020. Additionally, pursuant to the Supreme Court of Ohio's definition of shared savings in the *FirstEnergy* Decision, shared savings are not a cost of compliance and instead are an incentive payment.[15] Thus, for similar reasons, the Commission should also clarify that Duke is prohibited from recovering shared savings after December 31, 2020.

In a final attempt to collect lost distribution revenue and shared savings from customers after December 31, 2020, Duke asserted that the Ohio Constitution prevents the Commission from limiting recovery for program years 2018 and 2019 pursuant to H.B 6.[16] Until deemed otherwise, the Supreme Court of Ohio has held that "[a]ll legislative enactments enjoy a presumption of constitutionality, and the courts must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional."[17] As explained below, Duke cannot overcome this presumption and its final assignment of error should be denied.

Section 28, Article II of the Ohio Constitution provides that:

> The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

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15 *FirstEnergy* Decision at n.1.

16 See Duke's Application for Rehearing at 14-16.

17 *State ex rel. Taft v. Franklin County Court of Common Pleas*, 81 Ohio St.3d 480, 481 692 N.E.2d 560 (1998) (citations omitted) (internal quotations omitted).

The foregoing constitutional provision prohibits the retroactive application of legislation when it impairs a vested right.[18] "A right also cannot be characterized as vested 'unless it constitutes more than a 'mere expectation or interest based upon an anticipated continuance of existing laws.'"[19] While lost distribution revenue and shared savings may have been incidental benefits to Duke and the other EDUs, they cannot be said to be the primary purpose of R.C. 4928.66. If the General Assembly intended to confer lost distribution revenue and shared savings as a vested right to EDUs, R.C. 4928.66 would have included a provision stating so.[20] Consequently, Duke does not possess a vested right to shared savings or lost distribution revenue and cannot successfully state a claim of retroactivity under Section 28, Article II of the Ohio Constitution.

III. CONCLUSION

For the aforementioned reasons, the Commission should deny Duke's Application for Rehearing.

Respectfully submitted,

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[18] *State ex. Rel. Jordan v. Indus. Comm*, 120 Ohio St.3d 412, 2008-Ohio-6137, 900 N.E2d 150, ¶ 14.

[19] Id. at ¶ 9 (citing *Roberts v. Treasurer*, 14 Ohio App.3d 403, 411, 770 N.E.2d 1085 (2001); *In re Emery*, 59 Ohio App.2d 7, 11, 291 N.E.2d 746 (1978)).

[20] See, e.g., *Washington Cty. Taxpayers Assn. v. Peppel*, 78 Ohio App. 146, 155-56, 604 N.E.2d 181 (4th Dist.1992).

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on December 28, 2020 upon the parties listed below.

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Summary: Memorandum Contra Duke Energy Ohio, Inc.'s Application for Rehearing of The Ohio Manufacturers' Association Energy Group electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group