

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

FIFTH ENTRY ON REHEARING

Entered in the Journal on February 23, 2022

I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by Duke Energy Ohio, Inc.

II. PROCEDURAL HISTORY

{¶ 2} Ohio Power Company, d/b/a AEP Ohio, Duke Energy Ohio, Inc. (Duke), The Dayton Power and Light Company, 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.

{¶ 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. Sept. 27, 2017 Order at ¶ 47.

{¶ 7} On October 27, 2017, applications for rehearing of the Sept. 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 on November 6, 2017.

{¶ 8} On November 21, 2017, the Commission issued an Entry granting the applications for rehearing of the Sept. 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 Sept. 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. Sept. 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, terminated Ohio's annual energy efficiency savings requirements on December 31, 2020, and reduced 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 (OCC) 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.

{¶ 14} On November 18, 2020, in a Third Entry on Rehearing, the Commission granted in part and denied in part the applications for rehearing filed separately by Duke, OCC, and jointly by the Environmental Intervenors on October 27, 2017. Additionally, the Commission also denied Duke's March 27, 2020 application for rehearing regarding the *Wind Down Order*.

{¶ 15} On December 18, 2020, Duke filed an application for rehearing alleging five assignments of error regarding the Third Entry on Rehearing. Memoranda contra the application were filed by Ohio Manufacturers' Association Energy Group (OMA) and OCC on December 28, 2020.

{¶ 16} On January 13, 2021, the Commission granted Duke's application for rehearing further consideration of the matters specified therein.

III. DISCUSSION

{¶ 17} As discussed, in the *Third EOR*, the Commission granted in part and denied in part applications for rehearing. Our decision was responsive to the Supreme Court of Ohio's determination that an EE/PDR cost recovery cap identical to the one issued in this proceeding was improper under R.C. 4928.66. *Third EOR* at ¶49, citing *In re Ohio Edison Co.*, 2019-Ohio-4196, ¶ 11, 158 Ohio St.3d 27 (*FirstEnergy Decision*). Accordingly, we removed the 4 percent cost cap issued in this case. Additionally, the Commission granted OCC's application for rehearing regarding shared savings and modified the Stipulation to create a lower shared savings maximum of \$7.8 million (pre-tax) annually. *Third EOR* at ¶53. The

Commission denied all other requests for rehearing, including those regarding Duke's Portfolio Plan and the *Wind Down Order*.

{¶ 18} In its application for rehearing, Duke alleges five points of error. In each assignment of error, the Company asks the Commission to reverse its decisions in the *Third EOR*, or, alternatively, to provide clarifying orders.

A. Duke's First Assignment of Error

{¶ 19} Duke first alleges that the Commission wrongfully imposed a cap on shared savings recovery. The Company notes the Commission previously determined that \$8 million after-tax cap approved in the Stipulation was reasonable and beneficial to customers. According to Duke, the shared savings cap was decreased to counteract the court-ordered removal of the cost cap. Duke states the *Third EOR* wrongly does not consider shared savings to be cost bore by utilities, which is inconsistent with previous Commission decisions and court rulings. Duke asks that the Commission reinstate the original cap agreed upon in the Stipulation.

B. Duke's Second Assignment of Error

{¶ 20} Next, Duke contends the *Third EOR* unlawfully precludes Duke from recovering lost distribution revenue after December 31, 2020. Duke reads the *Third EOR* to interpret R.C. 4928.66(G)(3) that no recovery after the end of 2020 is permitted. Duke submits that this is an improper understanding of the statute, and R.C. 4928.66(G)(3) specifically allows for recovery of costs associated with compliance prior to the December 2020 deadline. According to the Company, its EE/PDR programs are three-year endeavors that will result in lost distribution revenue through 2023. Duke argues that the statute permits recovery for all costs associated with programs enacted before December 31, 2021. Duke explains that it could submit one final application for recovery and reconciliation to avoid maintaining the rider for multiple years. At the least, Duke asserts it should be permitted to recover the costs for all programs, shared savings, and lost distribution

revenues accrued as of the conclusion of 2020. Duke notes that it has still-pending applications for recovery of programs costs that were timely filed well before the deadline.

C. Duke's Third Assignment of Error

{¶ 21} Duke next submits that the *Third EOR* unreasonably does not specify that the Company can recover shared savings. The *Third EOR* describes shared savings as not a cost to utilities and Duke avers that this implies that shared savings are thus no longer recoverable. The Company seeks clarification that it will be able to recover shared savings for portfolio years 2018, 2019, and 2020.

D. Duke's Fourth Assignment of Error

{¶ 22} In regards to its current pending applications for cost recovery from 2018 and 2019, Duke submits that the Commission's decision in the *Third EOR* unreasonably does not explicitly provide that the Company will be able to see those applications through. Duke explains that there are significant delays between when the Company can apply and when, after audits, litigation, and Commission review, the Company can ultimately recover the costs described in its applications. Duke requests clarification as to whether it will still be able to recover in those pending cases.

E. Duke's Fifth Assignment of Error

{¶ 23} Finally, Duke contends the *Third EOR* is in error because the order wrongfully attempts to retroactively apply H.B. 6 to prior year's applications. Duke explains that H.B. 6 was not enacted until near the end of 2019. Thus, according to the Company, the Commission cannot apply the effects of H.B. 6 towards Duke's 2018 and 2019 applications for recovery. Duke asserts it conducted its EE/PDR programming in reliance on its right to recover and it would be unlawful and unconstitutional for recovery to be denied in a reaction to H.B. 6.

F. *Memoranda Contra*

{¶ 24} In their memoranda contra, OCC and OMA argue that Duke's application for rehearing should be denied. Initially, OCC asserts that the Commission's lowering of the cap on shared savings is proper. According to OCC, the *FirstEnergy Decision* does not apply to this situation. OCC explains that there is no statutory right to shared savings, which are a Commission construct. Further, asserts OCC, shared savings are not a recoverable cost expenditure by the utility, but rather an incentive payment that directly profits Duke. OCC notes that shared savings are only applicable when a utility exceeds that statutory minimum, and thus is not associated with compliance with the statute.

{¶ 25} OCC additionally submits that Duke should not be able to collect lost revenues that occur after 2020. OCC avers that compliance will have been met by the end of 2020, and thus it is illogical that Duke could continue to bear costs associated with compliance after that date. OMA agrees, asserting that the plain language of R.C. 4928.66(G)(3) specifically disallows recovery after December 31, 2020. Similar to OCC's earlier argument, OMA contends that shared savings and lost distribution revenues are not costs associated with EE/PDR compliance and thus Duke should not be able to recover for them after the end of 2020.

G. *Commission Conclusion*

{¶ 26} Duke's application for rehearing regarding its first assignment of error should be denied. We find Duke's attempt to connect the *First Energy Decision* to a cap on shared savings to be misguided. To start, we note that Duke does not argue that a cap on shared savings is unlawful, but rather the Company submits it is unlawful to lower the capped amount submitted in the Stipulation. Further, we emphasize, as we did in the *Third EOR*, that shared savings is not a cost recovery. *Third EOR* at ¶ 53. As described by the Supreme Court of Ohio, shared savings is "an incentive payment from customers to the utility for * * * programs that *exceed* the statutory mandates * * *." (emphasis added) *First*

Energy Decision at ¶ 2. In striking down the original cost recovery cap, the Court directed that the Commission cannot impose a limitation on a utility's "recovery of costs incurred to meet statutory benchmarks." *First Energy Decision* at ¶ 16. Here, we are limiting what Duke can receive in incentive payments from customers for exceeding what is mandated; the Commission is not preventing the Company from full recovery for costs incurred to comply with the statute.

{¶ 27} The Commission is also unpersuaded that our decision to establish a new shared savings cap is arbitrary and against precedent. As discussed in the *Third EOR*, the Commission has consistently put limits on how much customers must pay for shared savings. *Third EOR* at ¶ 53, citing *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. Additionally, our adjustment to the shared savings cap was based on evidence in the record and in accordance with the law. Consistent with R.C. 4903.10, upon a timely filing of an application for rehearing, the Commission may modify any part of an order that it deems unjust or unwarranted. Here, we were persuaded by the arguments of OCC that the shared savings cap was excessive. In establishing a new shared savings limit, we relied on the testimony of OCC witness Shutrump, who specifically recommended the \$7.8 million cap that we ultimately adopted. *Third EOR* at ¶ 53, citing OCC Ex. 13 at 12. Thus, our decision to lower the amount that customers must pay Duke was procedurally sound, based on the evidence, and consistent with the law. Accordingly, Duke's application for rehearing on this issue is denied.

{¶ 28} As to Duke's additional four assignments of error, we affirm our original denials of their applications for rehearing as discussed in the *Third EOR*. Consistent with R.C. 4928.66(G)(3), in the Company's final reconciliation, Duke cannot recover for lost distribution revenues that occur after December 31, 2020. Notwithstanding our decision

above regarding the shared savings cap, this does not affect Duke's pending 2018, 2019, and 2020 applications for cost recovery.

{¶ 29} Duke is directed to file updated applications and exhibits consistent with this Entry in its 2018 application for cost recovery, Case No. 19-622-EL-RDR, within 30 days of this Entry on Rehearing. The additional applications for recovery and reconciliation will be addressed thereafter.

IV. ORDER

{¶ 30} It is, therefore,

{¶ 31} ORDERED, That the application for rehearing filed by Duke be denied. It is, further,

{¶ 32} ORDERED, That Duke update its application in Case No. 19-622-EL-RDR, consistent with Paragraph 29 and this Entry on Rehearing. It is, further,

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

COMMISSIONERS:

Approving:

Jenifer French, Chair

M. Beth Trombold

Daniel R. Conway

Dennis P. Deters

Recusal:

Lawrence K. Friedeman

NJW/hac

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

Summary: Entry denying the application for rehearing filed by Duke Energy Ohio,
Inc. electronically filed by Heather A. Chilcote on behalf of Public Utilities
Commission of Ohio