

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke     )  
Energy Ohio, Inc., for Approval to Modify    )     Case No. 15-0050-GA-RDR  
Rider FBS, Rider EFBS, and Rider FRAS.     )

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**MEMORANDUM CONTRA  
DUKE ENERGY OHIO, INC.,  
INTERSTATE GAS SUPPLY, INC., AND  
RETAIL ENERGY SUPPLY ASSOCIATION  
APPLICATIONS FOR REHEARING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I.     BACKGROUND**

In this case, Duke Energy Ohio, Inc. (“Duke”) sought to modify its tariff regarding Rider FBS (“Firm Balancing Service”) and Rider EFBS (“Enhanced Firm Balancing Service”) in order to prevent Gas Cost Recovery (“GCR”) customers from subsidizing cost incurred to serve Marketers. Duke asserted that undersubscription to EFBS by Marketers could make it more difficult for Duke to manage its gas system. Duke would have to incur increased costs by making purchases from or forced sales into the gas spot markets. Without Duke’s requested tariff modifications, these increased costs, though caused by Marketers, would be unjustly and unreasonably charged to Duke’s 201,000 GCR customers.

Duke presented evidence that it has had difficulty managing its gas capacity portfolio because of Marketers’ undersubscription to EFBS service. To properly manage its system, Duke was forced to make purchases and sales in the gas spot markets and pass the additional costs on to GCR customers, though such customers did not cause the costs.

Duke could be forced to make such purchases in the future if its tariff is not modified.

The modifications Duke initially proposed would prevent this unfair allocation of costs.

The Office of the Ohio Consumers' Counsel ("OCC") intervened in this proceeding.<sup>1</sup> OCC filed comments and testimony in this proceeding, and participated in the hearing held in this case on August 4, 2015. The OCC's focus in this case was, and remains, to ensure that the rates GCR customers pay only include just and reasonable gas costs as required by Ohio law.<sup>2</sup> GCR customers would not pay just and reasonable gas costs if they were forced to pay costs caused by Marketers.

The PUCO issued its Opinion and Order ("Order") on January 6, 2016. The PUCO found that "Duke's proposal to modify the terms under which choice suppliers and aggregators receive firm balancing service or enhanced firm balancing service, including the Company's related request to modify the Full Requirements Aggregation Service and Gas Trading Service tariffs, is reasonable and should be approved, with the modifications set forth below."<sup>3</sup>

Duke, Interstate Gas Supply ("IGS"), and the Retail Energy Supply Association ("RESA") seek rehearing on various issues. Rehearing should be denied. OCC recommends that the Order be affirmed.

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<sup>1</sup> See Motion to Intervene by the Office of the Ohio Consumers' Counsel (Feb. 12, 2015). OCC's Motion to Intervene was granted in an Entry dated March 25, 2015.

<sup>2</sup> See Initial Post-Hearing Brief by The Office of the Ohio Consumers' Counsel (filed September 4, 2015); Post-Hearing Reply Brief by The Office of the Ohio Consumers' Counsel (filed September 18, 2015).

<sup>3</sup> Order at 9.

## II. RECOMMENDATIONS

### A. **There are no grounds for rehearing based on the PUCO's administrative notice of the Audit Report in Case No. 15-218-GA-GCR.**<sup>4</sup>

IGS and RESA argue that the PUCO erred in taking administrative notice of the Audit Report.<sup>5</sup> RESA and IGS urge the PUCO to reconsider on this basis. The PUCO should deny rehearing on this basis. IGS and RESA misread the Order and, in any event, suffered no prejudice.

#### 1. **IGS and RESA misread the Order.**

RESA and IGS argue that the PUCO erred by unreasonably and unlawfully taking administrative notice of the Audit Report from Case No. 15-218-GA-GCR.<sup>6</sup> In raising this allegation, RESA and IGS misunderstand the PUCO's Order. The Order does not "accept" or "rely" on the findings in the Audit Report.<sup>7</sup> The Order merely notes that the Audit Report's "recommended 6,000 dth/day threshold is reasonable[.]"<sup>8</sup> The Order is actually based on Staff's recommendation, *not* the Audit Report.<sup>9</sup>

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<sup>4</sup> *In the Matter of the Regulations of the Purchased Gas Adjustment Clauses Contained Within the Rate Schedules of Duke Energy Ohio and Related Matters*, Case No. 15-218-GA-GCR, Report on the Management and Performance Audit of Duke Energy Ohio's Gas Procurement Practices and Policies for the Audit Period September 2012 Through August 2015 (Dec. 9, 2015) (hereinafter "Audit Report").

<sup>5</sup> RESA Application for Rehearing at 4-6; IGS Application for Rehearing at 16-19.

<sup>6</sup> RESA Application for Rehearing at 1; IGS Application for Rehearing at 4.

<sup>7</sup> *See* Order at 9-10.

<sup>8</sup> *Id.* at 9.

<sup>9</sup> *See id.* ("For this reason, we find it appropriate to adopt Staff's recommendation on an interim basis, such that, for the 2016-17 hearing season, choice supplier should take either the same level of service under Rider EFBS that they elected for 2015-16, or more if they prefer. Consistent with Staff's recommendation, we note that any winter spot market purchases for 2016-17 should be thoroughly audited to ensure that GCR customers are not unduly prejudiced.")

The PUCO clearly notes that the Audit Report’s “recommendations regarding Duke’s storage levels and any other balancing issues will be addressed in the *2015 GCR Case*.”<sup>10</sup> Because the 6,000 dth/day threshold is one such “recommendation” it should and will be addressed in the proper forum – the 2015 GCR Case.

The PUCO based its Order on Staff’s recommendations, not the Audit Report. The proper place to address the Audit Report is in the 2015 GCR Case, as the PUCO recognized in its Order. IGS and RESA will have adequate opportunities to cross-examine the Audit Report’s sponsor; prepare, respond, and rebut the Audit Report; and present witnesses and exhibits at an evidentiary hearing in the 2015 GCR Case, including the testimony of Mr. Scarpitti. Rehearing should be denied.

## **2. IGS and RESA have not suffered any prejudice.**

For the PUCO to have taken “unreasonable” or “unlawful” administrative notice of the Audit Report, RESA and IGS must demonstrate that they have been prejudiced by such action.<sup>11</sup> It is well settled that a PUCO order will not be reversed because of an error that did not prejudice the party seeking reversal.<sup>12</sup> As discussed above, the PUCO merely stated that the Audit Report’s threshold recommendation was “reasonable.” The Order was based on Staff’s recommendation, not the Audit Report. This mere introduction of the Audit Report does not prejudice IGS and RESA.<sup>13</sup>

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<sup>10</sup> See *id.* at 9, note 1.

<sup>11</sup> *Allen v. Pub. Util. Comm’n*, 40 Ohio St. 3d 184, 185 (1988); *Cincinnati Bell Tel. Co. v. Pub. Util. Comm’n*, 12 Ohio St. 3d 280 (1984).

<sup>12</sup> *Cincinnati v. Pub. Util. Comm.* (1949), 151 Ohio St. 353; *Ohio Edison Co. v. Pub. Util. Comm.* (1962), 173 Ohio St. 478; *Akron v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 155; *Holladay v. Pub. Util. Comm.* (1980), 61 Ohio St.2d 335; *Allen v. Pub. Util. Comm.* (1988), 40 Ohio St.3d 184.

<sup>13</sup> See *Canton Storage and Transfer Co. v. Pub. Util. Comm’n Ohio*, 72 Ohio St. 3d 1, 8 (1995) (citing *Allen v. Pub. Util. Comm’n*, 40 Ohio St. 3d 184, 185 (1988) (noting that the PUCO “may take administrative notice of facts if the complaining parties have had an opportunity to prepare and respond to the evidence, and they are not prejudiced by its introduction.”)).

RESA's Application does not point to any specific way in which RESA was prejudiced by the PUCO's taking administrative notice of the Audit Report.<sup>14</sup> IGS asserts that the PUCO's taking administrative notice of the Audit Report prejudiced IGS because the "administratively noticed fact reduce[d] the burden of proof of [Duke]."<sup>15</sup> Specifically, IGS points to three portions of the Audit Report that the PUCO "relied upon" in the instant case that "reduced Duke's burden of modifying its balancing tariffs."<sup>16</sup> This argument has no merit.

First, the Order was based on Staff's recommendation, not the Audit Report. So Duke's burden was not modified, and could not have been modified, by the Audit Report.

Second, the PUCO in its Order cites to ample evidence furnished by Duke *in this proceeding* that supports the same points made in the Audit Report that IGS now claims reduced Duke's burden of proof.<sup>17</sup> Indeed, without considering the information administratively noticed by the PUCO, the evidence of record establishes that Duke had insufficient firm transportation in relation to storage, considered several possible solutions, and that a threshold under 20,000 dth/day was reasonable for Duke's purposes.<sup>18</sup> Because the voluminous evidence Duke submitted independently satisfies Duke's burden of proof, IGS and RESA have not been prejudiced by the PUCO's taking administrative notice of the Audit Report.

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<sup>14</sup> RESA Application for Rehearing at 4-6.

<sup>15</sup> IGS Application for Rehearing at 17.

<sup>16</sup> *See id.* at 17-18.

<sup>17</sup> Order at 4-5.

<sup>18</sup> *See id.* at 4-5; Duke Ex. 2 at 5-7, 10, Attach. JLK-3, Attach. JLK-6; Tr. At 94 (supporting the notion that an MDQ threshold under 20,000 dth/day would make little difference to Duke).

**B. Denying IGS's invitation to do a "thorough and comprehensive review of Duke's balancing system and Choice program" was just and reasonable.**

RESA argues that the PUCO should not have approved any modifications to Duke's balancing program "prior to undertaking a thorough and comprehensive review of Duke's balancing system and Choice program."<sup>19</sup> The argument is based upon RESA's claim that Duke's distribution rates have "subsidies embedded" in them that "flow through to the GCR mechanism."<sup>20</sup> In its Application for Rehearing, RESA fails to raise any new factual or legal arguments.<sup>21</sup> Instead, RESA merely rehashes the same arguments it made in its post-hearing briefs. The PUCO already considered, addressed, and properly rejected these arguments in its Order, saying that they were outside the scope of this proceeding.<sup>22</sup> There is no need to re-plow this ground. Accordingly, the PUCO should deny RESA's Application for Rehearing (and IGS's) related to the "thorough and comprehensive review of Duke's balancing system and Choice program."

**C. The PUCO-ordered "thorough audit" is just and reasonable, and will confirm Duke's tariff modifications adequately protect GCR customers.**

Duke seeks rehearing on the PUCO's requirement that "spot purchases should be monitored for the 2016-2017 heating season[.]"<sup>23</sup>

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<sup>19</sup> RESA Application for Rehearing at 13. IGS makes a similar argument. *See* IGS Application for Rehearing at 22-23. Its argument should be rejected for the same reasons that RESA's should.

<sup>20</sup> Order at 7 (citing RESA testimony, brief, and reply brief).

<sup>21</sup> RESA Application for Rehearing at 13-15.

<sup>22</sup> Order at 9.

<sup>23</sup> Duke Application for Rehearing at 1.

The PUCO ordered that winter spot market purchases be “thoroughly audited to ensure that GCR customers are not unduly impacted.”<sup>24</sup> Duke asserts that, because “the Opinion and Order does not mention what the resolution would be if it is determined that spot purchases for the 2016-2017 heating season did impact the GCR customers, either positively or negatively[,]” it “is left with uncertainty regarding the business risk associated with spot purchases.”<sup>25</sup> Duke requests that the PUCO “clarify or otherwise provide a mechanism for recovery of costs associated with such necessary spot purchases during the interim period.”<sup>26</sup>

In its initial Application, Duke asserted that undersubscription of EFBS by Marketers was making it harder for Duke to manage its gas storage balances. As a result, Duke had to “purchase additional gas in the spot market during colder than normal periods or sell gas into the spot market during warmer than normal periods.”<sup>27</sup> These additional costs would be borne by GCR customers without any modifications to Duke’s tariffs.

Duke proposed modifications to its tariffs so that it could balance its system without having to make spot market purchases or sales. This would prevent unjust and unreasonable shifting of Marketer-caused costs to GCR customers. The PUCO-ordered audits are tools to ensure that Duke’s tariff modifications live up to their billing. The PUCO was clear in affirming that Duke spot market purchases or sales may not “unduly impact” GCR customers. If they do, they may not flow through to GCR customers.

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<sup>24</sup> *Id.* at 4.

<sup>25</sup> *Id.* at 4-5.

<sup>26</sup> *Id.* at 5.

<sup>27</sup> *Id.*

Further clarification is not necessary. Duke's Application for Rehearing should be denied.

### **III. CONCLUSION**

The PUCO should deny Duke's, IGS's, and RESA's Applications for Rehearing. They have failed to raise any new matters not previously addressed and rejected in the Order. They have failed to demonstrate that the PUCO's Order was unlawful, unjust, or unreasonable. The PUCO's Order properly protects GCR customers from subsidizing costs that are caused by Marketers participating in Duke's Choice program.

Respectfully submitted,

BRUCE J. WESTON (0016973)  
OHIO CONSUMERS' COUNSEL

/s/ William J. Michael

William J. Michael (0070921)

Counsel of Record

Jodi J. Bair (0062921)

Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

Telephone: 614-466-1291 (Michael direct)

Telephone: 614-466-9559 (Bair direct)

[William.michael@occ.ohio.gov](mailto:William.michael@occ.ohio.gov)

(will accept service via email)

[Jodi.bair@occ.ohio.gov](mailto:Jodi.bair@occ.ohio.gov)

(will accept service via email)



## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum Contra Applications for Rehearing by the Office of the Ohio Consumers' Counsel was served by electronic mail to the persons listed below, on this 16<sup>th</sup> day of February 2016.

*/s/ William J. Michael*

William J. Michael

Assistant Consumers' Counsel

## **SERVICE LIST**

[Thomas.mcnamee@puc.state.oh.us](mailto:Thomas.mcnamee@puc.state.oh.us)  
[mhpetricoff@vorys.com](mailto:mhpetricoff@vorys.com)  
[mjsettineri@vorys.com](mailto:mjsettineri@vorys.com)  
[glpetrucci@vorys.com](mailto:glpetrucci@vorys.com)

[Amy.Spiller@duke-energy.com](mailto:Amy.Spiller@duke-energy.com)  
[Elizabeth.watts@duke-energy.com](mailto:Elizabeth.watts@duke-energy.com)  
[joliker@igsenergy.com](mailto:joliker@igsenergy.com)  
[joseph.clark@directenergy.com](mailto:joseph.clark@directenergy.com)  
[Jennifer.spinosi@directenergy.com](mailto:Jennifer.spinosi@directenergy.com)

Attorney Examiner:

[Sarah.parrot@puc.state.oh.us](mailto:Sarah.parrot@puc.state.oh.us)

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