BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service.	)))))))	Case No. 14-841-EL-SSO
In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20.	))))	Case No. 14-842-EL-ATA

MEMORANDUM CONTRA DUKE ENERGY OHIO, INC.'S MOTION TO CONTINUE CHARGING ITS CUSTOMERS FOR RIDERS BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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TABLE OF CONTENTS

PAGE

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BY
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I. INTRODUCTION

Duke has been charging its customers, since June 1, 2015, under a rate plan that is scheduled to expire on May 31, 2018. The Office of the Ohio Consumers' Counsel ("OCC") [1] and others[2] back in 2015, applied for rehearing on the rates that the Public Utilities Commission of Ohio (PUCO) approved. OCC's rehearing request challenged, inter alia, the PUCO's approval to charge consumers a "price stabilization rider" ("PSR")

[1] OCC Application for Rehearing (May 4, 2015).

[2] City of Cincinnati, Direct Energy Services, Duke Energy Ohio, Environmental Law & Policy Center, Industrial Energy Users-Ohio, IGS, Ohio Manufacturers' Association, Ohio Environmental Council, Ohio Partners for Affordable Energy, RESA, and Sierra Club all filed applications for rehearing..

rider as a "placeholder," providing the gateway[3] for Duke to seek subsidies of two fifty year old power plants held by Ohio Valley Electric Corporation ("OVEC").[4] OCC also challenged the distribution capital investment rider that allowed Duke to invest approximately $170 million over three years, with customers paying for a return on and of the investment.[5] And OCC challenged the flawed comparison between Duke's electric security plan ("ESP") and a market rate offer, that found the electric security plan to be more favorable in the aggregate to customers than a market rate offer (when it was not more favorable to customers).[6]

The PUCO initially granted rehearing to allow itself more time to consider the rehearing requests.[7] *But three years later it still has not issued a final order on the parties' rehearing claims.* The PUCO's inaction for almost three years has avoided judicial scrutiny of Duke's charges by withholding the final order needed as a prerequisite to appeal under R.C. 4903.10 and 4903.13. And now, with just two months left in the three-year term of its electric security plan, Duke is seeking to extend the unlawful rates until new electric security plan rates are approved.

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[3] *See In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer*, Case No. 17-1263-EL-SSO, Application at 18 (June 1, 2017) (requesting approval of Price Stabilization Rider); *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Modify Rider PSR*, Case No. 17-0873-EL-ATA (Mar. 31, 2017).

[4] *Id*. at 3-43.

[5] *Id*. at 62-64.

[6] *Id.* at 43-60.

[7] Entry on Rehearing (May 28, 2015).

Duke, on March 9, 2018, filed a motion[8] to continue all the riders the PUCO approved for its electric security plan "until such time as a new SSO can be implemented."[9] Duke claims that it "needs to maintain other aspects of its existing, statutorily mandated SSO."[10] Duke requests explicit approval to extend its distribution capital investment rider, in its current form, subject to the existing $35 million cap, until the earlier of August 1, 2018 or the effective date of Duke's fourth standard service offer.[11] Duke asserts that no party will be prejudiced, given that it is "not *currently* seeking relief from the existing cap."[12] Duke asks for PUCO action "to avoid a situation in which it is unable to fulfill its statutory obligation to provide an SSO." [13]

The PUCO should deny Duke's request to extend its electric security plan (and collect more money from customers) using charges that should be considered unlawful. While the PUCO has authority under certain circumstances to continue a utility's *standard service offer*, those circumstances do not apply in this case and do not extend to continuing a utility's *electric security plan.* Additionally, Duke's request for an extension of its unlawful electric security plan is nothing more than a belated request for rehearing

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[8] The Ohio Energy Group filed a "memorandum in support" of Duke. There are no provisions in the PUCO rules that permit such a pleading. OEG's filing asks that *all riders* be extended or continued charging to consumers. However, even if Duke's riders are extended (and they should not be), certain riders were to expire on May 31, 2018, including Rider Load Factor Adjustment ("LFA). Riders with a sunset, such as Rider LFA, should not be continued.

[9] Duke Motion at 2 (Mar. 9, 2018).

[10] Duke Motion at 2.

[11] Duke Motion at 5.

[12] *Id.* This begs the question as to when it will request relief from the cap.

[13] Under the PUCO's rules, parties are afforded fifteen days to file a memorandum contra Duke's motion. Ohio Admin. Code 4901-1-12(B)(1). That would mean that the memorandum contra is due on March 26, 2018. However, the PUCO published notice that this matter will be addressed at the PUCO"s signing session on Mar. 21, 2018. With Duke's ESP expiring on May 31, 2018, the PUCO should afford parties a full opportunity to respond to Duke's motion, in accordance with the PUCO's rules.

on the ending date of its electric security plan. As such the PUCO does not have jurisdiction to act upon it under R.C. 4903.10. Finally, the PUCO should reject Duke's motion because it collaterally attacks the PUCO's April 2, 2015 Opinion and Order. Duke's collateral attack should be precluded under the doctrines of res judicata and collateral estoppel.

In any event, the PUCO should, at a minimum, require language changes to all of the riders being extended. The language changes should address refund language to protect customers from paying costs that are later determined to be imprudent or otherwise unlawful or unreasonable. These language changes are necessary because of the Ohio Supreme Court's recent ruling, *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.,* Slip Opinion No. 2018-Ohio-229 ("*FirstEnergy*").

A. Customers should not be charged to continue Duke's expiring electric security plan because there is no statutory provision which allows the PUCO to extend an expiring electric security plan if a new electric security plan has not been approved.

The PUCO is a creature of statute and may only exercise the authority conferred on it by the General Assembly. *Columbus S. Power Co. v. Pub. Util. Comm.,* 67 Ohio St.3d 535, 620 N.E.2d 835 (1993); *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d 181, 429 N.E.2d 444 (1981). The PUCO must follow the law. The law in this case does not support Duke's motion.

Duke is correct that Ohio law "does not, however, address the possibility that a filed application for a subsequent ESP has not been ruled upon by the Commission within the 275-day period established in R.C. 4928.143(C)(1)."[14] Nonetheless it believes that

[14] Duke Motion at 3.

somehow the PUCO can order "that the provisions, terms, and conditions of the *current ESP* continue until a subsequent SSO is approved and implemented."[15] Duke cites to R.C. 4928.143(C)(2)(b) as its authority for that assertion,[16] and interprets the "provisions, terms and conditions" to extend to the *electric security plan*, meaning all riders currently in effect and approved through its existing electric security plan can be continued by the PUCO.

But Duke misreads the statute. The statute is limited to addressing two circumstances, neither of which applies to the case at hand. And the statute speaks to continuing a utility's standard service offer, not the utility's electric security plan. The statute states:

> If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions *of the utility's most recent standard service offer,* along with any expected increases or decreases in fuel costs from those contained in that *offer* until a subsequent *offer* is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.[17]

The statute focuses on what happens if: 1) a utility terminates an application (where the PUCO has modified and approved the application) or 2) the PUCO disapproves an application. It clearly does not apply to the scenario at hand where

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[15] Duke Motion at 4-5. (emphasis added).

[16] Duke Motion at footnote 13.

[17] R.C. 4928.143(C)(2)(b) (emphasis added).

Duke's electric security plan will expire before it has an additional electric security plan approved.

And in reading the words carefully, as the PUCO must do, it is evident that what "shall" be continued (by PUCO order) are "the provisions, terms, and conditions of the utility's most recent *standard service offer*." The standard service offer is not the same as the utility's "electric security plan."

The standard service offer is defined by R.C. 4928.141 as "all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service."[18] Alternatively, a utility's "electric security plan" is much broader and may contain a myriad of provisions unrelated to the supply of the standard service offer. For instance, in Duke's electric security plan, there were many riders, including the distribution capital investment rider, that do not relate to the supply and pricing of generation service, i.e. the standard service offer.[19] The distribution capital investment rider charge (like the many other riders) comes in through R.C. 4928.143(B)(2), as a provision of an electric security plan, separate and apart from the "provisions relating to the supply and pricing of electric generation service" (i.e, the standard offer) under R.C. 4928.143(B)(1).

Duke's claim that the PUCO has authority, under the present circumstances, to continue the provisions, terms, and conditions of its existing electric security plan under

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[18] In this regard, several of Duke's riders could be considered as part of the standard service offer that was extended by PUCO Order: Retail Capacity Rider, Retail Energy Rider, and the Supplier Cost Reconciliation Rider. The PUCO however, did not specifically extend these riders when requiring Duke to procure power for the standard offer.

[19] For instance, Rider UE-GEN, Rider NM, Rider DDR, Rider DSR, Rider DR-ECF, Rider LFA, and Rider BDP.

R.C. 4928.143(C)(2) is just plain wrong. The words in the statute are much more limited and focus on continuing the utility's standard service offer, not on continuing a utility's electric security plan. What Duke is asking for is beyond the PUCO's authority. Duke's request must be rejected.

B. Duke's request to extend its electric security plan is nothing more than an untimely request for rehearing of the end date for its electric security plan. The PUCO has no jurisdiction to consider a late request for rehearing.

When the PUCO approved Duke's current electric security plan, the PUCO anticipated that issues could arise if Duke's next standard service offer was not effective before the ending date of Duke's electric security plan, May 31, 2018. In this regard the PUCO directed Duke to file its next application for a standard offer no later than June 1, 2017.[20] The PUCO also ruled that, if a subsequent standard offer is not authorized by April 1, 2018, Duke was to procure power to be deliverable to standard offer customers on June 1, 2018, until a subsequent standard offer is authorized.[21] Notably, the PUCO did not make allowances for continuing Duke's electric security plan (and charging consumers for the 14 riders) beyond the end date that Duke requested (and the PUCO approved) for its electric security plan -- May 31, 2018. And Duke did not seek rehearing asking for its electric security plan to continue beyond May 31, 2018, even if there was no new electric security plan approved by that date.[22]

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[20] Opinion and Order at 51.

[21] Opinion and Order at 51 (Apr. 2, 2015).

[22] *See* Duke Application for Rehearing (May 4, 2015).

Instead, Duke complied with this aspect of the PUCO's Order[23] and held two auctions for the standard offer load on February 20, 2018 and February 27, 2018. The auctions included one, two and three-year products to supply a standard service offer to Duke's Ohio utility customers. The power is to be supplied to serve standard offer customers beginning June 2018. The PUCO accepted the results of Duke's wholesale auctions which set the standard offer rates to Duke's customers through May 2021. Duke's obligation to provide a standard offer to customers under R.C. 4928.141 has been satisfied.[24]

But now, Duke is seeking to continue its electric security plan, with all of its riders, until the PUCO approves Duke's next electric security plan. Duke is seeking to modify the PUCO's Order establishing, inter alia, May 31, 2018 as the definitive end date for its electric security plan.

The proper place to request a modification to a PUCO Order is in an application for rehearing. Under R.C. 4903.10, after any order has been issued by the PUCO, any party may apply for rehearing with respect to any of the matters determined in the proceeding.[25] This provision of the Code requires that the application for rehearing shall be filed within thirty days after the Order has been entered on the journal of the Commission. Further, the statute specifies that "[n]o cause of action arising out of any

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[23] *But see*, Correspondence (June 30, 2015), where Duke admitted it was not complying with the PUCO Order to pursue the divestiture or transfer of its contractual investment in OVEC, while its application for rehearing is pending.

[24] Despite Duke's protestations otherwise, there is no inability (on Duke's end) to fulfill its obligation to provide a standard service offer. *See* Duke Motion at 3 (claiming that it seeks to avoid a situation in which it is unable to fulfill its statutory obligation to provide an SSO).

[25] *See, also,* Ohio Admin. Code 4901-1-35(A), also requiring the filing of an application for rehearing within thirty days after issuance of a PUCO order.

order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for rehearing." A "proper application" is one that meets, inter alia, the thirty-day deadline for rehearing.

Duke cannot avoid the requirements of the law[26] by calling its filing a "motion to continue the riders included in the electric security plan." The Commission should treat the motion as a late-filed application for rehearing of the PUCO's April 2, 2015 Order. "The logic of words should yield to the logic of realities."[27] The reality is that this is an untimely application for rehearing. Requests for rehearing were to be made on or before May 4, 2015. Duke is out of luck and out of time.

And, where no application for rehearing is filed within thirty days as required, the PUCO has no power to entertain it.[28] Thus, the PUCO fundamentally lacks jurisdiction on this matter. It must, under the law, reject Duke's motion.

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[26] *See, e.g.*, *In re Application of Duke Energy Ohio, Inc. for the Establishment of a Charge Pursuant to Section 4909.18 Revised Code*, Case No. 12-2400-EL-UNC, Opinion & Order (Feb. 13, 2014) (dismissing utilities' application because the issues raised should have been raised in an application for rehearing); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Entry at ¶ 15 (Dec. 22, 2012)(ruling that utility could not avoid the requirements of the PUCO's rules on interlocutory appeals by calling its filing an application for rehearing, rather than an interlocutory appeal)(citing *In re Cincinnati Gas & Electric Company,* Case No. 05-59-EL-AIR, Entry at 2 (Nov. 3, 2005)); *In re Application of the E. Ohio Gas Co. d/b/a/ Dominion E. for Authority to Increase Rates for its Gas Distrib. Serv.*, Case No. 07-829-GA-AIR, Entry (Sept. 23, 2009) (denying utility's motion to reopen case and for a waiver request on the grounds that it was an untimely application for rehearing).

[27] U.S. Supreme Court Justice Brandeis, *DeSanto v. Pennsylvania* (1927), 273 U.S. 34, 43.

[28] *Greer v. Pub. Util. Comm.,* (1961), 172 Ohio St. 361; *Dover v. Pub. Util. Comm.,* (1933), 126 Ohio St. 438.

C. Duke is precluded under the doctrines of res judicata and collateral estoppel from re-litigating its Electric Security Plan.

It is both routine and appropriate for the PUCO as well as courts throughout Ohio (and the United States) to dismiss causes when parties try to re-litigate what has already been litigated to a final judgment. This judicial policy has been referred to as "res judicata" and "collateral estoppel." The United States Supreme Court held that:

> The doctrine of res judicata rests at bottom upon the ground that the party to be affected…has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction.[29]

Under Ohio law, res judicata means that "a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action."[30] Res judicata not only precludes re-litigation of issues raised and decided in a prior action. The doctrine also "applies even to instances in which a party is prepared to present new evidence or new causes of action not presented in the first action, or to seek remedies or forms of relief not sought in the first action."[31] The Supreme Court of Ohio has stated that:

> A party can not re-litigate matters which he might have interposed, but failed to do in a prior action between the same parties or their privies, in reference to the same subject matter. And if one of the parties failed to introduce matters for the consideration of the court

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[29] *Postal Telegraph-Cable Company v. Newport,* (1917), 247 U.S. 464, 476, 62 L. Ed. 1215, 1221.

[30] *Grava v. Parkman Tshp.,* (1995), 73 Ohio St.3d 379, 653 N.E.2d 226, syllabus. In *Grava*, the Court defined a single transaction or occurrence as one "based on a claim arising from a nucleus of facts that was the subject matter of his first application." *Id.* at 383.

[31] *American Home Products Corporation v. Roger W. Tracy,* (2003), 152 Ohio App.3d 267 (Ct. Apps., 10th Dist.); *Ron Thomas, Sr. v. Restaurant Developers Corp*., (1997), 1997 Ohio App. LEXIS 3062.

> that he might have done, he will be presumed to have waived his right to do so.[32]

While res judicata pertains to re-litigating a cause of action, collateral estoppel pertains to re-litigating *issues* in a later case involving a different cause of action. The Supreme Court of Ohio characterized "collateral estoppel" as precluding the re-litigation of an issue that has been "actually and necessarily litigated and determined in a prior action."[33] "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."[34]

Both of these doctrines apply to hearings before the PUCO.[35] According to the Court, "where an administrative proceeding is of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding."[36] The Court has also held that the doctrine of res judicata may be used to bar litigation of issues in a second administrative proceeding.

The Duke electric security plan proceeding was clearly judicial in nature and provided parties the opportunity to litigate the issues. In the Duke electric security plan proceeding, the PUCO provided notice, held an evidentiary hearing, and provided parties

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[32] *Covington and Cincinnati Bridge Co. v. Sargent,* (1875), 27 Ohio St. 233, 237-38.

[33] *New Winchester Gardens, Ltd. v. Franklin Cty. Brd. Of Revision,*(1997), 80 Ohio St.3d 36, 41, 684 N.E.2d 312.

[34] Restatement of the Law, Second, Judgments, Section 27.

[35] *Superior's Brand Meats, Inc. v Lindle,* (1980), 62 Ohio St.2d 133, *403 N.E.2d 996, syllabus; Office of Consumers' Counsel v. Pub. Util. Comm., (1985), 16 Ohio St.3d 9, 10, 475 N.E.2d 782.*

[36] *Superior's Brand Meats, Inc. v. Lindley*, 62 Ohio St.2d 133 (syllabus).

the opportunity to introduce evidence. Thus, the PUCO acted in its judicial capacity in resolving the proceeding. The PUCO issued a decision on the merits of the application and approved rates that customers began to pay on June 1, 2015. For the purposes of res judicata, the case was litigated to a final judgement, notwithstanding applications for rehearing. Consequently, collateral estoppel and res judicata may be used to bar litigation of these same issues in a second administrative proceeding.[37]

Historically, in order to apply the doctrine of res judicata and collateral estoppel, both the parties and issues in the two proceedings would have to be the same.[38] In this instance, these criteria are met. Duke, the applicant in this proceeding, is the very same party who earlier litigated the issues involved with its electric security plan, including the term of its plan. And the issues the Duke now seeks to raise are also the same as those that were present in the earlier phases of its electric security plan proceeding.

Now, Duke is attempting to re-litigate the terms of its electric security plan. The PUCO should dismiss Duke's Application on res judicata and collateral estoppel grounds.

In *National Amusements, Inc. v. Springdale* (1990), 53 Ohio St.2d 60, the Supreme Court of Ohio recognized the importance of having doctrines such as res judicata and collateral estoppel:

> It has long been the law of Ohio that 'an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit.' * * * '[W]here a party is called upon to make good his cause of action * * *, he must do so by all the proper means within his control, and if he fails in that respect * * *, he will not afterward be

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[37] *Id.* at 135.

[38] *Whitehead v. Gen. Tel. Co.*, (1969), 20 Ohio St.2d 108, 112.

> permitted to deny the correctness of the determination, nor to relitigate the same matters between the same parties.'* * * The doctrine of res judicata 'encourages reliance on judicial decisions, bars vexatious litigation, and frees the court to resolve other disputes.' * * * 'Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if * * * conclusiveness did not attend the judgments of such tribunals ***.'[39]

The PUCO, in applying these doctrines, has primarily emphasized whether parties have been afforded one fair opportunity to litigate a claim or issue. The PUCO has noted that it is guided by the following general policy considerations: (1) fairness to the prevailing party requires that it not be subjected to the expense and potential harassment associated with re-litigating matters which were, or should have been, litigated in an earlier action, and (2) judicial economy requires that litigation arising from a particular controversy not be continued indefinitely.[40]

Duke was afforded one fair opportunity to litigate its electric security plan. That opportunity is long gone. Duke's attempt to get a second bite at the regulatory process should not be permitted.

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[39] *Id.* at 62. (Citations omitted and emphasis supplied).

[40] *See, e.g., In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of The Toledo Edison Company and Related Matters*, Case No. 86-05-EL-EFC, Entry at ¶5 (Nov. 10, 1986).

D. If the PUCO extends the electric security plan, it should also require the tariff language to be amended to allow refunds for customers on charges that are imprudent or unjust and unreasonable.

On January 24, 2018, the Supreme Court of Ohio issued a decision in an appeal of the PUCO's Order in FirstEnergy's alternative energy rider case.[41] Like most of the riders in Duke's electric security plan, FirstEnergy's alternative energy rider was updated periodically and new rates automatically went into effect in 30 days unless the PUCO ruled otherwise.[42] The PUCO subsequently audited FirstEnergy's rider, and based on the audit, ordered FirstEnergy to return more than $43 million in imprudently incurred charges to customers.[43]

On FirstEnergy's appeal, the Court determined that the automatic approval of FirstEnergy's quarterly filings constituted PUCO approval of new rates.[44] The Court also emphasized that the alternative energy rider tariff did not state that the rates were subject to refund.[45] Thus, even though the order approving FirstEnergy's alternative energy rider stated that the utility could only collect prudently incurred costs,[46] the Court held that the PUCO's order to refund the overcharges to customers was unlawful retroactive

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[41] *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.,* Slip Opinion No. 2018-Ohio-229.

[42] *See id.*, ¶18.

[43] *See id.*, ¶10.

[44] *See id.*, ¶18.

[45] *Id.*, ¶19.

[46] *See id.*, ¶8.

ratemaking.[47] Consumers, thus, were forced to pay $43 million to FirstEnergy even though the PUCO found the charges were imprudent.

In reaching this decision, the Court relied on the "filed rate doctrine" of R.C. 4905.32. The Court concluded that because FirstEnergy had collected costs from customers under a "filed" rate schedule, the PUCO was prohibited from later ordering a disallowance or refund of those costs.[48] The Court noted that although FirstEnergy was entitled to collect only prudently incurred costs from customers, "there can be no remedy in this case because the costs were already recovered."[49]

The Court's decision has far-reaching and negative ramifications for consumers who pay utility charges through riders that are periodically updated, subject to prudence reviews, and/or automatically approved. Duke's electric security plan features 14 riders that have some, if not all, of these attributes. Unless the PUCO takes action to conform these riders to the Court's decision, the PUCO's review of these riders could be rendered meaningless.[50] Consumers could be overcharged for utility service without any way to be reimbursed. This circumstance can result in an unfair windfall for utilities who are already benefiting (to the detriment of consumers) from an exception to traditional regulation that allows single-issue ratemaking (for riders) in Ohio's 2008 energy law.[51]

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[47] *Id.*, ¶20.

[48] *Id.*, ¶18.

[49] *Id.*

[50] *See id.,* ¶85 (dissent of Justice French).

[51] *See FirstEnergy,* ¶18.

Should the PUCO decide to extend Duke's ESP (which it should not), then to protect consumers, the PUCO should take the following actions regarding the riders that Duke is seeking to extend:

First, the PUCO should not allow quarterly rider updates to be automatically approved. Under the Court's decision, automatic approval would make the rate a "filed" rate that is not subject to refund through an annual prudency review.

Second, the PUCO, in extending the riders, should require Duke to amend its tariffs to state that the tariff is being collected, subject to refund. This would help protect consumers' interest in having the rider rates adjusted as a result of any subsequent PUCO review.[52]

And third, the PUCO should order that tariffs for riders that are subject to prudency reviews (e.g., the distribution capital investment rider) include language that the approved rate is subject to refund to consumers who paid it. OCC recommends the following language be required: "Any charge collected from customers under this tariff that is later determined to be unlawful, imprudent, or unreasonable by the PUCO or the Supreme Court of Ohio is refundable to customers."

All of the 14 riders at issue in Duke's electric security plan could be affected by the Court's *FirstEnergy* decision.[53] The PUCO should conform Duke's tariffs to address the Court's decision to deter later claims that the periodic reviews of the riders result in a

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[52] The PUCO has in recent tariff filings, approved tariff language to address the *FirstEnergy* decision. *See, e.g., In the Matter of the Application of Ohio Power Company to Update Its Gridsmart Phase 2 rider*, Case No. 17-1156-EL-RDR, Finding and Order (Feb. 28, 2018). Doing so in this proceeding, would be consistent with the actions the PUCO has already taken.

[53] They are all subject to some form of review, whether it be prudency or financial/true-up or both. The 14 riders are Distribution Capital Investment Rider, Rider UE-GEN, Rider NM, Rider DDR, Rider DSR, Rider DR-ECF, Rider LFA, Rider BDP, Rider RC, Rider RE, Rider PSR, Rider SCR, Rider AER, Rider BTR.

"filed" rate that cannot be adjusted (reduced) for consumers' protection. This should not happen, as it would render meaningless the PUCO's review of the electric security plan riders and render single-issue ratemaking all the more unfair. And consumers could be harmed.

It would be especially unfair to customers and violate the public interest to grant Duke's motion to allow its riders to continue, without language protecting customers from paying unreasonable, unjust, or imprudent charges. The PUCO should require the tariffs of Duke's 14 riders to be amended, as suggested by OCC.

E. The PUCO should strike Ohio Energy Group's memorandum in support of Duke's Motion.

On March 12, 2018, the Ohio Energy Group filed a "Memorandum in Support" of Duke's motion. OEG states that is "does not oppose Duke's Motion," but requests that the PUCO explicitly rule that all provisions, terms, and conditions of the Company's current ESP, including the large customer interruptible load program, continue through whatever time the PUCO considers appropriate.[54] OEG further comments that it would be unworkable to approve only a continuation of Duke's riders without similarly continuing other parts of the electric security plan.

Under the PUCO rules after a party has filed a motion, any party may file a memorandum contra.[55]The PUCO rules, however, do not permit parties to file in support of a motion. OEG did not follow the rules. OEG's filing was improper. The PUCO should strike it and ignore it when considering the merits of Duke's motion.

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[54] OEG Memorandum in Support at 1 (Mar. 12, 2018).

[55] Ohio Admin. Code 4901-1-12(B)(1).

Striking OEG's memorandum in support is consistent with the rules and PUCO precedent.[56] And it is fair. All parties need to follow the rules.

II. CONCLUSION

The PUCO should end the unjust and unreasonable electric security plan rates of Duke, on May 31, 2018, as it originally ordered. While the General Assembly allowed in law for a standard offer to be continued, it did not grant the PUCO the statutory authority to extend a utility's electric security plan. The PUCO is bound to follow the law, not create the law. Duke's motion must be rejected.

Respectfully submitted,

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[56] *See, e.g.*, *In the Matter of the Investigation into SBC Ohio's Entry into In-Region InterLATA Service*, Case No. 00-942-TP-COI, Entry on Rehearing at 8-9 (Aug. 26, 2003); *In the Matter of the Report of Duke Concerning Energy Efficiency and Peak Demand Reduction Programs*, Case No. 09-1999-EL-POR, Opinion and Order at 4 (Dec. 15, 2010).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served via electronic transmission upon the parties this 19th day of March, 2018.

/s/ Maureen R. Willis
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Summary: Memorandum Memorandum Contra Duke Energy Ohio, Inc.’s Motion to Continue Charging its Customers for Riders by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.