

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Application of Duke)	
Energy Ohio, Inc. for Authority to)	Case No. 14-841-EL-SSO
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.)	

In the Matter of Application of Duke)	
Energy Ohio, Inc. for Authority to)	Case No. 14-842-EL-ATA
Amend its Certified Supplier Tariff,)	
P.U.C.O. No. 20.)	

**MEMORANDUM CONTRA DUKE ENERGY OHIO, INC.'S
MOTION TO INCREASE CHARGES TO ITS CUSTOMERS FOR
DISTRIBUTION INVESTMENT
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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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 others² 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 gateway³ 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 ("Rider DCI") 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 It was not until March 21, 2018, almost three years later, that the PUCO ruled on the parties' rehearing claims.⁸ The PUCO's delay 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.

On March 9, 2018, Duke filed a motion seeking to extend all the rider charges (including Rider DCI) that were approved in its earlier electric security plan. In that motion, Duke indicated that "[s]ignificantly, Duke Energy Ohio is not, at this time,

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).

⁸ *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, Second Entry on Rehearing (Mar. 21, 2018).

requesting an alteration of the current 2018 cap applicable to Rider DCI and instead submits that it is capable of continuing proactive investments under the rider's 2018 cap of \$35 million through at least July 2018."⁹ In that filing, Duke also sought PUCO confirmation that Rider DCI would continue in its current form, subject to the existing \$35 million cap, "until the earlier of August 1, 2018, or the effective date of the Company's fourth SSO."¹⁰ It went on to claim that "[n]otably, no party would be prejudiced by the sought after confirmation, given that Duke Energy Ohio is not currently seeking relief from the existing cap."¹¹

But in less than two months' time, Duke has changed its mind. In this filing Duke is seeking "relief from the existing cap" despite its earlier representations otherwise. Duke now seeks to charge customers more than the \$35 million (the existing 2018 cap) it was authorized to charge customers for 2018. Duke seeks to continue to charge

⁹ *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer*, Case No. 14-841-EL-SSO, Motion of Duke Energy Ohio Inc., to Continue the Riders Included in the Electric Security Plan Approved Herein and Memorandum in Support at 2-3(Mar. 9, 2018). ("Duke Motion to Continue Charging Customers under expiring ESP").

¹⁰ *Id.* at 5.

¹¹ *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer*, Case No. 14-841-EL-SSO, Duke Motion to Continue Charging Customers under expiring ESP at 5 (Mar. 9, 2018). OCC opposed that motion.

See In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer, Case No. 14-841-EL-SSO, OCC Memorandum Contra Duke Energy Ohio, Inc.'s Motion to Continue Charging Its Customers for Riders (Mar. 19, 2018).

customers under Rider DCI at the rate of \$7 million per month, until the PUCO decides its pending electric security plan application.¹²

That means that if Duke gets its way, beginning June 1, 2018, customers will pay \$7 million each month (under an extended Rider DCI), until the PUCO issues its decision in the pending ESP. Duke speculates that an order approving the next electric security plan "will not likely be issued, at the earliest, until late third quarter or the early part of fourth quarter of 2018."¹³ If Duke is correct in its assessment, that means that customers will potentially pay almost \$30 million more under Rider DCI (in addition to the \$35 million paid in the first five months of 2018), than the PUCO approved.

The PUCO should deny Duke's request. Duke asks for something the PUCO did not approve. The PUCO approved charging customers \$35 million for distribution investment (under Rider DCI) during the first five months of 2018. No more and no less. The PUCO has no jurisdiction to approve Duke's request for a \$30 million rate increase (in the form of single issue ratemaking) to customers. Customers will be harmed under Duke's request because they will pay more money (\$30 million more) to Duke than the PUCO approved. Not even Duke can claim "no party will be prejudiced" by its latest request to increase rates to customers by approximately \$30 million.

And 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 elements (such as Rider DCI) of an approved security plan*.

¹² *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer*, Case No. 14-841-EL-SSO, Motion of Duke Energy Ohio, Inc., to Continue the Cap for Rider DCI (May 11, 2018). ("Duke Motion to Charge Customers more than Rider DCI cap").

¹³ *Id.* at 5.

Additionally, Duke's request for an extension of Rider DCI (and a new cap for 2018) is nothing more than a belated request for rehearing on the 2018 cap. 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.

A. Customers should not be charged \$30 million for additional distribution investment because there is no law that allows the PUCO to increase rates to customers 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 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,

¹⁴ *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer*, Case No. 14-841-EL-SSO, Duke Motion to Continue Charging Customers under expiring ESP at 3.

¹⁵ Duke Motion to Continue Charging Customers under expiring ESP at 4-5. (Emphasis added).

¹⁶ Duke Motion at to Continue Charging Customers under expiring ESP, footnote 13.

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. 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 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

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

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 R.C. 4928.143(C)(2) is just plain wrong. What Duke is asking for is beyond the PUCO's authority. Duke's request must be rejected.

B. Duke's request for a \$30 million increase to customers is nothing more than an untimely request for rehearing. 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,

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.

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 the remaining elements of 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 Neither did Duke seek rehearing on the \$35 million cap on DCI charges to customers.

Instead, Duke complied with this aspect of the PUCO's Order²³ 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

²⁰ Opinion and Order at 51.

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

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

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).

But now, Duke is seeking to continue its electric security plan, and create new charges to customers for Rider DCI, charges that are to remain in effect 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 Rider DCI. Duke also presses to modify the PUCO's determination that \$35 million is all that customers are obligated to pay in 2018 under Rider DCI.

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 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.

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.

Duke cannot avoid the requirements of the law²⁶ by calling its filing a “motion to continue the cap for Rider DCI.” 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.

C. Duke is precluded under the doctrines of res judicata and collateral estoppel from seeking to charge customers \$30 million more under Rider DCI.

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:

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.

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 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

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.

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

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 the opportunity to introduce evidence. Thus, the PUCO acted in its judicial capacity in resolving the proceeding, including determining the length of the DCI rider and the cap on the amount customers pay under the rider. The PUCO issued a decision on the merits of the application and approved rates that customers began to pay on June 1, 2015.

³³ *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. 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).

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 that 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-- in this motion it seeks to relitigate the terms of Rider DCI. The relitigation will mean that customers may end up paying \$30 million more under Rider DCI. That is not just or reasonable. 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 permitted to deny the correctness of the determination, nor to relitigate the same matters between the same parties.' * * * The

³⁷ *Id.* at 135.

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

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 and provisions in its electric security plan, including Rider DCI. That opportunity is long gone. Duke’s attempt to get a second bite at the apple should not be permitted. Duke’s second bite comes at too high a cost for customers (\$30 million).

D. If the PUCO allows Duke to continue to charge its customers under Rider DCI, then it should reduce the \$7 million monthly charge because otherwise customers will be deprived of the tax savings associated with the Tax Cuts and Jobs Act of 2017.

As explained, the PUCO should not allow Duke to continue to charge its customers \$7 million per month under Rider DCI, as if the PUCO cap for 2018 (\$35

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).

million) did not exist. However, should the PUCO allow Duke to extend Rider DCI and charge customers additional amounts for distribution investment beyond the \$35 million cap, the PUCO should lower the average \$7 million per month cap for Rider DCI to allow customers to receive tax savings associated with the Tax Cuts and Jobs Act of 2017 (Tax Cut Law).

The Tax Cut Law became effective on January 1, 2018. The Tax Cut Law reduced the federal corporate income tax rate from 35% to 21%. The federal corporate income tax rate is included in the calculation of Duke's Rider DCI rate cap. When the DCI Rider rate cap was approved by the PUCO in this case, the tax rate was 35%. However, the tax rate had been changed to 21%. Thus, the Rider DCI rate cap should be calculated with the new tax rate, so that customers receive the full benefit of the reduced taxes. If the new tax rate is not used, then the Rider DCI rate cap would be overstated, which would allow Duke to spend more under the Rider than contemplated by the PUCO. The end result would be that not all of the impacts resulting from the Tax Cut Law would be returned to customers, contrary to the PUCO's expressed intention otherwise.⁴¹

Unless the Rider DCI rate cap is reduced to address the tax rate reduction, Duke's spending will be unreasonably high and higher than the PUCO contemplated when it approved the DCI Rider rate cap based upon the high corporate income tax rate. The PUCO, if it is to order Rider DCI to continue (which it should not), should recalculate the Rider DCI rate cap for 2018, using the current federal corporate income tax rate of 21%.

⁴¹ See *In the Matter of the Commission's Investigation of the Financial Impact of the Tax Cuts and Jobs Act of 2017 on Regulated Ohio Utility Companies*, Case No. 18-47-AU-COI, Second Entry on Rehearing at ¶1 (Apr. 25, 2018).

II. CONCLUSION

The PUCO should end the unjust and unreasonable electric security plan rates of Duke, on May 31, 2018, as it originally ordered. That should mean an end to Duke's customers paying \$7 million per month under Rider DCI. 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. Nor did it grant the PUCO authority to extend certain provisions of an electric security plan, including in this case, Duke's Rider DCI. That collection was to end May 31, 2018, as the PUCO ordered, with customers paying no more than \$35 million for distribution investment in 2018. The PUCO is bound to follow the law, not create the law. Duke's motion to collect approximately \$30 million more from customers (under Rider DCI) must be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served via electronic transmission upon the parties this 15th day of May, 2018.

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Summary: Memorandum Memorandum Contra Duke Energy Ohio, Inc.'s Motion to Increase Charges to its Customers for Distribution Investment by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.