

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Annual Application of Duke)
Energy Ohio, Inc. for an Adjustment to Rider) Case No. 17-2318-GA-RDR
AMRP Rates.)

In the Matter of the Application of Duke Energy) Case No. 17-2319-GA-ATA
Ohio, Inc. for Tariff Approval.)

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

In this case the Public Utilities Commission of Ohio (“PUCO”) has approved a settlement reached between the PUCO Staff and Duke Energy Ohio, Inc. (“Duke”) that, among other issues, fails to return to customers over \$900,000 in tax savings that Duke received during the first four months of 2018 as a result of the Tax Cuts and Jobs Act of 2017.¹ The PUCO authorized Duke to collect nearly \$16 million from residential customers over a 12-month period through its Accelerated Main Replacement Program Rider (“AMRP”) for replacing pipes.²

OCC is the statutory representative of Duke’s 390,000 residential natural gas customers.³ To protect these customers, OCC files this application for rehearing to address two issues.⁴ First, consumers were denied the full benefit of the federal tax changes that reduced Duke’s tax bill. On January 1, 2018, Duke’s federal tax liability was

¹ Opinion and Order (April 25, 2018) (“Order”).

² Duke Exhibit 2 at Schedule 14.

³ See R.C. Chapter 4911.

⁴ This application for rehearing is authorized under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

reduced from 35% to 21%⁵ but the Settlement and the PUCO's Order failed to adjust for Duke's over-collection from January 1, 2018 through April 30, 2018.

Second, consumers should be protected by requiring Duke to file a rate case for a full rate review where all of Duke's revenues and expenses would be considered, including actual savings and benefits afforded from the AMRP program.⁶ Without such an examination, customers face unjust and unreasonable rates for the foreseeable future.

Accordingly, the Order was unjust, unlawful and unreasonable in the following respects:

ASSIGNMENT OF ERROR NO. 1: The PUCO unjustly, unlawfully, and unreasonably failed to protect customers when it failed to reduce rates to customers by the amount Duke over-collected in taxes due to the lower federal tax rate from January 1, 2018 through April 30, 2018.

- A. The PUCO violated Ohio law, R.C. 4905.22, Supreme Court of Ohio precedent, and its own precedent when it refused to reduce the charge to customers to account for known and measurable tax changes.
- B. The PUCO unjustly and unreasonably found that known and measurable tax adjustments are not ripe in a proceeding where it is setting rates.

ASSIGNMENT OF ERROR NO. 2: The PUCO unreasonably ignored the benefits to customers associated with a base rate case as well as its own regulatory policy when it failed to require Duke to file a base rate case.

The reasons in support of this application for rehearing are further set forth in the accompanying memorandum in support. The PUCO should grant rehearing and modify its Order as requested by OCC.

⁵ See Pub. L. No. 115-97 (2017) (the "Federal Tax Act").

⁶ See e.g., OCC Exhibit 3 at 8.

Respectfully submitted,

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Zachary E. Woltz
Zachary E. Woltz (0096669)
Counsel of Record
Terry L. Etter (0067445)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215-4213
Telephone: [Woltz] 614-466-9565
Telephone: [Etter] 614-466-7964
Zachary.woltz@occ.ohio.gov
Terry.etter@occ.ohio.gov
(will accept service via email)

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Federal Tax Act reduced Duke's federal corporate income tax liability rate from 35% to 21%, effective January 1, 2018. The benefits of a lower tax rate should flow through to customers who actually pay, through rates, Duke's tax liabilities. In this case, the PUCO approved Duke's annual application for its Rider AMRP. Yet, the PUCO Order did not fully adjust the rates to reflect the corporate tax reduction. Instead, the PUCO Order approved the rates that only reflect reductions based on the lower tax liability beginning May 1, 2018. Thus, Duke has over-collected for its federal tax liability for January 1, 2018 through April 30, 2018, which becomes a windfall for Duke's shareholders.

In addition, no new investments are being made under the AMRP. In 2015, Duke completed all projects associated with its main and riser replacements.⁷ But, Duke will continue to recover the net plant depreciation through its Rider AMRP. Sadly, customers continue to pay for the net plant depreciation without fully receiving the actual savings associated with the completion of the main replacement program implemented by Duke.

⁷ OCC Exhibit 2 at 3:5-7.

The PUCO Order is, therefore, unjust, unlawful, and unreasonable. The PUCO should modify or abrogate its Order so that the charge to customers through Rider AMRP will reflect the known and measurable federal tax reductions. Additionally, the PUCO should instruct Duke to file a base rate case so that customers will receive the benefits of reduced maintenance expenses and other operational efficiencies under the AMRP, that would result if new base rates are established.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.” OCC is an intervenor in this case⁸ and filed testimony regarding Duke’s Application and the Settlement.

R.C. 4903.10 requires that an application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” Additionally, Ohio Adm. Code 4901-1-35(A) states: “An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing.”

In considering an application for rehearing, R.C. 4903.10 provides that “the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.” The statute also provides: “[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be

⁸ See Entry (March 15, 2018).

changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.”

The statutory standard for abrogating or modifying the Order is met here. The PUCO should grant rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Order.

III. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The PUCO unjustly, unlawfully, and unreasonably failed to protect customers when it failed to reduce rates to customers by the amount Duke over-collected in taxes due to the lower federal tax rate from January 1, 2018 through April 30, 2018.

On December 22, 2017, the Tax Cut and Jobs Act of 2017 (“Federal Tax Act”) was signed into law, effective January 1, 2018.⁹ The Federal Tax Act reduced the federal corporate income tax rate from 35% to 21%. In Duke’s application it adjusted its rates to reflect the 21% tax rate beginning May 1, 2018.¹⁰ But, Duke repeatedly declined to adjust its rates starting January 1, 2018, to give customers the benefit of the full savings associated with the Federal Tax Act.

The PUCO Order in this proceeding erroneously determined that the over-collections of taxes from January 1, 2018 through April 30, 2018 are not ripe for determination.¹¹

⁹ See Pub. L. No. 115-97 (2017).

¹⁰ Duke Exhibit 2; OCC Exhibit 1 at 9:13-15.

¹¹ Order ¶46.

Thus, the PUCO did not adjust the rates to reflect the known and measurable tax savings when setting rates. But, this is contrary to Ohio law, Supreme Court of Ohio (“Court”) precedent and PUCO precedent. The PUCO erred. Rehearing should be granted.

A. The PUCO violated Ohio law, R.C. 4905.22, Supreme Court of Ohio precedent, and its own precedent when it failed to reduce the charge to customers to account for a known and measurable tax changes.

The PUCO’s failure to adjust the rates under rider AMRP results in an unlawful and unreasonable order. It is undisputable that Duke may recover costs associated with the payment of federal income taxes.¹² But, the Court has held that when the PUCO approves a tax rate different than one it knew would be assessed, its Order is arbitrary and unreasonable.¹³ In fact, the Court found that the PUCO has a duty to compute and assess the taxes that a utility will actually be assessed.¹⁴

In *General Tel. Co. v. Pub. Util. Com.*,¹⁵ the Court again found that the PUCO has a duty to adjust for known tax assessments. The Court held “the income tax which the company is required to pay to the federal government under the income tax law on its annual dollar return can be calculated mathematically according to the federal income tax law to an exact accurate amount.”¹⁶ The Court went on to say that doing otherwise is “contrary to law.”¹⁷

¹² *East Ohio Gas Co. v. Pub. Util. Com.*, 133 Ohio St. 212 (1938).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 174 Ohio St.575 (1963).

¹⁶ *Id.*

¹⁷ *Id.*

Here, the same duty applies. Duke's over-collection in taxes from January 1, 2018 through April 30, 2018 can be calculated mathematically to an exact accurate amount. In fact, OCC Witness Duann made the calculation that the over-collection is \$921,365.¹⁸ Thus, it would be arbitrary and unreasonable for the PUCO to not reduce Duke's AMRP rates by reducing the charge customers pay through the rider.

In addition to being arbitrary and unreasonable, failing to reduce Duke's AMRP rates is inconsistent with PUCO precedent. The Court has instructed the commission to "respect its own precedents in its decisions to assure the predictability which is essential in all areas of law, including administrative law."¹⁹ In addition, the Court instructs the PUCO that when it does depart from a precedent it *must* explain why and the new order must be substantively reasonable and lawful.²⁰ Sadly, the PUCO has departed from prior precedent with no explanation. Additionally, the order is not substantively reasonable or lawful.

The PUCO precedent on this matter is clear. In Case No. 86-2025-EL-AIR, the PUCO approved rates that reflected the federal income tax rate the company actually paid as opposed to a previous higher rate.²¹ PUCO Staff had testified that "the Commission has consistently ruled that known and measurable tax changes should be recognized in the revenue requirement calculation."²² In addition the PUCO's order in that case recognized that its ruling "is in keeping with prior Commission decisions."²³ Thus, the

¹⁸ OCC Exhibit 1 at 13:20-21.

¹⁹ *In re Ohio Power Co.*, 144 Ohio St.3d 1 (2015) ¶16.

²⁰ *Id.* ¶17.

²¹ Case No. 86-2025-EL-AIR, Opinion and Order (December 16, 1987).

²² *Id.*

²³ *Id.*

PUCO's own precedent requires that Duke's AMRP rates be reduced to reflect the known and measurable over-collection of federal income tax.

The over-collection of federal income taxes must be passed along to customers in this proceeding. There is no statute, Court precedent, or PUCO precedent that allows the PUCO simply to avoid the question in hopes of dealing with it in another proceeding. Thus, the PUCO must adjust the AMRP to reflect the over-collection of taxes for January 1, 2018 through April 30, 2018. Its failure to do so makes its Order unjust, unreasonable and unlawful. Rehearing should be granted.

B. The PUCO unjustly and unreasonably found that known and measurable tax adjustments are not ripe in a proceeding where it is setting rates.

The PUCO broadly held, "[t]he Commission has already determined that OCC's proposals in these cases are not ripe for our consideration of Duke's application and the Stipulation, and are more appropriately addressed in the *Tax COI Case*."²⁴ But, the PUCO's determination is wrong for two reasons.

First, the PUCO misinterprets the ripeness doctrine. The ripeness doctrine requires a dispute to have reached a point where the facts have developed sufficiently to permit an intelligent and useful decision to be made.²⁵ This proceeding has all the elements required to make the over-collection of taxes ripe for review by the PUCO. There is a dispute as to whether Duke must flow the over-collection of taxes from January 1, 2018 through April 30, 2018 back to customers. The facts have developed to the point where parties have quantified the over-collection, briefed the legal issues, and presented evidence in support of positions. The PUCO is now capable of making an

²⁴ *Id.*

²⁵ Black's Law Dictionary 1524 (Bryan A. Garner ed., 10th ed. 2009).

intelligent and useful decision to pass on the over-collection of taxes back to customers.

Additionally, pushing the issue off to the generic tax investigation case makes little sense and is likely to unreasonably delay customers getting refunds for the overpayment that occurred in the first quarter of 2018. This delay directly contradicts a previous PUCO order. In Case No. 17-2280-EL-RDR, the PUCO rejected OCC's tariff language finding that it would delay the rate reduction as a result of the Federal Tax Act.²⁶ The PUCO opined that it "is already prioritizing the issues related to the reduction in the federal corporate income tax rate for all utility companies."²⁷ Sadly, the PUCO seems to have departed from this position by failing to address the known over-collection for taxes in this case.

Further, the AMRP is adjusted for over- or under-collection annually.²⁸ But Duke argues that the over-collection for taxes should be handled in the Tax COI.²⁹ Duke repeatedly argues that the Tax COI is best to address any "filed rates" issues.³⁰ But, the PUCO, in this proceeding, has the opportunity to address this issue where there is an adjustment mechanism (in the AMRP) that allows customers to receive the savings associated with over-collection.

Second, the PUCO has already approved other applications that address the same issues raised in this proceeding. The PUCO has approved Columbia Gas of Ohio applications and settlements that adjusted for lower federal income tax liability beginning

²⁶ *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company, to Modify Rider DMR Rates*, Case No. 17-2280-EL-RDR, Finding and Order (February 28, 2018) ¶17.

²⁷ ¶17.

²⁸ Order ¶4.

²⁹ Merit Brief of Duke Energy Ohio at 6-7.

³⁰ *Id.*

January 1, 2018.³¹ In addition, the PUCO has approved East Ohio Gas Company's application and settlement that adjusted for lower federal income tax liability beginning January 1, 2018.³² It is arbitrary and capricious for the PUCO to address the over-collection of taxes in other cases only to claim the same issue is not ripe in this proceeding.

Contrary to the PUCO's decision, the over-collection of federal income tax from January 1, 2018 through April 30, 2018, is in fact ripe and ready for the PUCO's review. Duke has presented no factual support for why the PUCO should not address this issue as it has with Columbia Gas and East Ohio Gas. The PUCO erred when it failed to address the over-collection in this proceeding.

ASSIGNMENT OF ERROR NO. 2: The PUCO unreasonably ignored the benefits to customers associated with a base rate case as well as its own regulatory policy when it failed to require Duke to file a base rate case.

Duke is not replacing any new mains or risers under rider AMRP. Duke completed all work under rider AMRP in 2015.³³ But, the PUCO failed to instruct Duke to file a base rate case on the grounds that customers would see more benefits from reduced rider rates (with declining depreciation) than they would experience if net plant depreciation was fixed in a rate case. Duke argued, and the PUCO accepted, an illusory benefit that future rider filings will reflect a lower revenue requirement and customers will benefit from a lower rate.³⁴ There is no dispute that the revenue requirement will

³¹ *In the Matter of the Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 17-2374-GA-RDR, Opinion and Order (Apr. 25, 2018).

³² *In the Matter of the Application of the East Ohio Gas Company D/B/A Dominion Energy Ohio to Adjust its Pipeline Infrastructure Replacement Program Cost Recovery Charge and Related Matters*, Case No. 17-2177-GA-RDR, Opinion and Order (Apr. 18, 2018).

³³ OCC Exhibit 2 at 3:5-7.

³⁴ Opinion and Order ¶43.

decrease in coming years under Duke's rider. But, the lower revenue requirement through the rider does not mean that customers would not benefit even more from the lower operation and maintenance expenses that should result from the hundreds of millions of dollars Duke spent replacing mains.

As Duke argued, the revenue requirement is reduced each year as the assets associated with the AMRP depreciate.³⁵ But, Duke, and the PUCO, ignored the fact that the assets' depreciation follows a normal depreciation schedule. This depreciation will extend the life to Rider AMRP for at least 30 years, if not longer.³⁶ There is a small probability that Duke will not file a rate case in this time period. But, when Duke does file a base rate case the lower plant values (as a result of depreciation) will be part of the formula rates set, where lower plant values will equate to lower base rates for customers. At the same time, during a base rate case, Duke's expenses will be examined and customers will have the full opportunity to benefit from cost savings under the AMRP program. Duke's alleged benefits are merely illusory as the net plant depreciation will eventually be folded into base rates, lowering the rate base and corresponding rates to customers.

Contrarily, with no base rate case, Duke will continue to collect rates that do not reflect the full operational savings of the AMRP and other major smart grid projects funded through the Advanced Utility (AU) Rider that were completed since its 2012 rate case. Only through a rate case will customers have the opportunity to receive all savings associated with the AMRP, AU, and other programs.

³⁵ *Id.*

³⁶ The asset that depreciates the quickest has a life of 27.85 years while the asset that depreciates the slowest has a life of 53.48 years.

The PUCO has previously determined that it is prudent regulatory practice to conduct regular distribution cases.³⁷ Additionally, it is a prudent regulatory practice to gain a holistic understanding of regulated distribution companies' operations on a regular basis.³⁸ The time is ripe for a more holistic examination of Duke's revenues and expenses and to ensure that programs implemented by Duke are effective in providing safe, secure, and reliable services at a just and reasonable price.³⁹

IV. CONCLUSION

The PUCO should grant rehearing as requested by the OCC and order that (1) Duke's rates be reduced to reflect, for consumers, the over-collection of federal income taxes from January 1, 2018 through April 30, 2018; and (2) instruct Duke to file a base rate case. This will ensure that consumers are receiving both the benefits of Duke's reduced tax liability and operational savings associated with Duke's programs and services. In addition, it will assure that any rates Duke collects from its customers are just and reasonable.

³⁷ *In re the Application of Ohio Edison Co., the Cleveland Elec. Illuminating Co., and the Toledo Edison Co.*, Case No. 14-1297-EL-SSO, Eighth Entry on Rehearing (Aug. 16, 2017) ¶91.

³⁸ *Id.* ¶90.

³⁹ R.C. 4905.22.

Respectfully submitted,

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Zachary E. Woltz
Zachary E. Woltz (0096669)
Counsel of Record
Terry L. Etter (0067445)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215-4213
Telephone: [Woltz] 614-466-9565
Telephone: [Etter] 614-466-7964
Zachary.woltz@occ.ohio.gov
Terry.etter@occ.ohio.gov
(will accept service via email)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission, this 25th day of May 2018.

/s/ Zachary E. Woltz
Zachary E. Woltz
Assistant Consumers' Counsel

SERVICE LIST

steven.beeler@ohioattorneygeneral.gov

Rocco.Dascenzo@duke-energy.com

Jeanne.Kingery@duke-energy.com

Attorney Examiner:

Kerry.sheets@puc.state.oh.us

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Summary: App for Rehearing Application for Rehearing by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Woltz, Zachary E Mr.