

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates.	) ) )	Case No. 17-0032-EL-AIR
In the Matter of the application of Duke Energy Ohio, Inc., for Tariff Approval.	) )	Case No. 17-0033-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.	) )	Case No. 17-0034-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Modify Rider PSR.	) ) )	Case No. 17-0872-EL-RDR
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Amend Rider PSR.	) ) )	Case No. 17-0873-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.	) ) )	Case No. 17-0874-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service.	) ) ) ) ) ) ) ) )	Case No. 17-1263-EL-SSO
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Amend Its Certified Supplier Tariff, P.U.C.O. No. 20.	) ) ) )	Case No. 17-1264-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Vegetation Management Costs.	) ) )	Case No. 17-1265-EL-AAM

In the Matter of the Application of Duke)	
Energy Ohio, Inc. to Establish Minimum)	
Reliability Performance Standards	)	Case No. 16-1602-EL-ESS
Pursuant to Chapter 4901:1-10, Ohio)	
Administrative Code.)	

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

The Office of the Ohio Consumers' Counsel ("OCC") files this Application for Rehearing ("Application") to protect consumers from paying their utility hundreds of millions of dollars for charges such as the Price Stability Rider ("Rider PSR") to subsidize old, uneconomic coal plants that cannot compete in a market deregulated by the Ohio General Assembly over 16 years ago, and to protect consumers from paying hundreds of millions of dollars for a new smart grid, when Duke just finished installing its current one less than four years ago.¹ In its Opinion and Order of December 19, 2018 ("Opinion and Order"), the Public Utilities Commission of Ohio ("PUCO") approved a Joint Stipulation and Recommendation ("Settlement") filed in this case that includes a number of unlawful and unreasonable customer charges, including Rider PSR and charges for smart grid.

The Opinion and Order harms customers and is unreasonable and unlawful in the following respects:

ASSIGNMENT OF ERROR 1: The PUCO's Opinion and Order is unlawful and unreasonable because the PUCO found that it had jurisdiction to authorize charges to consumers through Rider PSR. But the PUCO's jurisdiction is preempted under federal law.

ASSIGNMENT OF ERROR 2: The PUCO's Opinion and Order is unlawful and unreasonable because it approved Rider PSR as a limitation on customer shopping without any record evidence, in violation of R.C. 4903.09 and this Court's precedent.

¹ See R.C. 4903.10 and O.A.C. 4901-1-35.

ASSIGNMENT OF ERROR 3: The Opinion and Order is unreasonable and unlawful because it violates R.C. 4909.15(A)(1) and 4903.09 because it allows Duke to charge customers for property (the Echelon metering system) that is not used and useful.

ASSIGNMENT OF ERROR 4: The Opinion and Order is unreasonable and unlawful because it violates R.C. 4903.09 and the PUCO's prior order in Case No. 10-2326-GE-RDR because there is no evidence that Duke included the customer benefits of smart grid in its base rate revenue requirement.

ASSIGNMENT OF ERROR 5: The Opinion and Order is unreasonable and unlawful because it approves Duke's proposed smart grid charges to customers (the "Ohio AMI Transition") without any finding that the Ohio AMI Transition will be cost-effective, as required by R.C. 4928.02, R.C. 4928.06, PUCO precedent, and the PUCO's recent PowerForward Roadmap.

ASSIGNMENT OF ERROR 6: The Opinion and Order is unreasonable and unlawful because it approves charges to customers under the PowerForward Rider without any finding that the investments under this rider will be cost-effective, as required by R.C. 4928.02, R.C. 4928.06, PUCO precedent, and the PUCO's recent PowerForward Roadmap.

ASSIGNMENT OF ERROR 7: The Opinion and Order is unreasonable and unlawful because it violates R.C. 4903.09 because it finds, contrary to all available evidence, that the Ohio AMI Transition is the "least cost option" and that "other alternatives were not demonstrated to be economical options."

ASSIGNMENT OF ERROR 8: The Opinion and Order is unreasonable and unlawful because it violates R.C. 4928.11(A) by failing to require Duke to provide safe and reliable service to its customers.

ASSIGNMENT OF ERROR 9: The Opinion and Order is unreasonable and unlawful because it violates Supreme Court of Ohio precedent by approving a settlement with distribution reliability standards that were established through an exclusionary settlement process involving only two of the three parties in the case.

ASSIGNMENT OF ERROR 10: The Opinion and Order is unreasonable and unlawful because it violates R.C. 4928.143(B)(2)(h) by approving continuation of the Distribution Capital Investment ("DCI") rider despite a misalignment in expectations for reliability between Duke and its customers.

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

Respectfully submitted,

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TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. STANDARD OF REVIEW	2
III. ERRORS	3
ASSIGNMENT OF ERROR 1: The PUCO’s Opinion and Order is unlawful and unreasonable because the PUCO found that it had jurisdiction to authorize charges to consumers through Rider PSR. But the PUCO’s jurisdiction is preempted under federal law.....	3
ASSIGNMENT OF ERROR 2: The PUCO’s Opinion and Order is unlawful and unreasonable because it approved Rider PSR as a limitation on customer shopping without any record evidence, in violation of R.C. 4903.09 and this Court’s precedent.	3
ASSIGNMENT OF ERROR 3: The Opinion and Order is unreasonable and unlawful because it violates R.C. 4909.15(A)(1) and 4903.09 because it allows Duke to charge customers for property (the Echelon metering system) that is not used and useful.....	5
ASSIGNMENT OF ERROR 4: The Opinion and Order is unreasonable and unlawful because it violates R.C. 4903.09 and the PUCO’s prior order in Case No. 10-2326-GE-RDR because there is no evidence that Duke included the customer benefits of smart grid in its base rate revenue requirement.....	8
ASSIGNMENT OF ERROR 5: The Opinion and Order is unreasonable and unlawful because it approves Duke’s proposed smart grid charges to customers (the “Ohio AMI Transition”) without any finding that the Ohio AMI Transition will be cost-effective, as required by R.C. 4928.02, R.C. 4928.06, PUCO precedent, and the PUCO’s recent PowerForward Roadmap.	10
ASSIGNMENT OF ERROR 6: The Opinion and Order is unreasonable and unlawful because it approves charges to customers under the PowerForward Rider without any finding that the investments under this rider will be cost-effective, as required by R.C. 4928.02, R.C. 4928.06, PUCO precedent, and the PUCO’s recent PowerForward Roadmap.....	13
ASSIGNMENT OF ERROR 7: The Opinion and Order is unreasonable and unlawful because it violates R.C. 4903.09 because it finds, contrary to all available evidence, that the Ohio AMI Transition is the “least cost option” and that “other alternatives were not demonstrated to be economical options.”	15

ASSIGNMENT OF ERROR 8: The Opinion and Order is unreasonable and unlawful because it violates R.C. 4928.11(A) by failing to require Duke to provide safe and reliable service to its customers.....	19
ASSIGNMENT OF ERROR 9: The Opinion and Order is unreasonable and unlawful because it violates Supreme Court of Ohio precedent by approving a settlement with distribution reliability standards that were established through an exclusionary settlement process involving only two of the three parties in the case.....	21
ASSIGNMENT OF ERROR 10: The Opinion and Order is unreasonable and unlawful because it violates R.C. 4928.143(B)(2)(h) by approving continuation of the Distribution Capital Investment (“DCI”) rider despite a misalignment in expectations for reliability between Duke and its customers.....	23
IV. CONCLUSION.....	24

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Opinion and Order in this case involving an electric security plan (“ESP”) has only confirmed what consumers have long known—that ESPs and settlements favor electric utilities and disfavor consumers and the State of Ohio. And while the typical ESP is bad, this one is even worse given that it has authorized a utility to charge customers above market prices to subsidize old, uneconomic coal plants, which can no longer compete in the competitive marketplace. This is contrary to competition and the intent of the Ohio General Assembly that passed S.B. 3 in 1999.² Just as bad, the Opinion and Order allows Duke to charge customers hundreds of millions of dollars for a new smart grid system, even though Duke just finished installing its current system less than four years ago, and even though Duke’s proposal is substantially more expensive than it needs to be. What is more, Duke will be allowed to spend all of this customer money on its electric grid even though it has failed in one of its primary obligations – supplying reliable service.

To protect consumers, the PUCO should grant rehearing and abrogate its Opinion and Order as requested by OCC.

² See Ohio Senate Bill 3, as passed by the 123rd General Assembly, 1999.

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 filed a motion to intervene in this proceeding, which was granted. OCC also filed testimony regarding the application, the Settlement, and participated in the evidentiary hearing on 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.” In addition, 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 changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.”

The statutory standard for abrogating some portions of the Opinion and Order and is met here. The PUCO should grant and hold rehearing on the matters specified in this Application, and subsequently abrogate or modify its Opinion and Order. The PUCO’s ruling was unreasonable or unlawful as described below.

III. ERRORS

ASSIGNMENT OF ERROR 1: The PUCO's Opinion and Order is unlawful and unreasonable because the PUCO found that it had jurisdiction to authorize charges to consumers through Rider PSR. But the PUCO's jurisdiction is preempted under federal law.

OCC explained in its Initial Brief that the PUCO's jurisdiction to authorize Rider PSR is preempted by federal law.³ In response, the PUCO said that it would not address the preemption issue because it was best reserved for judicial determination.⁴ Yet the PUCO approved including the net costs (or benefits) of Duke's contract with the Ohio Valley Electric Corporation in Rider PSR.⁵ So the PUCO effectively *did* decide that it had jurisdiction to authorize Rider PSR.

The PUCO should revisit this determination. For the reasons explained in OCC's Initial Brief,⁶ the PUCO should conclude that its jurisdiction to authorize Rider PSR is preempted. Upon that determination, the PUCO should abrogate and modify the Opinion and Order by disallowing Rider PSR.

ASSIGNMENT OF ERROR 2: The PUCO's Opinion and Order is unlawful and unreasonable because it approved Rider PSR as a limitation on customer shopping without any record evidence, in violation of R.C. 4903.09 and this Court's precedent.

Rejecting arguments that Rider PSR was not authorized under the ESP statute, the PUCO relied on its decision in Duke's third electric security plan case (Case No. 14-841-EL-SSO) to reiterate that Rider PSR is an authorized limitation on customer shopping under R.C. 4928.143(B)(2)(d).⁷ But there was no record evidence in that case (or this

³ See OCC's Initial Brief at 13-18.

⁴ See Opinion and Order at 94.

⁵ See Opinion and Order.

⁶ See OCC's Initial Brief at 13-18.

⁷ See Opinion and Order at 95.

case) that Rider PSR limits customer shopping. So the neither Duke, nor the PUCO, can rely on the record from Duke's third ESP (or the record in this case) to support Rider PSR as a limitation on customer shopping.

In Case No. 14-841, Duke failed to articulate (in its 300-page application or its 700 pages of testimony) how Rider PSR fits into the ESP statute. The PUCO found a hook to allow Rider PSR in the brief of the Ohio Energy Group ("OEG"), an intervenor that was supporting Duke's proposal as a result of a settlement.⁸ But briefs are not part of the factual record of the case, upon which the PUCO can rely. The PUCO thus violated R.C. 4903.09, which requires the PUCO to base its findings on facts in the record.⁹

The PUCO relied on the record in Duke's third ESP here. And, as explained above, that record is insufficient to authorize Rider PSR as a limitation on customer shopping. The record here is no better and cannot save Rider PSR. The rider that Duke is seeking to charge customers here is the same rider as in Case No. 14-841.¹⁰ The proposed rider here functions the same as the rider in Case No. 14-841.¹¹ Rider PSR was approved as part of an ESP in Case. No. 14-841 under R.C. 4928.143(B)(2)(d) as a purported limitation on customer shopping,¹² and Duke is not asserting any new statutory basis for Rider PSR here.¹³ And crucially, both Duke and PUCO Staff admit in this case that Rider PSR will *not* act as a limitation on customer shopping. It is non-bypassable, so

⁸ See Case No. 14-841, Brief of OEG (filed December 15, 2014) at 5; Case No. 14-841, Opinion and Order (April 2, 2015) at 45.

⁹ See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 300 (2006).

¹⁰ See Hearing Transcript at Vol. I, p. 68:19-22.

¹¹ See *id.* at 1026:20-1027:7.

¹² See *id.* at 97:19-23; *id.* at 100:4-8.

¹³ See *id.* at 99:22-25; see also Duke's Initial Brief at 52.

all customers, shopping and non-shopping alike, will pay it.¹⁴ Its effect on shopping will be “neutral,” and “neither advantage or disadvantage” shopping.¹⁵

Contrary to the PUCO finding otherwise, Rider PSR does not relate to a limitation on customers shopping for electric supply. Customers are free to shop for 100% of their needs even with Rider PSR.

There is no record evidence that Rider PSR is a limitation on customer shopping – either in Duke’s third ESP, upon which the PUCO relied here, or in the record of this case. As a result, the PUCO should abrogate and modify the Opinion and Order by disallowing Rider PSR.

ASSIGNMENT OF ERROR 3: The Opinion and Order is unreasonable and unlawful because it violates R.C. 4909.15(A)(1) and 4903.09 because it allows Duke to charge customers for property (the Echelon metering system) that is not used and useful.

The law requires the PUCO, “when fixing and determining just and reasonable rates,” to determine the “valuation as of the date certain of the property of the public utility used and useful ... in rendering the public utility service.”¹⁶ The Order violates this law—it authorizes Duke to charge customers for its Echelon metering system without any evidence that the system is used and useful.

The Order cites no evidence that the Echelon metering system is used and useful because there is none.

¹⁴ See *id.* at 106:7-9.

¹⁵ See *id.* at 106:7-15; *id.* at Vol. XII, p. 2055:5-8; see also Duke’s Initial Brief at 33 (“Because Rider PSR is a non-bypassable charge or credit, there can be no adverse impact on the competitiveness of existing or future SSO auctions or the competitiveness of generation supply offers made by CRES providers competing for load, as both are on a level playing field.”); *id.* at 52 (“Rider PSR would have no impact on customers’ physical generation supply”).

¹⁶ R.C. 4909.15(A)(1). See also *Indus. Energy Users-Ohio v. PUCO*, 117 Ohio St. 3d 486, 492 (2008) (“R.C. 4909.15 provides that any property sought to be included in the calculation of utility rates must be used and useful in rendering the public-utility service.”).

The Staff Report says nothing at all about whether the Echelon system is used and useful.¹⁷ In fact, the PUCO Staff admitted that it did not even attempt to determine whether the Echelon system is used and useful. PUCO Staff Witness James Schweitzer testified that PUCO Staff did not look at the used and usefulness of the Echelon system because he believed that issue was resolved in annual rider audits of Duke’s smart grid rider, Rider DR-IM.¹⁸ But that issue was *not* resolved in annual rider audits of Duke’s smart grid rider. The PUCO did not find, in any of the most recent Rider DR-IM audits, that the Echelon system was used and useful. In each of the recent Rider DR-IM cases, the PUCO Staff issued a report of its audit.¹⁹ None of these reports uses the words “used and useful” or any derivative thereof.²⁰ Likewise, none of the orders in these cases finds that any of the property is used and useful.²¹

Further, in one of the recent annual rider audits that Mr. Schweitzer cited (Case No. 15-883-GE-RDR), the PUCO approved a settlement (signed by Duke, the PUCO Staff, OCC, and OPAE) that explicitly deferred the used and useful determination to this rate case: “The Signatory Parties are not agreeing that Duke’s SmartGrid, or any component thereof, is ‘used and useful,’ or that any related expenses are appropriate for

¹⁷ See *generally* Staff Report.

¹⁸ *Id.* at 4:4-7.

¹⁹ OCC Ex. 13 (Staff Audit from Case No. 17-1403-EL-RDR); OCC Ex. 14 (Staff Audit from Case No. 16-1404-EL-RDR); OCC Ex. 21 (Staff Audit from Case No. 15-883-EL-RDR); OCC Ex. 15 (Docket Card from Case No. 15-833-EL-RDR).

²⁰ OCC Ex. 13 (Staff Audit from Case No. 17-1403-EL-RDR); OCC Ex. 14 (Staff Audit from Case No. 16-1404-EL-RDR); OCC Ex. 15 (Docket Card from Case No. 15-883-GE-RDR); *see also* Hearing Transcript at Vol. IX, p. 1500:16-1501-3.

²¹ Case No. 17-1403-EL-RDR, Finding & Order (Mar. 21, 2018); Case No. 16-1404-EL-RDR, Entry (Dec. 21, 2016).

ratemaking, for purposes of the rate case that Duke must file by October 22, 2016, per the stipulation and Commission Order in Case No. 10-2326-GE-RDR.”²²

The PUCO did not previously find, in rider cases, that the Echelon metering system is used and useful. Any contrary factual finding is unsupported by evidence.

In summary, the record on whether the Echelon system is used and useful is as follows:

- The Staff Report says nothing about whether the Echelon system is used and useful.
- The Settlement says nothing about whether the Echelon system is used and useful.
- None of Duke’s witnesses testified that the Echelon system is used and useful.
- The PUCO approved a settlement explicitly stating that the PUCO was *not* making a finding as to used and usefulness in an annual smart grid rider audit.
- OCC’s witnesses uncovered significant evidence that the Echelon system is not used or useful in providing the benefits and services that Duke promised and that are required for a system to be considered a smart grid system.²³

The Opinion and Order does not make any attempt to explain how, despite this evidence, the PUCO could conclude that the Echelon metering system is used and useful. Instead, the Opinion and Order cites past rider cases and states that the PUCO previously found that Duke’s smart grid spending was “prudent and reasonable.”²⁴ But “prudent and reasonable” are not the same standards as “used and useful.” The prudence standard

²² OCC Ex. 16 (January 1, 2016 Stipulation and Recommendation filed in Case No. 15-883-GE-RDR); Case No. 15-883-GE-RDR, Opinion & Order Mar. 31, 2016).

²³ See Initial Post-Hearing Brief by the Ohio Consumers’ Counsel (Sept. 11, 2018).

²⁴ Opinion and Order ¶ 219.

applies to operations and maintenance expenses under R.C. 4909.154, and reasonableness applies more generally to all rates under R.C. 4905.22. The used and useful standard falls under a different statutory section, R.C. 4909.15(A)(1). Thus, even if the PUCO had previously found that Duke's smart grid spending was "prudent and reasonable," that is not the same as finding that the smart grid property was "used and useful" as required by R.C. 4909.15(A)(1).²⁵

Accordingly, the Opinion and Order violates (i) R.C. 4903.09 because the record evidence does not support the conclusion that the Echelon metering system is used and useful, and (ii) R.C. 4909.15(A)(1) because it allows Duke to charge customers for property that is not used and useful. The Order is therefore unlawful and unreasonable and should be modified on rehearing to deny Duke the right to charge customers for the remaining book value (\$68.7 million) of the Echelon metering system as of the date certain.

ASSIGNMENT OF ERROR 4: The Opinion and Order is unreasonable and unlawful because it violates R.C. 4903.09 and the PUCO's prior order in Case No. 10-2326-GE-RDR because there is no evidence that Duke included the customer benefits of smart grid in its base rate revenue requirement.

In Case No. 10-2326-GE-RDR (the "Mid-Deployment Review Case"), the PUCO ordered Duke to file a base rate case within one year of full deployment of its smart grid.²⁶ Case No. 17-32-EL-AIR is that case. The Mid-Deployment Review Case order also required Duke to quantify, in its test year revenue requirement, the savings to customers from smart grid: "The test year used in the base rate application shall begin no

²⁵ See *In re Duke Energy Ohio, Inc.*, 150 Ohio St. 3d 437, 442 (2017) (distinguishing prudence under R.C. 4928.154 and used and usefulness under R.C. 4909.15(A)(1)).

²⁶ *In re Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM & Rider AU for 2010 SmartGrid Costs & Mid-Deployment Review*, Case No. 10-2326-GE-RDR, Opinion & Order at 15 (June 13, 2012).

earlier than the date of full deployment such that the [revenue requirement] requested in that case will reflect the level of the benefits attributable to SmartGrid, which have actually been achieved by Duke.”²⁷

PUCO Staff witness Schweitzer testified that the phrase “level of benefits attributable to SmartGrid,” as used in the PUCO Order in the Mid-Deployment Review Case,” refers to a quantifiable dollar amount of benefits.²⁸ But Duke does not know what the dollar value of those benefits are.²⁹ It did not identify any such benefits in its rate case application or testimony, and despite repeated attempts at discovery, Duke simply stated that it does not track this data.³⁰ Likewise, the Staff Report did not address this issue or otherwise attempt to quantify the level of benefits attributable to smart grid in the test year.³¹ Nor could the PUCO Staff’s witness identify any test year savings from Duke’s smart grid.³²

The Opinion and Order includes no findings of fact on this issue. It did not address whether the base rate revenue requirement under the Settlement includes the “level of benefits attributable to SmartGrid, which have actually been achieved by Duke.” Instead, the Order approves the Settlement revenue requirement of \$467,775,638 without any analysis or discussion of the quantifiable dollar amount of benefits achieved for consumers.³³

²⁷ *Id.*

²⁸ Hearing Transcript at Vol. IX, p. 1538:5-8.

²⁹ *Id.* at 1504:12-15.

³⁰ Alexander Testimony at 6:15-19; *Id.* at Exhibit BRA-2.

³¹ *Id.* at 2:18-3:3.

³² Hearing Transcript at Vol. IX, p. 1538:9-13.

³³ Opinion and Order ¶ 323.

The PUCO must enforce its own order from the Mid-Deployment Review Case.³⁴ Here, the Opinion and Order allows Duke to charge customers base rates without any evidence that they include the savings from Duke's smart grid deployment. This violates the Mid-Deployment Review Case order. Further, the Opinion and Order violates R.C. 4903.09 because (i) it does not make any attempt to address OCC's arguments on this issue,³⁵ and (ii) the record evidence unambiguously shows that neither Duke nor any other party quantified the level of benefits to customers from smart grid. Therefore, the PUCO should abrogate and modify the Opinion and Order.

ASSIGNMENT OF ERROR 5: The Opinion and Order is unreasonable and unlawful because it approves Duke's proposed smart grid charges to customers (the "Ohio AMI Transition") without any finding that the Ohio AMI Transition will be cost-effective, as required by R.C. 4928.02, R.C. 4928.06, PUCO precedent, and the PUCO's recent PowerForward Roadmap.

The Ohio Revised Code requires smart grid programs and advanced metering infrastructure investments to be cost effective.³⁶ The PUCO has ruled that smart grid programs should be evaluated to determine whether they are cost effective and provide sufficient benefits to customers.³⁷ And in its recently-published *PowerForward: A*

³⁴ *In re Duke Energy Ohio, Inc.*, 150 Ohio St. 3d 437, 443 (2017) ("We have 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."); *In re Revision of the Rules for Waterworks Companies*, Case No. 86-2046-WS-COI, Opinion (Aug. 13, 1992) ("The Commission is generally empowered to enforce its own orders...").

³⁵ See *In re Comm'n Review of the Capacity Charges of Ohio Power Co.*, 147 Ohio St. 3d 59, 70-71 (2016) (PUCO erred by approving a proposal without addressing opposing party's challenges).

³⁶ R.C. 4928.02(D) (it is "the policy of this state to ... [e]ncourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure"). R.C. 4928.06(A) ("the public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated").

³⁷ *In re Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Elec. Security Plan*, Case No. 16-395-EL-SSO, Opinion & Order ¶ 59 (Oct. 20, 2017) ("OCC witness Williams contends that ... all smart grid programs should be evaluated to determine if they are cost effective and provide sufficient benefit to customers. We agree.").

Roadmap to Ohio's Electricity Future (the “PowerForward Roadmap”),³⁸ the PUCO again emphasized that utilities must include a cost-benefit analysis so that the PUCO and stakeholders “can transparently evaluate whether a grid modernization investment should be made in the first place.”³⁹

Despite all of this, and despite Duke’s own admission that it did not even *attempt* to evaluate the cost-effectiveness of its proposed Ohio AMI Transition,⁴⁰ the Opinion and Order authorizes Duke to charge customers hundreds of millions of dollars for smart grid, including wholesale replacement of Duke’s current AMI meters with new AMI meters.

An investment is only cost-effective if the benefits of the investment are greater than the costs. This is the definition of “cost-effective.”⁴¹ Duke projected that its smart grid proposal (the Ohio AMI [advanced metering infrastructure] Transition) will cost \$169,211,762 over a 20-year period, with a net present value of \$134,706,353.⁴² To show that the Ohio AMI Transition is cost-effective, therefore, Duke would need to show that the benefits to consumers would be greater than \$134,706,353 on a net present value basis. There is no evidence in the record that the benefits of the Ohio AMI Transition will

³⁸ Available at <https://www.puco.ohio.gov/industry-information/industry-topics/powerforward/powerforward-a-roadmap-to-ohios-electricity-future/>

³⁹ PowerForward Roadmap at 27.

⁴⁰ See Hearing Transcript at Vol. II, p. 372:9.

⁴¹ See *In re Application of [FirstEnergy] for Approval of [its] Energy Efficiency & Peak Demand Reduction Program Portfolio Plan for 2010 through 2012 & Associated Cost Recovery Mechanism*, Case No. 09-1947-EL-POR, Entry on Rehearing at 6 (Sep. 7, 2011); *In re Application of Owens Corning Sales, LLC & the Ohio Power Co. for Approval of a Special Arrangement*, Case No. 09-1500-EL-EEC, Finding & Order at fn. 8 (Feb. 11, 2010); Ohio Adm. Code 4901:1-39-01.

⁴² Schneider Testimony at Attachment DLS-1. OCC disputes these numbers (*see generally* Alvarez Testimony), but even using Duke’s own numbers, it has not shown that the Ohio AMI Transition is cost-effective.

be greater than \$134,706,353. Indeed, there is no evidence in the record attempting to quantify the benefits of the Ohio AMI Transition at all.

The PUCO did not find that the benefits of the Ohio AMI Transition will be greater than \$134,706,353. Yet the Opinion and Order states, without further elaboration, that the Ohio AMI Transition “allows the Company to cost-effectively address the unexpected issues to its current system and to continue to make advancements to its infrastructure that will benefit ratepayers.”⁴³ This finding is unreasonable.

This is not an instance where Duke’s witness testified that the proposal was cost-effective, OCC’s witness testified that it wasn’t, and the PUCO weighed the evidence and agreed with Duke. No: here, Duke unambiguously admitted that it did not attempt to evaluate whether the Ohio AMI Transition is cost-effective, and the Opinion and Order still somehow reached the conclusion that the Ohio AMI Transition is cost-effective. This finding of fact violates R.C. 4903.09 because there is no evidence whatsoever that the Ohio AMI Transition will be cost-effective. And because there is no evidence that the Ohio AMI Transition will be cost-effective, the Opinion and Order violates R.C. 4928.02, 4928.06, and PUCO precedent, all of which require smart grid investments to be cost-effective. Thus, the PUCO should abrogate and modify the Opinion and Order

⁴³ Opinion and Order ¶ 218.

ASSIGNMENT OF ERROR 6: The Opinion and Order is unreasonable and unlawful because it approves charges to customers under the PowerForward Rider without any finding that the investments under this rider will be cost-effective, as required by R.C. 4928.02, R.C. 4928.06, PUCO precedent, and the PUCO's recent PowerForward Roadmap.

The Settlement contains a variety of smart grid proposals in addition to the Ohio AMI Transition, most of which are vaguely defined, and most of which contain no information about their potential costs and benefits.

Under the Opinion and Order, the PUCO approved Duke's proposed PowerForward Rider ("Rider PF").⁴⁴ Rider PF is divided into three components. Component one includes "those incremental costs, if any, the Company incurs as a result of a Commission directive issued upon the conclusion of the PowerForward initiative."⁴⁵ Component one of Rider PF is not the same as, but rather is in addition to, the Ohio AMI Transition.⁴⁶ But the Settlement provides no additional details about component one. There is no evidence regarding how much it will cost, or how much customers might benefit from any initiatives funded through Rider PF component one. Thus, there is no basis for the PUCO to conclude that Rider PF component one will be cost-effective as required by R.C. 4928.02 and R.C. 4928.06.

Component two of Rider PF includes, among other things, "the enablement of PJM settlement data transfer enhancements," which are described in more detail in Attachment F to the Settlement.⁴⁷ Attachment F includes \$12.6 million in costs,⁴⁸ which

⁴⁴ Settlement at 16.

⁴⁵ Settlement at 16.

⁴⁶ Hearing Transcript at Vol. II, p. 348:3-6.

⁴⁷ Settlement at 16-17.

⁴⁸ Alexander Testimony at 29:8-9.

are in addition to the costs associated with Duke's proposed Ohio AMI Transition.⁴⁹ But again, there is no evidence regarding the value of the benefits to customers from this \$12.6 million investment, so there is no way for the PUCO to conclude that this proposal is cost-effective as required by R.C. 4928.02 and R.C. 4928.06.

Component three of Rider PF provides that Duke will file a new infrastructure modernization plan, which will include (but not be limited to) an upgrade to Duke's customer information system.⁵⁰ This new infrastructure modernization plan is in addition to Duke's Ohio AMI Transition.⁵¹ Duke has not developed this plan,⁵² does not know how much it will cost,⁵³ and will not commit to any limit on the amount that it might charge customers under this new infrastructure modernization plan.⁵⁴ In light of this, there is no evidence regarding how much component three of Rider PF will cost and how much it might benefit customers. It is impossible for the PUCO to conclude that this portion of Duke's proposal is cost-effective, as required by R.C. 4928.02 and 4928.06.

The Opinion and Order is silent regarding the cost-effectiveness of the Settlement's smart grid proposals under Rider PF. OCC explained in detail in its post-hearing briefs why the PUCO cannot approve Rider PF without evidence that the smart

⁴⁹ Hearing Transcript at Vol. II, p. 349:4-7.

⁵⁰ Settlement at 17.

⁵¹ Hearing Transcript at Vol. II, p. 355:14-356:13-16. It's not clear what the possible purpose of Rider PF component three could be, beyond upgrades to the customer information system. Duke is already going to proceed with the Ohio AMI Transition under Rider DCI and Rider PF component two, then it is going to proceed with more grid modernization deriving from PowerForward under Rider PF component one. It is anyone's guess what further grid modernization will be necessary or even possible after Duke completes the many other rounds of grid modernization contemplated by the rest of the Settlement.

⁵² Hearing Transcript at Vol. II, p. 356:13-16.

⁵³ *Id.* at 356:17-19.

⁵⁴ *Id.* at 357:2-5.

grid programs under that rider will be cost-effective.⁵⁵ The Opinion and Order ignored these arguments and approved Rider PF with no discussion whatsoever regarding cost-effectiveness. This violates R.C. 4903.09, which requires the PUCO to address parties' arguments and explain why they were or were not adopted.⁵⁶ And for the same reasons described above regarding the Ohio AMI Transition, it violates R.C. 4928.02, R.C. 4928.06, and PUCO precedent, which require smart grid investments to be cost-effective. The Opinion and Order is thus unlawful and unreasonable, and upon that determination, the PUCO should abrogate and modify the Opinion and Order.

ASSIGNMENT OF ERROR 7: The Opinion and Order is unreasonable and unlawful because it violates R.C. 4903.09 because it finds, contrary to all available evidence, that the Ohio AMI Transition is the "least cost option" and that "other alternatives were not demonstrated to be economical options."

The Opinion and Order approved charges to customers for Duke's Ohio AMI Transition (the replacement of all of Duke's current smart meters and related infrastructure with new smart meters and infrastructure). According to the Opinion and Order, the PUCO approved the Ohio AMI Transition in part because it is the "least-cost option" and "other alternatives ... were not demonstrated to be economical options."⁵⁷ There is no record evidence supporting either of these factual findings, and thus, they violate R.C. 4903.09.

There is no evidence that the Ohio AMI Transition is the "least cost option" because Duke did not consider any other options. If there is only one option, then it will

⁵⁵ See OCC Initial Post-Hearing Brief at 129-131.

⁵⁶ See *In re Comm'n Review of the Capacity Charges of Ohio Power Co.*, 147 Ohio St. 3d 59, 70-71 (2016) (PUCO erred by approving a proposal without addressing opposing party's challenges).

⁵⁷ Opinion and Order ¶ 218.

always be the least cost option. But Duke did not have only one option, even if it chose to ignore other possibilities.

OCC witness Alvarez identified numerous other options that Duke could have considered, and which could have been implemented at lower cost than the Ohio AMI Transition:

The Echelon system's meter data management system, EDMS, does not provide billing quality interval data and thus does not allow for large scale time-differentiated rates for customers.⁵⁸ Duke's solution to this problem is to remove every single Echelon meter and communication node connected to EDMS, replace them with Itron meters and CGRs, discard EDMS, and replace it with a new meter data management system called MDM.⁵⁹ There is no evidence that this is the "least-cost option" as the Opinion and Order suggests. Duke did not consider *any* alternatives to this wholesale replacement.

For example, Duke could have considered a software translation program that would map EDMS data into a format that is compatible with MDM and thus would allow for billing quality interval data.⁶⁰ Similarly, Duke could have considered customized software to deliver billing-quality energy data through EDMS, which would have allowed customers to benefit from time-of-use rates without replacing the Echelon system.⁶¹ Duke did not look into these or any other solutions. Instead, it chose the most capital-intensive solution possible: removing the entire existing system and replacing it at a cost to

⁵⁸ Schneider Testimony at 8:2-4.

⁵⁹ *Id.* at 12:17-15:4.

⁶⁰ Alvarez Testimony at 26:8-14.

⁶¹ *Id.* at 27:1-3.

consumers of nearly half a billion dollars.⁶² Duke made no effort to identify the least-cost option.

Duke claims that the Echelon system will no longer function as a smart grid after 2022 because Verizon's 2G/3G network (on which the Echelon system relies) will be retired.⁶³ There are several possible solutions to this problem. For example, Duke could have replaced the communications network cards in the Echelon meters with cards that could communicate directly with the public 4G network.⁶⁴ Duke did not even look at this option.⁶⁵ Duke could have replaced the communications network cards in the Echelon meters with cards that could be read by the new connected grid routers.⁶⁶ Duke did not even look at this option.⁶⁷ Duke could have replaced the communications network, including the communications cards in the existing electric meters, with the private 4G network now supported by Ericsson.⁶⁸ Duke did not even look at this option.⁶⁹ Duke could have worked with a wireless provider other than Verizon who might be able to offer a solution, but Duke did not even look at this option.⁷⁰ Instead of considering these or other potentially less costly options, Duke's solution is to remove every single Echelon meter and communication node connected to EDMS and replace them with Itron meters

⁶² *Id.* at 26:16-18; 27:3-5.

⁶³ Schneider Testimony at 10:8-11:23.

⁶⁴ Alvarez Testimony at 28:9-12.

⁶⁵ *Id.* at 29:1.

⁶⁶ *Id.* at 28:13-15.

⁶⁷ *Id.* at 29:1.

⁶⁸ *Id.* at 28:16-21.

⁶⁹ *Id.* at 29:1.

⁷⁰ Hearing Transcript at Vol. II, p. 381:17-382:10.

and CGRs that are compatible with 4G.⁷¹ Contrary to the Opinion and Order’s finding, there is no evidence that Duke’s capital-intensive approach is the least-cost option.

The communication nodes connected to the Echelon system are failing at an unexpectedly high rate, and Ericsson is no longer manufacturing nodes.⁷² There are various potential solutions to this problem. Duke could have talked to other technology companies to see if they could manufacture nodes. Duke could have worked with outside vendors to see if they are able to repair the nodes. But once again, Duke did not even look at these options.⁷³ And once again, Duke instead decided that the only option was to remove the entire Echelon system at a massive cost to consumers. Contrary to the Opinion and Order’s finding, there is no evidence that Duke’s replace-everything approach is the least-cost option.

When problems arose with the Echelon system, Duke did not determine the least-cost way to address those problems. Instead, it chose a solution that is extremely expensive and capital intensive, thus driving up costs for consumers and increasing Duke’s rate base and profits. The Order’s characterization of Duke’s approach as the “least-cost option” empowers utilities to willfully ignore actual least-cost options in favor of their preferred approach—capital spending to increase rate base and utility profits at the expense of captive customers. Likewise, the Opinion and Order’s conclusion that “other alternatives ... were not demonstrated to be economical options” is unfounded because Duke did not consider any other alternatives.

⁷¹ Schneider Testimony at 12:17-15:4.

⁷² Schneider Testimony at 9:9-13.

⁷³ Hearing Transcript at Vol. II, p. 367:12-22.

The Opinion and Order is unlawful and unreasonable in concluding that Duke's Ohio AMI Transition is the least-cost option and that other options were not demonstrated to be economical. Duke willfully put its head in the sand, ignoring all kinds of possible solutions. Duke chose the *highest*-cost option, not the least-cost option. The Opinion and Order violates R.C. 4903.09 because the PUCO's ruling is not based on record evidence, and as a result, the PUCO should abrogate and modify the Opinion and Order.

ASSIGNMENT OF ERROR 8: The Opinion and Order is unreasonable and unlawful because it violates R.C. 4928.11(A) by failing to require Duke to provide safe and reliable service to its customers.

In approving the Settlement, the Opinion and Order approved new distribution reliability standards. But it also approved a provision in the Settlement that Duke's failure to comply with distribution reliability standards in 2016 and 2017 would not be used to determine any penalty for failure to provide customers with safe and reliable service during both years.⁷⁴ R.C. 4928.11 compels the PUCO to protect consumers by requiring minimum service quality, safety, and reliability requirements for noncompetitive retail electric service provided by all electric utilities in the state. The requirements for establishing minimum service reliability standards is contained in Ohio Admin. Code 4901:1-10-10. The need for the PUCO to enforce the state minimum reliability standards was briefed extensively by the OCC.⁷⁵

Duke's minimum reliability performance are measured by two metrics -- a System Average Frequency Interruption Index ("SAIFI") and a Customer Average

⁷⁴ Opinion and Order page 66.

⁷⁵ OCC Initial Brief at 20-22.

Interruption Duration Index (“CAIDI”). SAIFI is a measure of the average number of outages that customers can experience annually. CAIDI is a measure of the duration of outages. Both standards are foundational in measuring the quality of service that Duke (and every other electric utility) in the state are providing consumers.

Duke’s minimum reliability performance standards for 2016 were a SAIFI of 1.05 and a CAIDI of 122.81 minutes. Duke’s actual reliability performance for 2016 was a SAIFI of 1.05 and a CAIDI of 136.42 minutes, meaning that Duke failed to meet its 2016 CAIDI standard by 13.61 minutes. And more importantly, this means that customers suffered through much longer outages in 2016 than permitted under Ohio law and PUCO rules. In 2017, Duke’s reliability standards included a SAIFI of 1.05 and a CAIDI of 122.81 minutes. Duke’s actual performance for 2017 was a SAIFI of 1.16 and a CAIDI of 127.28 minutes. This means that Duke failed to meet its SAIFI and CAIDI reliability performance standards for 2017. And importantly, customers suffered more outages in 2017 than permitted by Ohio law and PUCO rules, and for much longer durations of time.

The PUCO rules clearly specify that an electric utility failure to comply with the same performance standard for two consecutive years is a violation of its rules.⁷⁶ Despite Duke’s clear failure to provide consumers with adequate, safe, and reliable service as required by R.C. 4928.11, the Opinion and Order is silent regarding why the PUCO neglected to protect consumers by enforcing the reliability performance standards that it is authorized and responsible for enforcing under R.C. 4928.16(B). The bad precedent set by the PUCO in not enforcing Duke’s reliability standards can serve as a

⁷⁶ Ohio Adm. Code 4901:1-10-10.

disincentive for Ohio electric utilities to provide the service quality Ohioans should have a right to expect. The PUCO's Opinion and Order is unlawful and unreasonable, and the PUCO should abrogate and modify the Opinion and Order

ASSIGNMENT OF ERROR 9: The Opinion and Order is unreasonable and unlawful because it violates Supreme Court of Ohio precedent by approving a settlement with distribution reliability standards that were established through an exclusionary settlement process involving only two of the three parties in the case.

The Opinion and Order failed to deal with a significant issue that was addressed in OCC's Initial Brief regarding being excluded from the settlement negotiations as the new Duke reliability standards were being established.⁷⁷ The OCC, Staff, and Duke were the three parties in Case 16-1602-EL-ESS where the new proposed reliability standards were being established before the case was included in the Settlement. To protect the service quality of Ohio residential consumers, OCC has participated extensively in the cases involving the development of reliability standards for all of the Ohio electric distribution utilities since the reliability standards were initiated in 2009. And through the knowledgeable representation of the OCC, all of the reliability standards cases for all of the Ohio utilities (including Duke's previous reliability standards cases) were resolved amicably through settlement negotiations.

But as demonstrated in OCC's Initial Brief, Duke predetermined that OCC would not be a signatory party in the Settlement,⁷⁸ and therefore, excluded OCC from participating in the settlement discussions involving the reliability standards. The Supreme Court of Ohio expressed "grave concern" about the PUCO adopting a

⁷⁷ OCC Initial Brief at 20-21.

⁷⁸ Initial Brief at 21.

settlement resulting from “exclusionary settlement meetings.”⁷⁹ This is especially significant when the excluded party in the settlement is the exclusive representative of residential utility consumers. And as OCC made abundantly clear,⁸⁰ the exclusion of OCC as a knowledgeable party in negotiating the reliability standards undermined the ability of other signatory and non-opposing parties to the fully appreciate Duke’s failure in providing safe and reliable service.⁸¹

As became evident in the hearing, the reliability standards that were agreed upon between Staff and Duke that were ultimately approved by the PUCO are merely random numbers.⁸² The newly adopted reliability standards are not based on any specific methodology even though this supporting information is required in a reliability standards case.⁸³ Neither Duke nor the Staff witness were able to explain how the standards were calculated or what (if any) guidelines were used in setting the performance levels.⁸⁴ Regrettably for consumers, the excluding OCC from the settlement meetings means that consumers are not protected with well defined, quantifiable, and meaningful reliability performance standards. For this reason, the PUCO’s Opinion and Order is unreasonable and unlawful and should be modified and abrogated to adequately protect consumers from the delivery of unreliable service.

⁷⁹ See *Time Warner Axs v. PUCO*, 75 Ohio St. 3d 229 (1996).

⁸⁰ Initial Brief at 21.

⁸¹ *Id.*

⁸² Reply Brief at 7.

⁸³ Ohio Adm. Code 4901:1-10-10(B)(3).

⁸⁴ Reply Brief at 7.

ASSIGNMENT OF ERROR 10: The Opinion and Order is unreasonable and unlawful because it violates R.C. 4928.143(B)(2)(h) by approving continuation of the Distribution Capital Investment (“DCI”) rider despite a misalignment in expectations for reliability between Duke and its customers.

The Opinion and Order approved a continuation and expansion of the DCI rider even though customer and utility expectations for reliability are misaligned -- a clear violation of R.C. 4928.143(B)(2)(h). In approving the initial DCI, the PUCO found that Duke’s and customer expectations for reliability were aligned.⁸⁵ And in supporting approving the DCI in 2015, the PUCO specifically noted that Duke had consistently met its SAIFI and CAIDI reliability standards.⁸⁶

But Duke failed to meet its reliability performance standards in 2016 and 2017. Given that the reliability standards for 2016 and 2017 and the approval of the DCI included customer perception survey results as required under Ohio Adm. Code 4901:1-10-10(B), there can be no doubt that Duke’s failure to meet the 2016 and 2017 standards is a misalignment between customer expectations for reliability and the reliability Duke is providing. Rather than addressing Duke’s failure to meet reliability standards, the Opinion and Order just alludes to the investment that Duke has made in its distribution system that “may not be reflected in performance metrics.”⁸⁷ But those are the very same performance metrics that the PUCO relied upon when it approved the DCI initially and that it relied upon when approving the continuation and expansion of the DCI.⁸⁸

⁸⁵ 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 14-841-EL-SSO, Opinion and Order at 71.

⁸⁶ *Id.*

⁸⁷ *Id.* at 70.

⁸⁸ *Id.*

On a going-forward basis, the Opinion and Order fails to explain how Duke's and customer expectations for reliability are aligned. As demonstrated in OCC's Initial Brief, the majority of Duke customers consider an acceptable duration for non-storm related outages to be less than two hours.⁸⁹ The reliability standards that the PUCO approved supports outage durations between 134.4 minutes in 2018 to 137 minutes between 2022 and 2025.⁹⁰ There is an undeniable misalignment between the reliability standards the PUCO approved and customer expectations for reliability. Approving the DCI with such a misalignment between customer and company expectations for reliability violates R.C. 4928.143(B)(2)(h). Upon a determination that the PUCO's Opinion and Order is unlawful and unreasonable, the PUCO should abrogate and modify the Opinion and Order

IV. CONCLUSION

To protect customers from unnecessary and unlawful charges, the PUCO should grant rehearing and abrogate its Opinion and Order. This would ensure Duke's charges to consumers and the electric distribution service provided are lawful, fair, just, reasonable and reliable.

⁸⁹ OCC's Initial Brief at 49.

⁹⁰ Opinion and Order at 65.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Application for Rehearing has been served upon the below-named persons via electronic transmission this 18th day of January 2019.

/s/ William J. Michael

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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 Michael, William Mr.