**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Review of Duke Energy Ohio, Inc.’s Distribution Capital Investment Rider. | )  )  ) | Case No. 23-549-EL-RDR |

**CONSUMER PROTECTION REPLY COMMENTS**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

# I. INTRODUCTION

From July 1, 2022 through June 30, 2023, Duke charged consumers $41.5 million through its Distribution Capital Investment Rider (“DCI”).[[1]](#footnote-2) Duke uses Rider DCI to charge consumers for certain capital costs associated with modernizing its distribution system.[[2]](#footnote-3) In this case, the PUCO is reviewing Duke’s charges to consumers through the Rider DCI during the audit period.

The Auditor in this case made recommendations regarding Duke’s Rider DCI that the PUCO should adopt. These recommendations include: (1) reducing the Rider DCI revenue requirement by $1.07 million for the next quarterly Rider DCI update filing to correct for accounting errors[[3]](#footnote-4) and (2) making certain improvements in Duke’s accounting process for the Rider DCI program.[[4]](#footnote-5) OCC supports these recommendations.

Duke filed Initial Comments on March 14, 2024.[[5]](#footnote-6) Duke argues against two of the Auditor’s recommendations relating to: (1) Duke’s miscalculation of the Accumulated Deferred Income Tax (“ADIT”) from Duke’s last rate case[[6]](#footnote-7) and (2) improper capitalization of tree trimming expenses.[[7]](#footnote-8) To protect consumers, the PUCO should reject Duke’s arguments and adopt the Auditor’s recommendations and the recommendations set forth in OCC’s March 14, 2024 comments.

# II. REPLY COMMENTS

## A. Duke overstated the Rider DCI revenue requirement by $14,088,731 during the audit period by making an improper adjustment to the ADIT balance. The PUCO should adopt the Auditor’s recommendation to reject Duke’s adjustment.

The Auditor concluded that Duke made an improper adjustment to the ADIT balance, which overstated the Rider DCI revenue requirement that consumers must fund by $14,088,731.[[8]](#footnote-9) The Auditor recommended that the PUCO reject Duke’s improper ADIT adjustment.[[9]](#footnote-10) OCC supports the Auditor’s recommendation. Duke claims in its Comments that the Auditor is mistaken. [[10]](#footnote-11) But there is no legitimate reason for Duke’s extra charges to consumers.

As the Auditor noted,[[11]](#footnote-12) Duke claimed during the eleventh hour of the audit that it had inadvertently overstated the ADIT balance in its last distribution base rate case (Case No. 21-887-EL-AIR, et al.).[[12]](#footnote-13) The amount of the ADIT overstated from the rate case was $189 million (of which $170.5 million was related to distribution).[[13]](#footnote-14) As a result of this error, Duke’s base rates are $14,088,731 lower than they otherwise would have been.[[14]](#footnote-15) Duke adjusted its Rider DCI calculation to compensate for this error.[[15]](#footnote-16) Duke did not inform the Audit of this adjustment until November 28, 2023, shortly before the audit was finished, in response to Discovery Request BR-DR-13-005.[[16]](#footnote-17)

Duke argues that its ADIT adjustment is appropriate because it is an attempt to calculate the rider “with Commission-approved inputs supporting what is currently in base rates.”[[17]](#footnote-18) However, the “Commission-approved inputs” Duke must use to calculate Rider DCI are the actual *Commission-approved rates* from its rate case, not the “inputs” that Duke has come up with to cover its mistake.

Duke claims that the following language from the settlement in Case No. 17-32-EL-AIR supports its ADIT “correction:”[[18]](#footnote-19)

Capital costs included in Rider DCI shall be those recorded in FERC Accounts 360-374, provided such costs are not recovered elsewhere. Rider DCI shall be computed by comparing the current rate base associated exclusively with plant accounts recorded in the FERC accounts noted above to the rate base related to the same accounts as included in the overall *rate base approved in the most recent base electric distribution rate case*.[[19]](#footnote-20)

Duke’s reliance on this language for additional charges to consumers should be rejected. This language simply describes the specific FERC accounts covered by Rider DCI and does not excuse Duke from calculating Rider DCI using the actual rates PUCO-approved rates. Contrary to Duke’s interpretation, the Auditor viewed Duke’s ADIT adjustment as a serious matter:

Blue Ridge has never encountered a situation like the one here and struggled to find clearcut language in the larger Rider DCI record upon which to base a recommendation. Ultimately, Blue Ridge decided not to recommend the Company’s proposed adjustment to ‘correct’ a base rate case filing that has already been resolved among the parties and approved by the Commission, through a rider mechanism.[[20]](#footnote-21)

The PUCO should adopt the Auditor’s recommendation to reject Duke’s attempted ADIT adjustment. This case is not the proper forum to correct Duke’s own error from its last rate case. If Duke believes that its base rates do not provide it with an opportunity to earn an adequate return, then Duke could consider filing a new rate case. Duke is prohibited by law, however, from adjusting its base rates in this case to correct its ADIT mistake from its last rate case.[[21]](#footnote-22)

The PUCO should adopt the Auditor’s recommendation to reject Duke’s proposed ADIT adjustment. Duke’s improper ADIT adjustment increased the Rider DCI revenue requirement that consumers pay by $14.1 million. The PUCO should order Duke to credit consumers for any over-collection which occurred during the audit period based on the improper ADIT adjustment. The PUCO should also order Duke to file new tariffs removing the impact of the improper ADIT adjustment on a going forward basis.

## B. The PUCO should reject Duke’s attempt to charge consumers for $1,798,674 in improperly capitalized vegetation management costs during the audit period.

The audit report recommended that the Rider DCI gross plant be reduced by $1,798,694 in vegetation management costs that Duke improperly capitalized during the audit period.[[22]](#footnote-23) The Auditor stated that these costs should have been treated as Operations and Maintenance expenses.[[23]](#footnote-24) Duke disagreed with the Auditor’s finding arguing that its longstanding Capitalization Guidelines and practices have been “reviewed” by auditors in previous DCI audit cases.[[24]](#footnote-25) Duke seems to be saying that because it got away with using this improper capitalization policy in the past, it should be allowed to continue its improper accounting. Duke’s argument should be rejected.

The findings (or lack thereof) from prior DCI audit cases are not controlling. Neither the Auditor nor the PUCO is bound to repeat errors regarding capitalization of vegetation management costs from previous DCI audits.

Duke is required to comply with regulatory and accounting standards established by FERC and adopted by the PUCO.[[25]](#footnote-26) The standards used by the Auditor specifically included reviewing the DCI rider for accounting accuracy, including whether transactions were properly recorded as capital expenditures in the appropriate FERC account(s).[[26]](#footnote-27) The Auditor correctly identified the following error regarding Duke’s capitalization policy:

The Vegetation Management policies and procedures were not unreasonable except as they relate to the capitalization of work on “Danger Trees” outside the right-of-way and not directly associated with either the addition or replacement of a capital asset. Recording those type costs as capital is not recording them in accordance with 18 CFR.[[27]](#footnote-28)

Duke does not assert that the Auditor’s interpretation of the FERC guidelines and accounting standards is incorrect. Instead, Duke claims that it is entitled to follow its own company-specific Capitalization Guidelines rather than conforming with the FERC Uniform System of Accounts pertaining to Danger Trees outside the right-of-way. The Audit Report explains Duke’s position as follows:

Duke defines a “danger tree” in part as “any tree along the right-of-way corridor, but located outside the actual right-of-way boundary [emphasis added] that is dead, dying, diseased or severely leaning such that if it fell it could cause damage to poles, circuits, conductors, etc., or any other tree that, due to its proximity, shape, type or size otherwise endangers these assets.[[28]](#footnote-29)

The FERC capitalization policy is different from Duke’s own capitalization policy, but the FERC capitalization policy is the one Duke must follow.[[29]](#footnote-30) FERC Account 365 only includes the capital costs associated with the initial tree-trimming within a right-of-way when electric service is first initiated.[[30]](#footnote-31) After the initial tree-trimming and vegetation clearing, practically all other costs are expense items associated with the maintenance of the distribution facilities and should be tracked and reported as maintenance expense under FERC Account 593.[[31]](#footnote-32) Duke should have treated these type of expenses as normal O&M expenses that are therefore ineligible for inclusion within the DCI rider.

By improperly capitalizing these costs, Duke was unfairly able to collect a return for an item that was not an asset but an expense. The proper accounting treatment would be to treat these specific costs as normal O&M expenses, that are not subject to an added profit element (a return on).

The PUCO allows Duke to collect vegetation management costs through multiple riders and in base rates. As a result, there is no assurance that Duke is not double- collecting these expenses from consumers in base rates and through the Enhanced Service Reliability Rider (“Rider ESRR”) or through the Rider DCI (by improperly capitalizing these expenses).

The PUCO should adopt the Auditor’s recommendation and order Duke to make an adjustment to remove the costs from the audit period associated with Duke’s improper capitalization policy. Going forward, the PUCO should order Duke to modify its capitalization policy to conform with the FERC Uniform System of Accounts and cease capitalizing costs associated with danger tree removals after the initial clearing through Rider DCI.

Furthermore, to help protect consumers from the potential from unjust and unreasonable charges, the PUCO should require a more thorough examination of Duke’s accounting practices in Duke’s next distribution base rate case. This review should be aimed at preventing vegetation management costs from being double collected in base rates as well as through other riders like the DCI and the ESRR.

# III. CONCLUSION

OCC recommends that the PUCO adopt the Auditor’s recommendations as well as the additional recommendations provided by OCC in its Initial Comments.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Consumer Protection Reply Comments was served on the persons stated below via electronic transmission this 28th day of March 2024.

*/s/ John Finnigan*

John Finnigan

Assistant Consumers’ Counsel

The PUCO’s e-filing system will electronically serve notice of the filing of this document on the following parties:

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1. Audit Report at 9 (Jan. 16, 2024). [↑](#footnote-ref-2)
2. *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, et al., Opinion and Order (Dec. 19, 2018). [↑](#footnote-ref-3)
3. Audit Report at 11-13 (Jan. 16, 2024). [↑](#footnote-ref-4)
4. *Id.* at 13-14. [↑](#footnote-ref-5)
5. Comments of Duke Energy Ohio, Inc. (March 14, 2024). [↑](#footnote-ref-6)
6. Consumer Protection Comments of OCC at 4-9 (March 14, 2024). [↑](#footnote-ref-7)
7. *Id.* at 9-13. [↑](#footnote-ref-8)
8. Audit Report at 64-66 (Jan. 16, 2024). [↑](#footnote-ref-9)
9. *Id.* [↑](#footnote-ref-10)
10. Comments of Duke Energy Ohio, Inc. at 1-4 (March 14, 2024). [↑](#footnote-ref-11)
11. *Id.* [↑](#footnote-ref-12)
12. *Id.* [↑](#footnote-ref-13)
13. *Id.* [↑](#footnote-ref-14)
14. *Id.* [↑](#footnote-ref-15)
15. *Id.* [↑](#footnote-ref-16)
16. *Id.* [↑](#footnote-ref-17)
17. *Id.* at 4. [↑](#footnote-ref-18)
18. Comments of Duke Energy Ohio, Inc. at 3, Footnote 7 (March 14, 2024). [↑](#footnote-ref-19)
19. *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, et al., Stipulation and Recommendation (April 13, 2018) at 12. (Emphasis added.) [↑](#footnote-ref-20)
20. Audit Report at 66 (Jan. 16, 2024). [↑](#footnote-ref-21)
21. R.C. 4905.32. *See* *also* *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co*., 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957), where the Court found that under Ohio law a utility has no option but to collect the rates set by the PUCO and is “clearly forbidden to refund any part of rates so collected.” In addition, under the filed rate doctrine, a filed rate is an independent legal obligation which must be respected. *See, e.g., Pa. Water & Power Co. v. Federal Power Commission*, 343 U.S. 414, 422 (1952). [↑](#footnote-ref-22)
22. Audit Report at 8 (Jan. 16, 2024). [↑](#footnote-ref-23)
23. *Id*. [↑](#footnote-ref-24)
24. Comments of Duke Energy Ohio, Inc. at 5 (March 14, 2024). [↑](#footnote-ref-25)
25. R.C. 4905.13; *See also* Audit Report at 33. [↑](#footnote-ref-26)
26. Audit Report at 6. [↑](#footnote-ref-27)
27. *See* Audit Report at 9. [↑](#footnote-ref-28)
28. Audit Report at 32 (Jan. 16, 2024). [↑](#footnote-ref-29)
29. R.C. 4905.13. [↑](#footnote-ref-30)
30. *Id.* [↑](#footnote-ref-31)
31. Audit Report at 33 (Jan. 16, 2024). [↑](#footnote-ref-32)