**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Energy Efficiency and Peak Demand Reduction Portfolio of Programs. | )))) | Case No. 16-576-EL-POR |

**MEMORANDUM CONTRA**

**MOTION OF DUKE ENERGY OHIO, INC., FOR A WAIVER TO CHARGE CONSUMERS MORE FOR ENERGY EFFICIENCY**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Public Utilities Commission of Ohio ("PUCO") protected Duke's consumers from paying too much for energy efficiency by imposing a limit on what customers pay for Duke's 2017-2019 energy efficiency programs. The PUCO adopted an annual cap of 4% of Duke's total revenues, or approximately $38.6 million per year. The PUCO allowed Duke to exceed this annual cap for 2017 but ordered Duke to scale back its energy efficiency programs to avoid materially exceeding its 2017 budget ($38-39 million[[1]](#footnote-2)). The PUCO also ordered Duke to not exceed the 2017 budget without obtaining a waiver from the PUCO.

But two weeks after the PUCO ruling, Duke filed for a waiver to charge customers the "actual costs" for its 2017 energy efficiency expenditures, with no limit. Duke "anticipates" spending $56 million for 2017, but does not commit to even such a limit on spending. If Duke spends $56 million (and no more), it will exceed its 2017

budget by at least $17 million (43%)—a budget that Duke itself agreed to in the approved settlement[[2]](#footnote-3) in this case.

Duke's request for a waiver to collect more money from customers for energy efficiency should be denied. Duke's request violates the PUCO's order in this case[[3]](#footnote-4) because it asks for unlimited customer funding ("actual costs") that materially exceeds its 2017 budget. And Duke's ask undermines the protection that customers received under the PUCO-imposed caps on energy efficiency expenditures.

**I. BACKGROUND**

In this energy efficiency portfolio case, Duke filed an application that proposed program spending of about $38 million for 2017 (and similar budgets for 2018 and 2019).[[4]](#footnote-5) Duke also projected about $8.6 million, before taxes, in utility profits (shared savings) for 2017, meaning that total program costs and shared savings would have been around $46.6 million if the application had been approved as filed.[[5]](#footnote-6)

Subsequently, Duke filed a settlement.[[6]](#footnote-7) Under this Settlement, Duke agreed to make some minor modifications to its programs, but the proposed 2017 budget remained around $38 million.[[7]](#footnote-8) The Settlement also provided that Duke could charge customers around $12.5 million per year in utility profits ($8.0 million plus tax gross-up),[[8]](#footnote-9) meaning that total program costs and shared savings under the Settlement would be about $50.5 million per year for each of the three years covered. The parties to the Settlement agreed that the recommended portfolio would allow Duke to comply with the energy efficiency benchmarks and to implement its proposed programs.[[9]](#footnote-10)

The PUCO Staff and the Office of the Ohio Consumers' Counsel ("OCC") opposed the Settlement and recommended that the PUCO limit the amount that Duke can charge customers for energy efficiency program costs and shared savings to about $33.8 million annually (3.5% of Duke's 2015 total revenues).[[10]](#footnote-11) Duke opposed this recommendation but testified that if there were to be a cap, it should be about $52 million per year.[[11]](#footnote-12)

The Settlement was approved, but with modification. The PUCO ruled that Duke could charge customers no more than about $38.6 million (4.0% of Duke's 2015 total revenues) per year in program costs and shared savings combined.[[12]](#footnote-13) The Order stated further:[[13]](#footnote-14)

* "Duke may exceed the cap in calendar year 2017 to recover program costs only."
* "Duke will not be authorized to recover shared savings for 2017 to the extent such recovery would exceed the cap."
* "Duke should scale back, but not suspend, its EE-PDR programs to avoid materially exceeding its Portfolio Plan budget for 2017 as approved in this case."
* Duke "should not exceed the Portfolio Plan budget for programs for calendar year 2017 without having obtained a waiver from the Commission."

Duke then filed the Motion, seeking a waiver to exceed the $38.6 million cost cap for 2017 to allow it to collect its "actual costs." Duke states that it expects to spend $56 million on energy efficiency program costs for 2017.[[14]](#footnote-15) Duke asks that the PUCO grant the waiver to exceed the cost cap in 2017 and approve these charges—potentially without further review—in its separate 2017 rider true-up proceeding.[[15]](#footnote-16)

**II. ARGUMENT**

**A. The PUCO ordered Duke not to materially exceed the $38.6 million cost cap. Duke has substantially exceeded that cap by asking to charge customers $56 million or more. Duke's proposal is unjust and unreasonable.**

The PUCO ordered Duke not to charge customers more than $38.6 million per year in 2018 and 2019. This was a welcome consumer protection. For 2017, the PUCO made an exception allowing Duke to exceed the $38.6 million cost cap for program costs only. In making the exception, it ordered Duke to scale back its programs "to avoid materially exceeding" its 2017 budget of around $38-39 million. But now, Duke asks the PUCO to allow it to charge customers its "actual costs," expected to be **$56 million** for 2017.[[16]](#footnote-17) On its face, this "materially exceeds" Duke's $38-39 million budget for 2017 as well as the $38.6 million cost cap. It violates the Order. It would also result in charges to consumers that are neither just nor reasonable. Duke's waiver request should not be approved.[[17]](#footnote-18)

**B. Duke has not scaled back its programs, as the PUCO ordered it to do.**

The PUCO ordered Duke to scale back its programs to avoid materially exceeding its $38-39 million budget for 2017.[[18]](#footnote-19) In the Motion, Duke admits that it has the done the opposite. According to Duke (though without any evidentiary support or documentation), it is running programs with participation that has "surpassed historical levels."[[19]](#footnote-20) Duke also states that it is exceeding, rather than meeting, its statutory energy savings mandates.[[20]](#footnote-21)

Gone is the expectation that Duke had of more modest expenditures of $38-39 million for 2017—an expectation embodied in the Settlement. Duke now expects to spend $56 million on programs when it agreed to a projected budget under the Settlement of approximately $38-39 million. Duke is attempting to work around the PUCO-imposed caps by using the PUCO provision allowing it to seek a waiver for its 2017 spending. Customers should not be penalized and Duke should not be rewarded for contravening the PUCO's protections for consumers. The waiver should be denied.

**C. Duke's proposal to charge customers $56 million or more for energy efficiency programs defies the PUCO's Order and will harm customers by unreasonably adding to the costs they pay for energy efficiency.**

Duke's proposal to spend $56 million on programs in 2017 is contrary to the clear intent (and as described above, the plain language) of the Order. In the Settlement, Duke proposed to charge customers around $50.5 million per year in energy efficiency program costs and shared savings combined.[[21]](#footnote-22) The PUCO, however, found that charges of this magnitude would not benefit customers or the public interest and modified the Settlement to reduce the amount that customers will pay for energy efficiency to about $38.6 million per year.[[22]](#footnote-23) Now, Duke seeks a waiver, not only to exceed the PUCO's ordered cost cap, but to charge customers even more than Duke proposed to charge them in the Settlement, even more than Duke proposed to charge them when it filed its application in this case, and even more than the cost cap that Duke proposed in litigation. The PUCO should not approve a result that allows Duke to charge customers *more* for energy efficiency in response to an Order that explicitly instructed Duke to charge customers *less*.

**D. Duke's 2017 energy efficiency charges should remain subject to further prudence review and adjustment through Duke's annual rider true-up filing.**

If any waiver is granted, the PUCO should clarify that all costs remain subject to further review for prudency. On page two of the Motion, Duke appears to contemplate this by requesting a waiver "with reconciliation and recovery of such costs to be determined in a subsequent proceeding." But later, on page three, Duke "respectfully requests that the Commission permit recovery of these actual costs in the 2017 true-up rider proceeding and grant a waiver for this purpose in order to permit the Company to recover all program costs for 2017."

The latter quote seems to suggest that Duke is asking the PUCO to approve the $56 million (or more) in charges without any further review of (i) how Duke is spending this money, (ii) what programs it is being spent on, (iii) how much of this excessive spending is on residential vs. nonresidential programs, or (iv) any other information about these charges.[[23]](#footnote-24) Indeed, although Duke makes various claims throughout the Motion (that it expects to incur $56 million in program costs, that its "program participation has surpassed historical level," that it will "exceed the energy mandates," that its spending is "leading to accelerated customer participation and technological advances"[[24]](#footnote-25)), none of this information is in the record, and Duke provided no documentation of these claims with the Motion. They are wholly unsupported and cannot form the basis of a PUCO order guaranteeing Duke recovery of all actual energy efficiency costs for 2017.

And regardless of how much Duke spends on its programs in 2017, those costs should remain subject to further review by the PUCO (and parties) through Duke's annual true-up filings. This review should include, but not be limited to, a PUCO Staff prudence review, a third-party audit of Duke's spending, and standard evaluation, measurement, and verification processes. Thus, whether the PUCO grants a waiver or not, such waiver should not be deemed to be final approval of any specific charges, and parties should retain the right to challenge the prudence of such charges through Duke's rider filings, energy efficiency annual reports, or other applicable proceedings. Given Duke's already excessive spending in this case, the need for a detailed review of Duke's proposed charges to customers is evident.

**E. Duke's request to charge customers $56 million or more for 2017 program costs is effectively a request to modify the Order, and thus, it must be made through an application for rehearing, not through the Motion.**

Although the Order contemplates Duke's filing a request for a waiver to exceed the 2017 cost cap, it plainly states that Duke must scale back its programs "to avoid materially exceeding its Portfolio Plan budget for 2017 as approved in this case."[[25]](#footnote-26) In the Motion, Duke seeks to charge customers $56 million or more,[[26]](#footnote-27) even though the approved budget in this case was only $38 to $39 million.[[27]](#footnote-28)

Duke has not stated any intent to scale back its programs, and on its face, $56 million for 2017 materially exceeds the approved budget. In substance, therefore, Duke is not asking merely for a waiver to exceed the 2017 cost cap—it is seeking to modify the Order to allow Duke to exceed the 2017 cost cap by any amount that it wants.

The proper place to request such a modification to the Order is in an application for rehearing. Under the law, the PUCO may modify an order if, upon rehearing, it determines that any part of the order was unjust or unwarranted.[[28]](#footnote-29) The PUCO's rules similarly require a party to file an application for rehearing setting forth the specific grounds on which the party believes the order to be unreasonable or unlawful.[[29]](#footnote-30) And the PUCO does not permit parties to collaterally attack its orders outside of the application for rehearing process.[[30]](#footnote-31)

Duke is not asking for a waiver to exceed the 2017 cost cap by an immaterial amount. Duke is asking the PUCO to effectively modify the Order to allow Duke to substantially exceed the cost cap without Duke scaling back its programs. Thus, Duke has filed the wrong document to achieve its unjust and unreasonable ends. The PUCO should deny its motion.

**III. CONCLUSION**

When Duke filed its application in this case, it proposed charging customers around **$38 million** on programs in 2017.

When Duke filed the Settlement in this case, it proposed charging customers around **$38 million** on programs in 2017.

When Duke filed a request to update its 2017 energy efficiency rider, it estimated customer charges of around **$39 million** for 2017 programs.

When the PUCO entered the Order in this case, it capped annual charges to customers at **$38.6 million**.

But now, Duke wants to charge customers **$56 million** or more for 2017 programs.

This is unjust, unreasonable, and violates the PUCO's Order. The PUCO should deny the Motion and order Duke to limit 2017 energy efficiency charges to $38.6 million (4.0% of its 2015 revenues).

Respectfully submitted,

BRUCE WESTON (0016973)

OHIO CONSUMERS' COUNSEL

/s/ *Christopher Healey*

Christopher Healey (0086027)
Counsel of Record

**Office of the Ohio Consumers' Counsel**

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

Telephone: (614) 466-9571

christopher.healey@occ.ohio.gov

(willing to accept service by e-mail)

Dane Stinson (0019101)

Bricker & Eckler LLP

100 South Third Street

Columbus, Ohio 43215

Telephone: (614) 227-4854

dstinson@bricker.com

(willing to accept service by e-mail)

Outside Counsel for the Office of the Ohio Consumers’ Counsel

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum Contra was served on the persons stated below via electronic transmission, this 27th day of October 2017.

 /s/ *Christopher Healey*\_\_\_\_\_\_\_

 Christopher Healey

 Assistant Consumers' Counsel

**SERVICE LIST**

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|  |  |
| Bojko@carpenterlipps.comGhiloni@carpenterlipps.comperko@carpenterlipps.compaul@carpenterlipps.commfleisher@elpc.orgfdarr@mwncmh.commpritchard@mwncmh.comjoliker@igsenergy.comJohn.jones@ohioattorneygeneral.gov | Amy.spiller@duke-energy.comElizabeth.watts@duke-energy.comcmooney@ohiopartners.orgtdougherty@theOEC.orgjfinnigan@edf.orgrdove@attorneydove.comrick.sites@ohiohospitals.orgmwarnock@bricker.com dborchers@bricker.com |

 Attorney Examiner:

 Richard.bulgrin@puc.state.oh.us

1. *See* Tr. at 42:13-25 (Duff cross examination); Motion of Duke Energy Ohio, Inc. for a Waiver (the "Motion") at 2 (projected 2017 budget of around $39.1 million in Duke's 2017 rider true-up filing). [↑](#footnote-ref-2)
2. Amended Stipulation & Recommendation (Jan. 27, 2017). [↑](#footnote-ref-3)
3. Opinion & Order (Sept. 27, 2017) (the "Order"). [↑](#footnote-ref-4)
4. *See* Supplemental Testimony of Trisha A. Haemmerle on Behalf of Duke Energy Ohio, Inc. at Supplemental Attachment JEZ-1, page 1 (Oct. 14, 2016) ($36,401,147 in program costs and overhead plus $1,654,393 in M&V costs). *See also* Motion at 2 (noting forecasted budget for 2017 of $38.8 million based on Duke's rider filing). [↑](#footnote-ref-5)
5. *Id.* [↑](#footnote-ref-6)
6. Amended Stipulation & Recommendation (Jan. 27, 2017) (the "Settlement"). [↑](#footnote-ref-7)
7. *See* Tr. at 42:13-25 (Duff cross examination) (acknowledging that budget was about $38 million, plus some adjustments for program changes in the Settlement). Subsequently, Duke filed a request to update its energy efficiency rider, where it projected a 2017 budget of around $39.1 million. *See* Motion at 2 (projected 2017 budget of around $39.1 million in Duke's 2017 rider true-up filing). [↑](#footnote-ref-8)
8. Settlement at 5; Tr. at 42:3-6 (Duff cross examination). [↑](#footnote-ref-9)
9. Settlement at 4 (recommending approval of Duke's application as filed, subject to modifications set forth in the Settlement); Application at 13 (portfolio designed to meet or exceed statutory energy efficiency benchmarks). [↑](#footnote-ref-10)
10. Prefiled Direct Testimony of Patrick Donlon at 4:60-63 (Feb. 6, 2017); Tr. at 100:1-2 (Shutrump cross examination, supporting the PUCO's recommended 3.5% cost cap). [↑](#footnote-ref-11)
11. Rebuttal Testimony of Timothy J. Duff on Behalf of Duke Energy Ohio, Inc. at 8:4-7 (Mar. 7, 2017). [↑](#footnote-ref-12)
12. Order ¶¶ 46-47. [↑](#footnote-ref-13)
13. *Id.* [↑](#footnote-ref-14)
14. Motion at 3. [↑](#footnote-ref-15)
15. It is not clear what Duke's intent is in filing the Motion. On page 2, Duke states that it requests waiver "with reconciliation and recovery of such costs to be determined in a subsequent proceeding." But on page 3 of the Motion, Duke states that it "respectfully requests that the Commission permit recovery of these actual costs in the 2017 true-up rider proceeding and grant a waiver for this purpose in order to permit the Company to recover all program costs for 2017." The latter language seems to suggest that there may not be any further review of these costs. Duke's 2017 rider true-up proceeding is Case No. 17-781-EL-RDR. [↑](#footnote-ref-16)
16. Motion at 2. [↑](#footnote-ref-17)
17. This is not an isolated incident for Duke. In one of its prior energy efficiency cases, the PUCO found that Duke demonstrated a "continued refusal to comply with the dictates of the [PUCO's] rules" and that the PUCO would "no longer tolerate Duke's unwillingness to follow our directives ...." *In re Application of Duke Energy Ohio, Inc. for an Energy Efficiency Cost Recovery Mechanism & for Approval of Additional Programs for Inclusion in its Existing Portfolio*, Case No. 11-4393-EL-RDR, Entry ¶ 7 (May 9, 2012). [↑](#footnote-ref-18)
18. Order ¶ 47. [↑](#footnote-ref-19)
19. Motion at 2. [↑](#footnote-ref-20)
20. *Id.* [↑](#footnote-ref-21)
21. *See supra* § I. [↑](#footnote-ref-22)
22. Order ¶ 47. [↑](#footnote-ref-23)
23. *See* Motion at 3 (Duke "respectfully requests that the Commission permit recovery of these actual costs in the 2017 true-up rider proceeding and grant a waiver for this purpose in order to permit the Company to recover all program costs for 2017"). [↑](#footnote-ref-24)
24. Motion at 2-3. [↑](#footnote-ref-25)
25. Order ¶ 47. [↑](#footnote-ref-26)
26. Motion at 2. [↑](#footnote-ref-27)
27. *See* section I above. [↑](#footnote-ref-28)
28. R.C. 4903.10(B). [↑](#footnote-ref-29)
29. Ohio Adm. Code 4901-1-35(A). [↑](#footnote-ref-30)
30. *See, e.g., 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); *In re Application of Ohio Power Co. to Adopt a Final Implementation Plan for the Retail Stability Rider*, Case No. 14-1186-EL-RDR, Finding & Order ¶ 33 (Apr. 2, 2015) (rejecting parties' arguments as a collateral attack on prior PUCO orders); *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). [↑](#footnote-ref-31)