**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke )

Energy Ohio, Inc., for an Increase in Electric ) Case No. 17-0032-EL-AIR

Distribution Rates. )

In the Matter of the application of Duke ) Case No. 17-0033-EL-ATA

Energy Ohio, Inc., for Tariff Approval. )

In the Matter of the Application of Duke )

Energy Ohio, Inc. for Approval to Change ) Case No. 17-0034-EL-AAM

Accounting Methods.

In the Matter of the Application of Duke )

Energy Ohio, Inc. for Approval to Modify ) Case No. 17-0872-EL-RDR

Rider PSR. )

In the Matter of the Application of Duke )

Energy Ohio, Inc. for Approval to Amend ) Case No. 17-0873-EL-ATA

Rider PSR. )

In the Matter of the Application of Duke )

Energy Ohio, Inc. for Approval to Change ) Case No. 17-0874-EL-AAM

Accounting Methods. )

In the Matter of the Application of Duke )

Energy Ohio, Inc. for Authority to Establish )

a Standard Service Offer Pursuant to Section ) Case No. 17-1263-EL-SSO

4928.143, Revised Code, in the Form of an )

Electric Security Plan, Accounting )

Modifications and Tariffs for Generation )

Service. )

In the Matter of the Application of Duke )

Energy Ohio, Inc. for Authority to Amend ) Case No. 17-1264-EL-ATA

Its Certified Supplier Tariff, P.U.C.O. No. )

20. )

In the Matter of the Application of Duke )

Energy Ohio, Inc. for Authority to Defer ) Case No. 17-1265-EL-AAM

Vegetation Management Costs. )

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

**SECOND APPLICATION FOR REHEARING**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The Office of the Ohio Consumers' Counsel (“OCC”) files this Second Application for Rehearing (“Application”) to protect consumers from paying Duke Energy Ohio, Inc. (“Duke” or “Utility”) hundreds of millions of dollars for a charge, the Price Stability Rider (“Rider PSR”), to subsidize old, uneconomic coal plants – the Ohio Valley Electric Corporation (“OVEC”) – that cannot compete in a market deregulated by the Ohio General Assembly over 16 years ago.[[1]](#footnote-1) In its Second Entry on Rehearing of July 17, 2019 (“Second Entry”), the Public Utilities Commission of Ohio (“PUCO”) affirmed its holding that Rider PSR is a valid provision of Duke’s electric security plan. Its holding improperly relies on the Supreme Court of Ohio’s decision in *In re Application of Ohio Power Co.*, 155 Ohio St.3d 326, 2018-Ohio-4698, and violates OCC’s due process rights.

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

ASSIGNMENT OF ERROR 1: The PUCO’s Second Entry is unlawful and unreasonable in approving Rider PSR as a valid provision under Duke’s electric security plan based on *In re Application of Ohio Power Co.* That decision did not involve a factual determination of whether there was record support for establishing that the OVEC-related rider was a limitation on customer shopping.

ASSIGNMENT OF ERROR 2: The PUCO’s evaluation of Rider PSR, including in its Second Entry, is unlawful and unreasonable because it denied OCC its right to a hearing under R.C. 4928.141(B) and violated OCC’s due process rights by preventing OCC from having its day in court.

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 Second Entry as requested by OCC.

Respectfully submitted,

Bruce Weston (0016973)

Ohio Consumers’ Counsel

*/s/ William J. Michael*

William J. Michael (0070921)

Counsel of Record

Christopher Healey (0086027)

Assistant Consumers’ Counsel

**Office of the Ohio Consumers’ Counsel**

65 East State Street, 7th Floor

Columbus, Ohio 43215-4213

Telephone [Michael]: (614) 466-1291

Telephone [Healey]: (614) 466-9571

[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)

[Christopher.healey@occ.ohio.gov](mailto:Christopher.healey@occ.ohio.gov)

(willing to accept service by e-mail)

**TABLE OF CONTENTS**

**PAGE**

[I. INTRODUCTION 2](#_Toc16860454)

[II. STANDARD OF REVIEW 2](#_Toc16860455)

[iii. ERRORS 4](#_Toc16860456)

[ASSIGNMENT OF ERROR 1: The PUCO’s Second Entry is unlawful and unreasonable in approving Rider PSR as a valid provision under Duke’s electric security plan based on *In re Application of Ohio Power Co.* That decision did not involve a factual determination of whether there was record support for establishing that the OVEC-related rider was a limitation on customer   
shopping. 4](#_Toc16860457)

[ASSIGNMENT OF ERROR 2: The PUCO’s evaluation of Rider PSR, including in its Second Entry, is unlawful and unreasonable because it denied OCC its right to a hearing under R.C. 4928.141(B) and violated OCC’s due process rights by preventing OCC from having its day in court. 6](#_Toc16860458)

[iv. CONCLUSION 10](#_Toc16860459)

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**MEMORANDUM IN SUPPORT**

# I. INTRODUCTION

The Second Entry in this case involving Duke’s electric security plan (“ESP”) has only confirmed what consumers have long known—that ESPs and settlements of ESPs 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 Duke 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 power plant competition and the intent of the Ohio General Assembly that passed S.B. 3 in 1999.[[2]](#footnote-2)

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

# 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 Second Entry is met here. The PUCO should grant and hold rehearing on the matters specified in this Application, and subsequently abrogate or modify its Second Entry. The PUCO’s ruling was unreasonable or unlawful as described below.

# iii. ERRORS

## ASSIGNMENT OF ERROR 1: The PUCO’s Second Entry is unlawful and unreasonable in approving Rider PSR as a valid provision under Duke’s electric security plan based on *In re Application of Ohio Power Co.* That decision did not involve a factual determination of whether there was record support for establishing that the OVEC-related rider was a limitation on customer shopping.

OCC explained in its Application for Rehearing that the PUCO’s Opinion and Order is unlawful and unreasonable because it approved Rider PSR under R.C. 4928.143(B)(2)(d) as a limitation on customer shopping without any record evidence, in violation of R.C. 4903.09 and Supreme Court of Ohio precedent.[[3]](#footnote-3) In its Second Entry, the PUCO rejected OCC’s argument on the authority of *In re Application of Ohio Power Co.*, 155 Ohio St.3d 326, 2018-Ohio-4698. The PUCO wrote:

[T]he Supreme Court of Ohio upheld the Commission’s approval, pursuant to R.C. 4928.143(B)(2)(d), of a nearly identical OVEC-related rider for AEP Ohio. Like AEP Ohio’s rider, Rider PSR was authorized under R.C. 4928.143(B) as a limitation on customer shopping and the Supreme Court of Ohio held that R.C. 4928.143(B) provides that an ESP may include a charge notwithstanding any other provision of Title XLIX of the Revised Code to the contrary. Accordingly, we affirm that Ride PSR is a valid provision of an ESP.[[4]](#footnote-4)

In consumers’ interest, the PUCO should revisit this determination. The Court in *In re Application of Ohio Power Co.* addressed only *legal* challenges to the PUCO’s authority under R.C. 4928.143(B)(2)(d) to authorize AEP’s OVEC-related rider. It did not address the *factual* question of whether AEP’s OVEC-related rider limits customer shopping. And it certainly did not decide the *factual* question here of whether there is record support that Duke’s Rider PSR limits customer shopping. Each case must be decided on a case-by-case basis, according to each case’s own factual record, and legal merits.[[5]](#footnote-5)

In *In re Application of Ohio Power Co.*, OCC made the legal argument that R.C. 4928.143(B)(2)(d) does not allow *financial* limitations on customer shopping.[[6]](#footnote-6) The Court specifically characterized OCC’s argument as a legal one, “an issue of statutory interpretation.”[[7]](#footnote-7) It held that the plain language of the statute permits the PUCO to approve “limitations on customer shopping.” And because a financial limitation is a type of limitation on customer shopping, it rejected OCC’s argument.[[8]](#footnote-8)

OCC also made another legal argument, “[t]he gravamen” of which, according to the Court, was that “the phrase limitations on customer shopping allows only a provision that limits customers from physically switching . . . .”[[9]](#footnote-9) The Court explained that it need not decide if OCC’s interpretation of R.C. 4928.143(B)(2)(d) was correct. “[B]ecause even if OCC is correct, this would not preclude the use of a financial limitation as a means to restrict customers from physically switching.”[[10]](#footnote-10)

In *In re Application of Ohio Power Co.*, OCC made *legal* arguments that the PUCO’s authorization of AEP’s OVEC-related rider was unlawful. Here, OCC has demonstrated that the PUCO’s authorization of Rider PSR was unreasonable and unlawful because it lacked *record* support, in violation R.C. 4903.09 and Supreme Court of Ohio precedent. The PUCO’s reliance on *In re Application of Ohio Power Co.* was unlawful and unreasonable. As a result, the PUCO should abrogate and modify the Second Entry. To protect consumers, it should find that there is no record support for Rider PSR being a limitation on customer shopping and remove it from Duke’s ESP.[[11]](#footnote-11)

## ASSIGNMENT OF ERROR 2: The PUCO’s evaluation of Rider PSR, including in its Second Entry, is unlawful and unreasonable because it denied OCC its right to a hearing under R.C. 4928.141(B) and violated OCC’s due process rights by preventing OCC from having its day in court.

Under R.C. 4928.141(B), the PUCO is required to hold a hearing on a utility’s application for a standard service offer. The utility has the burden of proof at that hearing. R.C. 4928.143(C)(1). But on the issue of Rider PSR, the PUCO’s actions deprived OCC of its right to be heard on the Rider PSR:

* The PUCO in Duke’s third ESP waited nearly *three years* to rule on OCC’s Application for Rehearing of its Opinion and Order.
* The PUCO approved a settlement regarding Duke’s fourth ESP and Rider PSR while OCC’s appeal of Duke’s third ESP, including of Rider PSR, was pending.
* Because the PUCO waited nearly three years to rule on OCC’s challenges to Rider PSR in Duke’s third ESP, the Supreme Court of Ohio dismissed OCC’s appeal of Duke’s third ESP as moot.
* The PUCO in its Second Entry here asserted that OCC’s challenges must be rejected because Rider PSR was already approved in Duke’s third ESP as a limitation on customer shopping. But OCC’s challenges to Rider PSR as part of Duke’s third ESP were moot because the PUCO waited to rule on OCC’s challenges for nearly three years.
* The PUCO approved Rider PSR notwithstanding that there was no record evidence in Duke’s third ESP (or this one) supporting it as a limitation on customer shopping. It is reversible error for the PUCO to rely on a previous case to support its decision in the case before it where the previous case, itself, lacked record support.

Not only did the PUCO violate Ohio law, but the PUCO violates parties’ due process rights under the Ohio and federal constitution[[12]](#footnote-12) in this proceeding where it engaged in ratemaking, without record evidence or failed to allow parties to refute evidence. That is “not the fair hearing essential to due process. It is condemnation without trial.”[[13]](#footnote-13) The PUCO meets due process requirements only when it’s authority “is not arbitrarily and capriciously exercised.”[[14]](#footnote-14) Due process requires ample notice, an opportunity to present evidence, cross-examine witnesses, introduce exhibits, post-hearing briefs, and challenges through applications for rehearing.[[15]](#footnote-15) To comply with the law, the PUCO must provide “in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion.”[[16]](#footnote-16) The PUCO’s conduct throughout its evaluation of Rider PSR, including in its Second Entry, is unlawful and unreasonable because it has not met the standard that due process requires.

In Duke’s third ESP, where Rider PSR was initially approved as a placeholder rider,[[17]](#footnote-17) nearly *three years* passed between when OCC filed its Application for Rehearing of the PUCO’s Opinion and Order[[18]](#footnote-18) and when the PUCO ruled on it.[[19]](#footnote-19) Not surprisingly, Duke filed for its fourth ESP during that time.[[20]](#footnote-20) While Duke’s fourth ESP was pending, OCC filed its Notice of Appeal of Duke’s third ESP.[[21]](#footnote-21) OCC’s Notice of Appeal challenged Rider PSR on numerous grounds.[[22]](#footnote-22) As that appeal was pending, the PUCO approved a settlement regarding Duke’s fourth ESP and Rider PSR.[[23]](#footnote-23) Thereafter, the Supreme Court of Ohio issued an order, *sua sponte*, in connection with OCC’s appeal of Duke’s third ESP requiring OCC to show cause why its appeal should not be dismissed as moot in light of the PUCO’s approval of Duke’s fourth ESP.[[24]](#footnote-24) After responses to the Court’s order, the Court dismissed OCC’s appeal of Duke’s third ESP as moot.[[25]](#footnote-25)

In response to OCC’s challenge to Rider PSR in this case, the PUCO in its Second Entry asserted that OCC’s challenges must be rejected because Rider PSR was already approved in Duke’s third ESP.[[26]](#footnote-26) This notwithstanding that OCC’s challenges to Rider PSR as part of Duke’s third ESP were moot because the PUCO waited to rule on OCC’s challenges for nearly three years. Further, as OCC has repeatedly pointed out,[[27]](#footnote-27) there was no record evidence in Duke’s third ESP (or this one) supporting Rider PSR as a limitation on customer shopping. The Supreme Court of Ohio held in *Tongren v. Public Utilities Commission of Ohio*[[28]](#footnote-28) that it is reversible error for the PUCO to rely on a previous case to support its decision in the case before it where the previous case, itself, lacked record support.

This history (necessitating correction on rehearing) of the PUCO’s actions and inactions show that, to date, OCC has never gotten its day in court to challenge Rider PSR. OCC’s due process rights under Article I, section 16 of the Ohio Constitution and the United States Constitution’s Fourteenth Amendment have been violated. In Duke’s third ESP, the PUCO waited three years to rule on OCC’s Application for Rehearing of the PUCO’s Opinion and Order approving Duke’s ESP and Rider PSR, preventing an unobstructed appeal to the Supreme Court of Ohio. And by the time that the PUCO *did* rule on OCC’s Application for Rehearing and OCC could appeal the case and have it heard by the Supreme Court of Ohio, Duke’s fourth ESP was (not surprisingly) already in effect and OCC’s appeal was moot. This notwithstanding, the PUCO is now asserting that OCC’s challenge to Rider PSR is moot because of its decision in Duke’s third ESP. To make matters worse, in neither Duke’s third ESP nor in Duke’s fourth ESP was there any record evidence showing that Rider PSR limits customer shopping.[[29]](#footnote-29)

The PUCO’s conduct is arbitrary and capricious, an abuse of discretion, otherwise outside the law and “at variance with the rudiments of fair play long known to our law. The Fourteenth Amendment condemns such methods and defeats them.”[[30]](#footnote-30) As a result, the PUCO should abrogate and modify the Second Entry. To protect consumers, it should find that there is no record support for Rider PSR being a limitation on customer shopping and remove it from Duke’s ESP.[[31]](#footnote-31)

# iv. CONCLUSION

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

Respectfully submitted,

Bruce Weston (0016973)

Ohio Consumers’ Counsel

*/s/ William J. Michael*

William J. Michael (0070921)

Counsel of Record

Christopher Healey (0086027)

Assistant Consumers’ Counsel

**Office of the Ohio Consumers’ Counsel**

65 East State Street, 7th Floor

Columbus, Ohio 43215-4213

Telephone [Michael]: (614) 466-1291

Telephone [Healey]: (614) 466-9571

[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)

[Christopher.healey@occ.ohio.gov](mailto:Christopher.healey@occ.ohio.gov)

(willing to accept service by e-mail)

**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 16th day of August 2019.

*/s/ William J. Michael*

William J. Michael

Assistant Consumers’ Counsel

**SERVICE LIST**

|  |  |
| --- | --- |
| **Case No. 17-0872-EL-RDR et al.**  [Steven.beeler@ohioattorneygeneral.gov](mailto:Steven.beeler@ohioattorneygeneral.gov)  [cmooney@ohiopartners.org](mailto:cmooney@ohiopartners.org)  [mkurtz@BKLlawfirm.com](mailto:mkurtz@BKLlawfirm.com)  [kboehm@BKLlawfirm.com](mailto:kboehm@BKLlawfirm.com)  [jkylercohn@BKLlawfirm.com](mailto:jkylercohn@BKLlawfirm.com)  [dborchers@bricker.com](mailto:dborchers@bricker.com)  [dparram@bricker.com](mailto:dparram@bricker.com)  [whitt@whitt-sturtevant.com](mailto:whitt@whitt-sturtevant.com)  [campbell@whitt-sturtevant.com](mailto:campbell@whitt-sturtevant.com)  [glover@whitt-sturtevant.com](mailto:glover@whitt-sturtevant.com)  [rsahli@columbus.rr.com](mailto:rsahli@columbus.rr.com)  [mleppla@theoec.org](mailto:mleppla@theoec.org)  [tdougherty@theOEC.org](mailto:tdougherty@theOEC.org)  **Case No. 17-0032-EL-AIR et al.**  [Steven.beeler@ohioattorneygeneral.gov](mailto:Steven.beeler@ohioattorneygeneral.gov)  [Robert.eubanks@ohioattorneygeneral.gov](mailto:Robert.eubanks@ohioattorneygeneral.gov)  [cmooney@ohiopartners.org](mailto:cmooney@ohiopartners.org)  [mfleisher@elpc.org](mailto:mfleisher@elpc.org)  [fdarr@mwncmh.com](mailto:fdarr@mwncmh.com)  [mpritchard@mwncmh.com](mailto:mpritchard@mwncmh.com)  [paul@carpenterlipps.com](mailto:paul@carpenterlipps.com)  [mleppla@theOEC.org](mailto:mleppla@theOEC.org)  [tdougherty@theOEC.org](mailto:tdougherty@theOEC.org)  [dborchers@bricker.com](mailto:dborchers@bricker.com)  [dparram@bricker.com](mailto:dparram@bricker.com)  [whitt@whitt-sturtevant.com](mailto:whitt@whitt-sturtevant.com)  [campbell@whitt-sturtevant.com](mailto:campbell@whitt-sturtevant.com)  [glover@whitt-sturtevant.com](mailto:glover@whitt-sturtevant.com)  [mjsettineri@vorys.com](mailto:mjsettineri@vorys.com)  [glpetrucci@vorys.com](mailto:glpetrucci@vorys.com)  [talexander@calfee.com](mailto:talexander@calfee.com)  [jlang@calfee.com](mailto:jlang@calfee.com)  [slesser@calfee.com](mailto:slesser@calfee.com)  [talexander@calfee.com](mailto:talexander@calfee.com)  [mkeaney@calfee.com](mailto:mkeaney@calfee.com)  **Case No. 17-1263-EL-SSO et al.**  [Steven.beeler@ohioattorneygeneral.gov](mailto:Steven.beeler@ohioattorneygeneral.gov)  [fdarr@mwncmh.com](mailto:fdarr@mwncmh.com)  [mpritchard@mwncmh.com](mailto:mpritchard@mwncmh.com)  [mkurtz@BKLlawfirm.com](mailto:mkurtz@BKLlawfirm.com)  [jkylercohn@BKLlawfirm.com](mailto:jkylercohn@BKLlawfirm.com)  [cmooney@ohiopartners.org](mailto:cmooney@ohiopartners.org)  [Bojko@carpenterlipps.com](mailto:Bojko@carpenterlipps.com)  [dressel@carpenterlipps.com](mailto:dressel@carpenterlipps.com)  [slesser@calfee.com](mailto:slesser@calfee.com)  [jlang@calfee.com](mailto:jlang@calfee.com)  [talexander@calfee.com](mailto:talexander@calfee.com)  [mkeaney@calfee.com](mailto:mkeaney@calfee.com)  [eakhbari@bricker.com](mailto:eakhbari@bricker.com)  [nhewell@bricker.com](mailto:nhewell@bricker.com)  [paul@carpenterlipps.com](mailto:paul@carpenterlipps.com)  [whitt@whitt-sturtevant.com](mailto:whitt@whitt-sturtevant.com)  [campbell@whitt-sturtevant.com](mailto:campbell@whitt-sturtevant.com)  [glover@whitt-sturtevant.com](mailto:glover@whitt-sturtevant.com)  [rsahli@columbus.rr.com](mailto:rsahli@columbus.rr.com)  [tony.mendoza@sierraclub.org](mailto:tony.mendoza@sierraclub.org)  **Case No. 16-1602-EL-ESS**  [Thomas.lindgren@ohioattorneygeneral.gov](mailto:Thomas.lindgren@ohioattorneygeneral.gov)  [Elizabeth.watts@duke-energy.com](mailto:Elizabeth.watts@duke-energy.com) | [Jeanne.kingery@duke-energy.com](mailto:Jeanne.kingery@duke-energy.com)  [Elizabeth.watts@duke-energy.com](mailto:Elizabeth.watts@duke-energy.com)  [Rocco.dascenzo@duke-energy.com](mailto:Rocco.dascenzo@duke-energy.com)  [chris.michael@icemiller.com](mailto:chris.michael@icemiller.com)  [Mike.Mizell@icemiller.com](mailto:Mike.Mizell@icemiller.com)  [Kay.pashos@icemiller.com](mailto:Kay.pashos@icemiller.com)  [Camal.Robinson@duke-energy.com](mailto:Camal.Robinson@duke-energy.com)  [fdarr@mwncmh.com](mailto:fdarr@mwncmh.com)  [mpritchard@mwncmh.com](mailto:mpritchard@mwncmh.com)  [Bojko@carpenterlipps.com](mailto:Bojko@carpenterlipps.com)  [perko@carpenterlipps.com](mailto:perko@carpenterlipps.com)  [paul@carpenterlipps.com](mailto:paul@carpenterlipps.com)  [joliker@igsenergy.com](mailto:joliker@igsenergy.com)  [kboehm@BKLlawfirm.com](mailto:kboehm@BKLlawfirm.com)  [Jeanne.kingery@duke-energy.com](mailto:Jeanne.kingery@duke-energy.com)  [Elizabeth.watts@duke-energy.com](mailto:Elizabeth.watts@duke-energy.com)  [Rocco.dascenzo@duke-energy.com](mailto:Rocco.dascenzo@duke-energy.com)  [chris.michael@icemiller.com](mailto:chris.michael@icemiller.com)  [Mike.Mizell@icemiller.com](mailto:Mike.Mizell@icemiller.com)  [Kay.pashos@icemiller.com](mailto:Kay.pashos@icemiller.com)  [Camal.Robinson@duke-energy.com](mailto:Camal.Robinson@duke-energy.com)  [mkurtz@BKLlawfirm.com](mailto:mkurtz@BKLlawfirm.com)  [kboehm@BKLlawfirm.com](mailto:kboehm@BKLlawfirm.com)  [jkylercohn@BKLlawfirm.com](mailto:jkylercohn@BKLlawfirm.com)  [joliker@igsenergy.com](mailto:joliker@igsenergy.com)  [eakhbari@bricker.com](mailto:eakhbari@bricker.com)  [nhewell@bricker.com](mailto:nhewell@bricker.com)  [mdortch@kravitzllc.com](mailto:mdortch@kravitzllc.com)  [Bojko@carpenterlipps.com](mailto:Bojko@carpenterlipps.com)  [dressel@carpenterlipps.com](mailto:dressel@carpenterlipps.com)  [mnugent@igsenergy.com](mailto:mnugent@igsenergy.com)  [swilliams@nrdc.org](mailto:swilliams@nrdc.org)  [daltman@environlaw.com](mailto:daltman@environlaw.com)  [jnewman@environlaw.com](mailto:jnewman@environlaw.com)  [jweber@environlaw.com](mailto:jweber@environlaw.com)  [rdove@attorneydove.com](mailto:rdove@attorneydove.com)  [Jeanne.kingery@duke-energy.com](mailto:Jeanne.kingery@duke-energy.com)  [Elizabeth.watts@duke-energy.com](mailto:Elizabeth.watts@duke-energy.com)  [Rocco.dascenzo@duke-energy.com](mailto:Rocco.dascenzo@duke-energy.com)  [chris.michael@icemiller.com](mailto:chris.michael@icemiller.com)  [Mike.Mizell@icemiller.com](mailto:Mike.Mizell@icemiller.com)  [Kay.pashos@icemiller.com](mailto:Kay.pashos@icemiller.com)  [Camal.Robinson@duke-energy.com](mailto:Camal.Robinson@duke-energy.com)  [charris@spilmanlaw.com](mailto:charris@spilmanlaw.com)  [dwilliamson@spilmanlaw.com](mailto:dwilliamson@spilmanlaw.com)  [lbrandfass@spilmanlaw.com](mailto:lbrandfass@spilmanlaw.com)  [mfleisher@elpc.org](mailto:mfleisher@elpc.org)  [tdougherty@theOEC.org](mailto:tdougherty@theOEC.org)  [mleppla@theOEC.org](mailto:mleppla@theOEC.org)  [joliker@igsenergy.com](mailto:joliker@igsenergy.com)  [mnugent@igsenergy.com](mailto:mnugent@igsenergy.com)  [dborchers@bricker.com](mailto:dborchers@bricker.com)  [dparram@bricker.com](mailto:dparram@bricker.com)  [mjsettineri@vorys.com](mailto:mjsettineri@vorys.com)  [glpetrucci@vorys.com](mailto:glpetrucci@vorys.com)  [mdortch@kravitzllc.com](mailto:mdortch@kravitzllc.com)  [sean.mcglone@ohiohospitals.org](mailto:sean.mcglone@ohiohospitals.org) |

1. *See* R.C. 4903.10 and O.A.C. 4901-1-35. [↑](#footnote-ref-1)
2. *See* Ohio Senate Bill 3, as passed by the 123rd General Assembly, 1999. [↑](#footnote-ref-2)
3. *See* OCC’s Application for Rehearing at 3-5; *see also Ohio Consumers’ Counsel v. PUC*, 111 Ohio St. 3d 300 (2006). [↑](#footnote-ref-3)
4. Second Entry at 6 (internal quotations and citations omitted). [↑](#footnote-ref-4)
5. *See* R.C. 4903.03; *Ohio Consumers’ Counsel v. PUC*, 111 Ohio St.3d 300 (2006). [↑](#footnote-ref-5)
6. *See In re Application of Ohio Power Co.*, 2018-Ohio at ¶28. [↑](#footnote-ref-6)
7. *See id.* at ¶29. [↑](#footnote-ref-7)
8. *See id.*  [↑](#footnote-ref-8)
9. *See id.* at ¶31 (internal quotations omitted). [↑](#footnote-ref-9)
10. *See id.* [↑](#footnote-ref-10)
11. Clearly, consumers are prejudiced by the PUCO’s improper reliance on *In re Application of Ohio Power Co.* and the lack of record support for Rider PSR being a limitation on customer shopping. Consumers are paying Rider PSR when it should never have been approved in the first place. [↑](#footnote-ref-11)
12. *See* Ohio Const., Art. I, sec. 16; U.S. Const., Amend. XIV. [↑](#footnote-ref-12)
13. *See Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 301 U.S. 292, 300 (1937). [↑](#footnote-ref-13)
14. *See Pub. Util. Comm. v. Pollak*, 343 U.S. 451, 465 (1952). [↑](#footnote-ref-14)
15. *See Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 113 Ohio St. 3d 180, 2006-Ohio-1386 at ¶53. [↑](#footnote-ref-15)
16. *See Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 89 (1999). [↑](#footnote-ref-16)
17. *See* Case No. 14-0814-EL-SSO. [↑](#footnote-ref-17)
18. *See id.* at OCC’s Application for Rehearing (May 4, 2015). [↑](#footnote-ref-18)
19. *See id.* at Second Entry on Rehearing (March 21, 2018). [↑](#footnote-ref-19)
20. *See* Case No. 17-1263-EL-SSO (June 1, 2017). [↑](#footnote-ref-20)
21. *See* Case No. 14-0814-EL-SSO, Notice of Appeal (July 16, 2018). [↑](#footnote-ref-21)
22. *See id.* [↑](#footnote-ref-22)
23. *See* Case No. 17-1263-EL-SSO, Opinion and Order (December 19, 2018). [↑](#footnote-ref-23)
24. *See 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,* Case No. 2018-0973, Order (March 13, 2019). [↑](#footnote-ref-24)
25. *See id.* at Decision (May 8, 2019). [↑](#footnote-ref-25)
26. *See* Second Entry at 6. [↑](#footnote-ref-26)
27. *See, e.g.,* OCC’s Application for Rehearing at 3-5. [↑](#footnote-ref-27)
28. 85 Ohio St. 3d 87 (1999). [↑](#footnote-ref-28)
29. *See generally* OCC’s Application for Rehearing. [↑](#footnote-ref-29)
30. *See West Ohio Gas Co. v. Pub. Util. Comm.*, 294 U.S.63, 71 (1935) (internal quotations and citations omitted). [↑](#footnote-ref-30)
31. Clearly, consumers are prejudiced by the PUCO’s denial of OCC’s due process rights. Consumers are paying Rider PSR when it should never have been approved in the first place. [↑](#footnote-ref-31)