

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review)	
of Duke Energy Ohio, Inc.'s)	Case No. 18-1036-EL-RDR
Distribution Capital Investment Rider.)	

**DUKE ENERGY OHIO'S MOTION TO STRIKE
PORTIONS OF THE REPLY BRIEF FILED BY THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL**

Pursuant to Rule 4901-1-12, O.A.C., Duke Energy Ohio, Inc., (Duke Energy Ohio) hereby moves the Public Utilities Commission of Ohio (Commission), to strike certain false and misleading statements and allegations contained in the Reply Brief submitted by the Office of the Ohio Consumers' Counsel in this proceeding. As more fully explained in the accompanying Memorandum in Support, the statements at issue are unsupportable on the record, misleading to the Commission, and misstate facts and statements made by witnesses at the hearing. The transcript and other evidence in the record clearly show these statements to be incorrect. As these statements came up for the first time through OCC's Reply Brief submitted on September 11, 2019, Duke Energy Ohio has not had an opportunity to rebut these statements and thus it is appropriate for them to be completely stricken. The reasons for this motion are more fully set forth in the accompanying Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

The Office of the Ohio Consumers' Counsel (OCC) has erroneously made claims regarding the record of this case in its Reply Brief Opposing the Settlement (Reply Brief) in this case in two important respects. The incorrect statements are central to the facts that are relevant in the case and clearly shown to be incorrect in the record. While a certain amount of leeway can sometimes be accepted in respect of legal argument, these two incorrect statements are glaringly wrong, not supported, misstate facts, and must be corrected. For the reasons set forth below, Duke Energy Ohio, Inc. respectfully requests that the Public Utilities Commission of Ohio (Commission) strike the portions of OCC's brief that blatantly misstate that facts.

The Commission should specifically strike the following portions of OCC's Reply Brief: Page 3, second paragraph in section II, A.1., beginning with the words "The correction" and ending with the word "filing." Page 5, first full paragraph on the page, beginning with the word "Further" and ending with the word "tariffs."

OCC, in its Reply Brief states as follows:

"Further, Duke witness Lawler admitted that allowing Duke to charge consumers for transmission costs through the Distribution Charge violates the filed rate doctrine."¹

In support of this statement, OCC cites to the Revised Code and an Ohio Supreme Court case.² The cite provides no record support for Ms. Lawler's statement and indeed there is no such record support. This topic was discussed by Ms. Lawler during cross-examination by OCC's counsel. Counsel began by questioning Ms. Lawler regarding her knowledge of the filed-rate doctrine. After counsel's questions, Ms. Lawler stated: "I think I'm fairly confident that the Stipulation is - - we are in compliance with the tariff; the Stipulation is in compliance with the

¹ OCC Reply Brief at p. 5.

² OCC's footnote 18 states as follows: "*Under this doctrine, a utility can charge consumers only what is in its tariffs. See R.C.4905.33; In re Application of Columbus S. Power Co., 138 Ohio St. 3d 448 (2014).*"

tariff.”³ Nowhere in the record during cross examination does Ms. Lawler make such an admission. Further, such a legal conclusion is not something Ms. Lawler could opine upon as she is not an attorney. In fact, she clearly stated that she was not familiar with the term filed rate doctrine,⁴ and maintained that the settlement complied with the Company’s tariffs.⁵ There is simply no admission to support OCC’s claim. OCC failed to support this baseless assertion and thus it should be stricken. This is not merely legal argument on OCC’s part, this is a blatant misstatement of the record.

Next, OCC states in its Reply Brief as follows:

The correction to remove these erroneous and unwarranted charges on consumers for the transmission plant included with the Distribution Charge did not occur until the June 2018 quarterly Distribution Charge filing. In the interim, Duke incorrectly charged consumers \$2,763,853 on an annualized basis as a return on and of the transmission plant improperly included in the Distribution Charge.⁶

This statement too is incorrect and contrary to the facts in the record of the case. For example, the report of the Staff’s auditor that was filed in the case states:

When reviewing documentation related to compliance with quarterly filings, Rehmann noted that DEO recorded an adjustment to reduce distribution plant-in-service by \$20,341,971. These costs were originally added to the September 30, 2016 Rider DCI Filing. They were incorrectly classified as distribution plant and should have been classified as transmission plant. The correction was not made in PowerPlan until June 2018. The Rates Department made manual correcting adjustments in the Rider DCI filings for **December 31, 2017 and March 30, 2018** (the error was not known before that).

The timing of the manual adjustment was also explained by the Company in its initial comments in this case.⁷ The dates were also provided to counsel for OCC at hearing on cross-

³ Transcript at pp. 23-24.

⁴ Transcript at p. 22.

⁵ Transcript at p. 24.

⁶ OCC Reply Brief at p. 3.

⁷ Comments of Duke Energy Ohio, Inc., at p. 2 (February 26, 2019).

examination.⁸ The correct date was referenced at least four other times in the Auditor's report.⁹ Accordingly, OCC's misleading statement that a correction was not made until June of 2018 is entirely incorrect since that is merely the date when the change was automated, and the record in this case provides abundant evidence to the contrary. Indeed, OCC itself correctly recounted the dates in its Initial Brief and correctly cited the Audit Report.¹⁰ For these reasons, Duke Energy Ohio respectfully requests that this statement by OCC be stricken from its Reply Brief.

The inclusion of blatantly incorrect statements in OCC's Reply Brief is highly prejudicial and unfair to the Parties in this proceeding. Had an OCC witness testified to these matters at hearing, or even included them in their initial post hearing brief, the Company and Staff would have had an opportunity to cross-examine and correct the record. When such statements are made in a Reply Brief, no such opportunity is afforded. For this reason, Duke Energy Ohio respectfully requests that the Commission strike the specified statements in OCC's Reply Brief.

Respectfully submitted,
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⁸ Transcript at p. 9.

⁹ *Compliance Audit of the July 1, 2017 to June 30, 2018 Distribution Capital Investment Rider*, (December 6, 2018) prepared by Rehmann Consulting, (December 7, 2018) at pp. 14, 16, 17, 19.

¹⁰ Initial Brief Opposing The Settlement, at p. 5.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal delivery, or electronic mail, on this 13th day of September 2019, to the following parties.

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