

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Temporary Plan and Waiver of Tariffs and Rules Related to the COVID-19 State of Emergency. ) ) Case No. 20-599-GE-UNC

In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of a Reasonable Arrangement ) ) Case No. 20-856-EL-AEC

In the Matter of the Application of Duke Energy Ohio, Inc. to Modify its Economic Competitiveness Fund Rider and Request for Waivers. ) ) Case No. 20-857-EL-RDR

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**MEMORANDUM OF DUKE ENERGY OHIO, INC. CONTRA THE APPLICATION FOR REHEARING FILED BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

In its Application for Rehearing and supporting Memorandum, which were filed on July 17, 2020 (OCC AFR and OCC Mem. AFR respectively), OCC purports to challenge an order issued by the Public Utilities Commission of Ohio (Commission) on May 20, 2020.<sup>1</sup> If so, OCC's application for rehearing should be denied in its entirety as untimely under both R.C. 4903.10 and Ohio Administrative Code (O.A.C.) 4901-1-35(A), which both specify that any application for rehearing must be filed "within thirty days" of the issuance of the order being challenged. Nonetheless, the Company also explains below that the Commission has already rejected OCC's arguments in other pending cases and should also, accordingly, reject them in this case and deny OCC's application in its entirety.

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<sup>1</sup> OCC AFR, p. 2 ("The PUCO took action in its May 20, 2020 Finding and Order ("Order") . . .").

## II. ARGUMENT

### A. The Commission Adequately Explained its Decision In This Case to Reject the “Look-Back” Period Proposed by OCC.

In OCC’s first assignment of error, OCC appears to argue that the Commission erred by not requiring the Company to reconnect customers disconnected up to thirty days before the declaration of the state of emergency on March 9, 2020.<sup>2</sup> The Commission has already rejected this suggestion several times in cases involving other utilities, both in its initial orders and in subsequent entries denying rehearing.<sup>3</sup>

As for OCC’s argument that the Commission failed to explain its decision, the Commission explained in this case that it was rejecting this suggestion for the same reasons already given in another case.<sup>4</sup> In the cited case, the Commission had stated that it found the look-back period “overly strict” and “unnecessary,” and preferred instead to “encourage [the utility] . . . to work with its customers to agree on terms to reconnect service, regardless of when disconnection occurred.”<sup>5</sup> Contrary to OCC’s assertions, this is sufficient explanation for purposes of R.C. 4903.09, which the Ohio Supreme Court interprets to require only “enough evidence and discussion in an order to enable the commission’s reasoning to be readily discerned.”<sup>6</sup>

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<sup>2</sup> OCC Mem. AFR, pp. 2-3 In the heading of its assignment of error, OCC describes its desired look-back period as “thirty days before the PUCO’s emergency Order went into effect,” (which would presumably be the Commission’s first COVID-19-related docket entry in Case No. 20-591-AU-UNC on March 12), while in the body of its argument, OCC describes its recommended look-back period as “thirty days before March 9, 2020,” which was the date of the **Governor’s** Executive Order No. 2020-01D. Duke Energy Ohio believes that the latter is the OCC’s intended position.

<sup>3</sup> See *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Temporary Plan for Addressing the COVID-19 State of Emergency*, Case Nos. 20-651-EL-UNC, *et al.*, Entry on Rehearing, pp. 5-6 (July 15, 2020) (DP&L Entry on Rehearing); *In the Matter of the Application of Ohio Power Company for Approval of its Temporary Plan for Addressing the COVID-19 State of Emergency*, Case Nos. 20-602-EL-UNC, *et al.*, Entry on Rehearing, p. 11 (July 1, 2020) (AEP Ohio Entry on Rehearing); *In the Matter of the Motion of Columbia Gas of Ohio, Inc. to Suspend Certain Procedures and Process During the COVID-19 State of Emergency and Related Matters*, Case No. 20-637-GA-UNC, Entry on Rehearing, p. 7 (July 15, 2020) (Columbia Entry on Rehearing).

<sup>4</sup> June 17 Order, p. 10 (“As in the *AEP Order*, we also find it unnecessary . . .”).

<sup>5</sup> *In the Matter of the Application of Ohio Power Company for Approval of its Temporary Plan for Addressing the COVID-19 State of Emergency*, Case Nos. 20-602-EL-UNC, *et al.*, Finding and Order, p. 10 (May 6, 2020) (AEP Order).

<sup>6</sup> *Allen v. Pub. Utils. Comm.*, 40 Ohio St. 3d 184, 184, 532 N.E.2d 1307 (1988).

Finally, OCC is simply wrong on the merits. It is not “sheer happenstance,” that certain consumers were disconnected before the declaration of the emergency.<sup>7</sup> The emergency was declared on March 9, but schools and businesses, by and large, did not shut down until afterwards.<sup>8</sup> The financial difficulties of those customers who had already been disconnected—which occurs only after bills go unpaid and prescribed notification periods expire—had clearly begun well before the coronavirus halted significant economic activity in Ohio and are not likely to be attributable to the coronavirus state of emergency. Thus, OCC’s first assignment of error should be denied.

**B. OCC’s Second Assignment of Error is Without Merit and Should Be Denied.**

In OCC’s second assignment of error, OCC argues that the Commission erred by failing to continue the suspension of disconnections for nonpayment beyond the end of the declared emergency.<sup>9</sup> This assignment of error is premature, as the timing and process of resuming disconnections for non-payment is, as OCC acknowledges, currently still under consideration by the Commission.<sup>10</sup> The disconnection suspension remains in effect today, and its ultimate duration will be determined by a future Commission order on the Company’s pending proposed transition plan.<sup>11</sup> Thus, as in other utilities’ cases, OCC’s assignment of error on this basis should be denied.<sup>12</sup>

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<sup>7</sup> OCC Mem. AFR, p. 3.

<sup>8</sup> See, e.g., *In Re: Order the Closure of All K-12 Schools in the State of Ohio*, Director’s Order (March 14, 2020); *In Re: Order Limiting the Sale of Food and Beverages, Liquor, Beer and Wine to Carry-out and Delivery Only*, Director’s Order (March 15, 2020); *In re: Order to Cease Business Operations at Hair Salons, Day Spas, Nail Salons, Barber Shops, Tattoo Parlors, Body Piercing Locations, Tanning Facilities and Massage Therapy Locations*, Director’s Order (March 19, 2020).

<sup>9</sup> OCC Mem. AFR, pp. 3-4.

<sup>10</sup> OCC Mem. AFR, p. 3 (referring to the “requirement for Duke to file a plan to address it, with the opportunity for interested parties to comment”).

<sup>11</sup> See Transition Plan of Duke Energy Ohio, Inc. (June 26, 2020).

<sup>12</sup> See AEP Ohio Entry on Rehearing, p. 12; DP&L Entry on Rehearing, pp. 5-6; Columbia Entry on Rehearing pp. 9-10.

Even if it were not premature, OCC's argument would lack merit. OCC fails to address the Commission's rationale that "the safe resumption of more complete operations" has become appropriate "in light of the easing of social distancing restrictions" by the Department of Health, notwithstanding the continuation of the state of emergency itself.<sup>13</sup>

As the Commission has previously put it, "even in light of the emergency, service disconnections for non-payment cannot be suspended indefinitely."<sup>14</sup> The Commission also rejected this argument in a recent decision on another utility's plan for resuming disconnections. In approving the proposal of Columbia Gas to resume disconnections as of July 29, the Commission acknowledged the central premise underlying OCC's argument: "that many customers may continue to experience financial stress as a result of COVID-19 despite the reopening of businesses throughout the state."<sup>15</sup> However, the Commission catalogued the measures that Columbia Gas was taking to alleviate the financial stress on customers and then concluded that the plan to resume disconnections was "reasonable, particularly in light of the advanced notice to be provided and extended payment options."<sup>16</sup>

The Commission was correct to reject OCC's suggestion to indefinitely continue the suspension of disconnections for nonpayment. Any measures to relieve the financial stress being experienced by customers must be balanced with the need to maintain sustainable utility operations. Protracted suspensions of disconnections for nonpayment would lead to the accumulation of unmanageable amounts in arrearages, which would likely lead to more

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<sup>13</sup> Finding and Order, p. 9.

<sup>14</sup> AEP Order, p. 7.

<sup>15</sup> *In the Matter of the Motion of Columbia Gas of Ohio, Inc. to Suspend Certain Procedure and Process During the COVID-19 State of Emergency and Related Matters*, Case No. 20-637-GA-UNC, Supplemental Finding and Order, p. 8 (June 17, 2020).

<sup>16</sup> *Id.*, p. 9.

disconnections in the end, not fewer. Thus, even if OCC's second assignment of error were not premature, it would warrant denial on its merits.

**C. OCC's Third Assignment of Error is Without Merit and Should Be Denied.**

In OCC's third assignment of error, OCC argues that the Commission erred by failing to order that its declared state of emergency will continue "indefinitely, or at least until an extended period of time after the end to the coronavirus emergency is officially declared."<sup>17</sup> First, OCC does not identify where any party suggested in comments that the Commission should "continu[e] its emergency jurisdiction indefinitely, or at least until an extended period of time after the end to the coronavirus emergency,"<sup>18</sup> and OCC cannot raise a new issue on rehearing.

Additionally, like OCC's second assignment of error, the argument here is premature. The Commission is still considering how the Company will resume some or all of its currently suspended practices and operations. OCC was given the opportunity to comment on the Company's proposed transition plan and has done so.<sup>19</sup> When the Commission renders its decision on the Company's proposed transition plan, OCC's challenge may at least be timelier, though not any more meritorious.

Finally, on the merits, it is not clear what OCC is seeking here. OCC fails to explain why the Commission should declare its own independent state of emergency at a time when the Department of Health has been working for months with businesses, schools, restaurants, and other entities to responsibly reduce restrictions and facilitate resumption of operations, albeit with

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<sup>17</sup> OCC Mem. AFR, p. 4.

<sup>18</sup> *Id.*

<sup>19</sup> Joint Comments for Consumer Protection Regarding Duke's Transition Plan to Address the Coronavirus Emergency for Electric and Gas Customers by Legal Aid Society of Greater Cincinnati Office of the Ohio Consumers' Counsel Pro Seniors, Inc. (July 6, 2020) (Joint Comments).

certain additional precautions and safety measures.<sup>20</sup> The Commission’s jurisdiction extends to public utilities; the Commission has neither the jurisdiction nor the expertise to assess the acuteness or the duration of a public health threat or crisis. If the Commission finds it necessary, it can issue appropriate orders on specific issues as they arise. OCC’s third assignment of error should be denied.

**D. OCC’s Fourth Assignment of Error is Without Merit and Should Be Denied.**

In OCC’s fourth assignment of error, OCC argues that the Commission erred by declining to adopt all of the consumer protection recommendations of the National Consumer Law Center, which were proposed by the OCC.<sup>21</sup> However, the Commission has already rejected this proposal more than once.

As the Commission explained to OCC earlier this month, “It is not necessary, as OCC asserts, that all utilities under the Commission’s jurisdiction follow a uniform set of guidelines as presented by NCLC.”<sup>22</sup> In that case, the Commission explained that “consumer protection issues, including the disconnection of service for non-payment, the reconnection of service, the deferral of fees and deposits, extended payment plans, and payment assistance have been thoughtfully addressed.”<sup>23</sup> Similarly, in this case, the Commission has thoughtfully addressed consumer protection issues in its June 17 Order and will address such issues further in its ruling on the Company’s Transition Plan. OCC raises no new arguments in its assignment of error in this case, except to cite the Commission’s own rejections of its proposed uniform consumer protection

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<sup>20</sup> See generally Sector Specific Operating Requirements (July 17, 2020), <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/responsible-restart-ohio/sector-specific-operating-requirements/sector-specific-operating-requirements>

<sup>21</sup> OCC AFR, pp. 4-6.

<sup>22</sup> Columbia Entry on Rehearing, p. 11; see also DP&L Entry on Rehearing, pp. 5-6 (rejecting same assignment of error).

<sup>23</sup> *Id.*

scheme as “highlight[ing] the need” for it—a thoroughly circular argument. Thus, OCC’s fourth assignment of error should be denied.

### **III. CONCLUSION**

For the foregoing reasons, the Commission should deny OCC’s Application for Rehearing on all grounds.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Memorandum of Duke Energy Ohio, Inc., Contra the Application for Rehearing Filed by the Office Of the Ohio Consumers' Counsel* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 27th day of July, 2020 via electronic transmission.

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