**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust Rider DR-IM and Rider AU for 2013 SmartGrid Costs. | ) ) ) | Case No. 14-1051-GE-RDR |

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# APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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This is a single-issue ratemaking case examining the reasonableness and prudence of nearly $60 million of expenditures associated with deployment of advance meter technology for the SmartGrid project ("SmartGrid Program") of Duke Energy Ohio, Inc. ("Duke") for calendar year 2013. As such, the Public Utilities Commission of Ohio ("PUCO") did not look at whether Duke had any reductions in other expenses (e.g., meter reading) that could offset part of the costs.

On April 8, 2015, the PUCO issued an Opinion and Order ("Order") allowing Duke to collect approximately $52.8 million from electric customers and about $7.2 million from gas customers, which will have an adverse impact on customers.[1] The amounts are collected from residential customers through Rider DR-IM and from residential gas customers through Rider AU.

Under the Order, Duke's residential electric customers will pay $6.07 per month for SmartGrid (an increase of $1.24 per month).[2] Duke's residential gas customers will

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[1] See Duke's revised calculations (April 9, 2015), Schedule 1 Electric and Schedule 1 Gas.

[2] See OCC Brief (March 9, 2015) at 1.

pay $1.46 per month for SmartGrid ($0.06 more per month) and Duke's residential gas-only customers in Adams County, Georgetown, and Lebanon will receive a credit of $1.28 per month ($0.65 more per month than the current credit).[3] The PUCO approved these rates even though the Office of the Ohio Consumers' Counsel ("OCC") provided testimony that the amount to be collected from customers should be reduced even further.[4] In order to ensure that consumers do not pay more than they should through the SmartGrid riders, OCC files this Application for Rehearing of the Order.[5]

The PUCO's Order is unjust, unreasonable and unlawful in the following respects:

1. It was unreasonable and unlawful for the PUCO to not reduce the amount collected from electric customers by the costs associated with 15 self-healing team failures as that equipment was not used and useful.

2. It was unreasonable for the PUCO to not make future collection of SmartGrid costs dependent on Duke achieving a 90 percent success rate for self-healing teams.

The PUCO should abrogate or modify the Order as requested by OCC.

The grounds for this Application for Rehearing are set forth in the accompanying Memorandum in Support.

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[3] See id. at 1-2.

[4] See id. at 9-15.

[5] OCC files this Application for Rehearing pursuant to Ohio Adm. Code 4901-1-35.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

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## I. INTRODUCTION

In this case, the PUCO must ensure that Duke's customers pay only reasonable and prudent costs associated with Duke's SmartGrid Program for 2013.[6] Duke initially sought to collect more than $52.8 million from electric customers and $7.4 million from gas customers. [7] In its Order, the PUCO adopted the PUCO Staff's recommended reductions in Duke's expenses of about $46,000 for its electric SmartGrid Program[8] and about $984,000 for its gas SmartGrid Program.[9]

During the case, OCC argued that the amount to be collected from Duke's electric customers should be reduced by the costs associated with 15 self-healing team failures in 2013.[10] Self-healing teams are a series of switches designed for SmartGrid technology to reconfigure circuits and re-route electricity around a fault in order to reduce the number of customers affected by an outage. OCC noted that when self-healing teams fail to

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[6] See R.C. 4905.22. See also Duke Memorandum Contra (July 11, 2014) at 2.

[7] See Duke Ex. 2A.

[8] See Order at 10-12.

[9] See id. at 9. The gas expenses are capital costs and result in a reduction of about $203,000 in the amount Duke will collect from gas customers. See Staff Ex. 1, Attachment 2.

[10] OCC Brief at 21-22.

operate, they are not used and useful.[11] OCC also urged the PUCO to make Duke's future collection of SmartGrid costs dependent on Duke achieving a 90% success rate for self-healing teams.[12]

In the Order, the PUCO rejected OCC's arguments to remove costs associated with the self-healing team failures from the amount customers would pay through Rider DR-IM.[13] The PUCO also refused to make Duke's future collection of SmartGrid costs dependent on a 90% success rate for self-healing teams.[14] OCC seeks rehearing on these issues.

## 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 is an intervenor in this proceeding.[15] OCC filed comments and testimony in this proceeding, and participated in the hearing held in this case on February 19, 2015.

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: "If, after such rehearing, the commission is of the opinion that the original

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[11] Id. at 22.

[12] Id.

[13] Order at 8.

[14] Id.

[15] OCC's Motion to Intervene was granted in an Entry dated October 16, 2014 (at 3).

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." As shown herein, the statutory standard to modify or abrogate the Order is met here.

## III. DISCUSSION

### A. It was unreasonable and unlawful for the PUCO to not reduce the amount collected from electric customers by the costs associated with 15 self-healing team failures as that equipment was not used and useful.

In the Order, the PUCO stated that "[a]n important part of the DA portion of Duke's grid modernization program involves a set of automated switches or 'self-healing teams.'"[16] Consumers, who are paying the costs associated with installation and operation of the self-healing teams, should be ensured that the self-healing teams are performing adequately. Unfortunately, consumers do not have that assurance.

In this case, OCC presented evidence of the inadequate performance of Duke's self-healing teams in 2013. In that year, Duke's self-healing teams operated 42 times and were successful only 27 times – a 64 percent success rate.[17] Even in 2014 – the year Duke began formally tracking self-healing team performance under the stipulation in Case No. 13-1141 – Duke's self-healing teams had only a 74 percent success rate.[18] OCC noted that such poor performance is not acceptable to customers, who have already

[16] Order at 7. DA is an acronym for "Distribution Automation."

[17] OCC Ex. 1 at 5 and Attachment JDW-2 at page 3 of 4.

[18] See Tr. at 71.

paid more than $100 million for Duke's SmartGrid Program.[19] OCC argued that the cost of the 15 self-healing teams that failed should be removed from the amount that customers will pay through Rider DR-IM.[20]

In the Order, the PUCO rejected OCC's argument. The PUCO stated that the "technology is still being developed, and it appears to be improving."[21] The PUCO added that the record of the case does not "justify deducting the costs of failures experienced in the operation of self-healing teams from Duke's cost recovery through Rider DR-IM in this case, as OCC suggests."[22] The PUCO's Order is unreasonable.

OCC's evidence showed that consumers did not get what they paid for from Duke's self-healing teams in 2013. A 64 percent success rate is not acceptable, and customers should not have to pay the costs associated with the failures of the self-healing teams.

Even the "improvement" in the success rate of self-healing teams to 74 percent is troublesome. After five years' experience with its SmartGrid system in Ohio, Duke's self-healing teams still failed to function properly at least 26 percent of the time. This is unacceptable to Duke's customers, who have already paid more than $100 million for Duke's SmartGrid Program. Customers should be guaranteed better performance from Duke in detecting and repairing outages through the self-healing teams.

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[19] See OCC Ex. 13 at 3. From Duke's previous SmartGrid rider cases, its electric customers have paid a total of $88.5 million and its gas customers have paid a total of $29.1 million. See Case No. 10-2326-GE-RDR, Opinion and Order (June 13, 2012) at 13 (electric customers pay $19.2 million and gas customers pay $9.2 million); Case No. 12-1811-GE-RDR, Opinion and Order (March 27, 2013) at 5 (electric customers pay $28.5 million and gas customers pay $12.3 million); Case No. 13-1141-GE-RDR, Opinion and Order (April 9, 2014) at 7 (electric customers pay $41.8 million and gas customers pay $7.0 million).

[20] See OCC Brief at 23.

[21] Order at 8.

[22] Id.

Additionally, the self-healing teams that failed to operate were not used and useful. Duke should not be allowed to collect the cost from customers for the self-healing teams that failed because only equipment that is used and useful may be included in the rider that customers will pay through rates.[23]

The Supreme Court of Ohio has interpreted R.C. 4909.15 to mean that only facilities that are "actually used and useful" may be included in rates that customers will pay.[24] In *Consumers' Counsel*, the Court reviewed whether a utility's nuclear power plant that had not yet become operational should have been included in the utility's rate base.[25] The Court held that the nuclear power plant was not includable in base rates because the requirements of R.C. 4909.15 had not been met.[26] The Court stated that the statutory language incorporated the generally accepted principle, given by the United States Supreme Court, "that a utility is not entitled to include in the valuation of its rate base property not actually used or useful in providing public service, **no matter how useful the property may have been in the past or may yet be in the future**."[27]

The Court further stated that it would be inequitable to prematurely shift the risk of the failure of an asset not yet proven from shareholders to customers.[28] The Court's rationale for that statement was that shareholders stand to gain from the success of the plant so it is appropriate for them to bear the risk of its failure.[29] Customers, on the other

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[23] R.C. 4909.15. See Order at 9.

[24] *Office of Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 58 Ohio St.2d 449, 453, 391 N.E.2d 311 (1979).

[25] Id. at 452.

[26] Id. at 457.

[27] Id. citing *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470 (1938) (emphasis added).

[28] Id. at 456.

[29] Id.

hand, gain nothing if the plant succeeds and therefore should not also be expected to bear the risk of its failure.[30]

Applying the U.S. Supreme Court's principle as recognized by the Ohio Supreme Court in *Consumers' Counsel*, Duke is not entitled to include the failed self-healing teams in the expenses to be collected from customers in this proceeding. Following the rationale of the Court in *Consumers' Counsel*, it would be inequitable to prematurely shift the risk of failure of a utility asset to the customer before the asset has provided anything for the customer's benefit. Customers did not receive a benefit from the failed self-healing teams, and thus they should not bear the risk for those failed self-healing teams. It is only equitable that Duke bears the costs incurred for the failed self-healing teams.

It was unreasonable and unlawful for the PUCO to not reduce the amount to be collected from customers through Rider DR-IM by the amount of costs associated with the 15 self-healing team failures in 2013. The PUCO's Order should be abrogated.

### B. It was unreasonable for the PUCO to not make future collection of SmartGrid costs dependent on Duke achieving a 90 percent success rate for self-healing teams.

OCC also argued that Duke's future collection of SmartGrid costs should be dependent on Duke achieving at least a 90 percent success rate for its self-healing teams.[31] OCC noted that the two main things that consumers want from a utility are affordable rates and reliability. The importance of providing consumers with reliability and affordable rates is even further amplified through state law.[32] From the consumer

[30] Id.

[31] See OCC Brief at 22.

[32] R.C. 4928.02(A).

perspective, a key utility justification for SmartGrid programs is the expected improvement in its ability to detect outages and to quickly restore service.[33] Improved detection and repairing of outages was a major benefit anticipated for consumers in the stipulation the PUCO approved in Duke's first SmartGrid case, and a justification for why consumers should pay more than $100 million for installing the SmartGrid.[34]

OCC argued that Duke should not be allowed to collect future SmartGrid costs unless its self-healing teams have a 90 percent success rate.[35] The PUCO, however, rejected OCC's argument. The PUCO stated that there is "nothing in the record to suggest that the development of self-healing teams should be tied to Duke's achieving a 90 percent success rate…."[36] The PUCO overlooked important evidence presented by OCC, i.e., the precedent for making Duke's collection of SmartGrid costs contingent on a 90 percent success rate for self-healing teams.

In comments regarding Ohio Power's self-healing teams, the PUCO Staff noted that Ohio Power's 60 percent success rate in 2012 falls below the PUCO Staff's expectations.[37] The same should be said for Duke's 64 percent success rate in 2013. And while Duke languished at a 64 percent success rate, Ohio Power achieved a 92

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[33] See *In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, et al., Direct Testimony of Todd W. Arnold (July 31, 2008) at 15.

[34] See *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM and Rider AU for 2010 SmartGrid Costs and Mid-Deployment Review*, Case No. 10-2326-GE-RDR, Stipulation and Recommendation (February 24, 2012), Attachment 1 (showing that, based on MetaVu's audit in that case, the benefits from Outage Detection ($0.050 million), Outage Verification ($0.410 million) and Outage Reductions ($0.370 million) – a combined total of $0.93 million – represented more than 10% of the estimated benefits from the electric SmartGrid program ($8.003 million) for 2013).

[35] See OCC Brief at 22.

[36] Order at 8.

[37] See OCC Ex. 1 at 6 citing *In the Matter of the Application of Ohio Power Company to Update Its gridSMART Rider*, Case No. 13-345-EL-RDR, Comments Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (August 2, 2013) at 7.

percent success rate (25 successful events out of 27 events) for its self-healing teams in 2013.[38]

It appears that Duke needs an incentive to improve the performance of its self-healing teams. Making collection of SmartGrid costs contingent on a 90 percent success rate for self-healing teams (in addition to a reasonable and prudent review) would be one such incentive.

Duke should be held to a high standard. Duke is the most experienced of Ohio's utilities when it comes to smart grid technology. Duke's SmartGrid Program is also nearly fully deployed, and yet Duke is lagging behind in the performance of its self-healing teams.

When self-healing teams fail, customers are not getting what they paid for. And because nearly all of Duke's SmartGrid is deployed, nearly all Duke customers can be adversely affected by poor performance from the self-healing teams.

No one expects 100 percent success from self-healing teams. But a 90 percent success rate should become the minimum requirement for self-healing teams. Ohio Power has already achieved that level. Duke should be required to achieve it as well.

Customers have already paid more than $100 million for Duke's SmartGrid Program, and they should be receiving better performance from Duke in detecting and repairing outages through the self-healing teams. The PUCO should modify the Order by making Duke's future collection of SmartGrid costs dependent on Duke achieving at least a 90 percent success rate for its self-healing teams.

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[38] See OCC Ex. 13 at 4, n. 16, citing Case No. 13-345-EL-RDR, Reply Comments of Ohio Power Company in Response to Staff's Comments (August 23, 2013) at 3.

## IV. CONCLUSION

The PUCO's Order was unreasonable and unlawful. The Order should be abrogated or modified as discussed herein.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing by the Office of the Ohio Consumers' Counsel was served by electronic mail to the persons listed below, on this 8th day of May 2015.

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