

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc. to Adjust Rider DR-) Case No. 10-2326-GE-RDR
IM and Rider AU for 2010 SmartGrid)
Costs and Mid-Deployment Review.)

**MEMORANDUM CONTRA DUKE’S APPLICATION FOR WAIVER THAT
WOULD DELAY CONSUMERS RECEIVING OPERATIONAL SAVINGS OF
SMART GRID PROMISED UNDER A PUCO-APPROVED SETTLEMENT
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

The requested waiver in this proceeding of the requirement that a distribution rate case be filed is patently unfair to consumers because without such a filing customers will, at a minimum, not realize the full benefits of the operational savings from the deployment of the “smart grid.” Since 2009, Ohioans have paid more than \$250 million to Duke Energy Ohio (“Duke”) for deployment of its “smart grid.”¹ Customers should receive an estimated \$382.8 million in operational benefits over 20 years.²

¹ From Duke’s previous smart grid rider cases, its electric customers have paid a total of \$205.6 million and its gas customers have paid a total of \$47.1 million. *See* Case No. 10-867-GE-RDR, Opinion and Order (March 23, 2011) at 7 (electric customers pay \$8.6 million and gas customers pay \$5 million); 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); Case No. 14-1051-GE-RDR, Second Entry on Rehearing (July 1, 2015) at 2 (electric customers pay \$52.5 million and gas customers pay \$7.2 million); Case No. 15-883-GE-RDR, Opinion and Order (March 31, 2016) at 7 (electric customers pay \$55 million and gas customers pay \$6.4 million).

² Duke Energy Ohio Smart Grid Audit and Assessment prepared by MetaVu, Inc. (June 30, 2011) at 13. Meta Vu estimated the operational benefits to range between \$325.8 million and \$447.5 million. \$382.8 million is the mid-range of the estimate.

From the Settlement filed in this case in 2012, Duke's electric customers have received approximately \$40 million in operational savings over six years (2010-2015) through a reduced amount collected by Duke through Rider DR-IM.³ The operational savings credit is to continue at the rate of \$12.933 million per year for as long as collection through Rider DR-IM continues.⁴ This amount will not return the expected \$382.8 million in operational benefits to customers.⁵

In the Settlement, Duke committed to filing a distribution base rate case with the Public Utilities Commission of Ohio ("PUCO") within one year after the PUCO Staff determined that Duke's smart grid was fully deployed.⁶ The remainder of the operational savings is to be passed along to customers through the rate case.⁷ On October 22, 2015, the PUCO Staff docketed in this case its determination that Duke's smart grid is fully deployed. Hence, under the terms of the Settlement, Duke must file a distribution base rate case by October 22, 2016. That rate case will give customers the opportunity to benefit from the smart grid investment by receiving rates that are lower due to pass-back of operational savings. The rate case will also give parties the right to seek reductions in charges that may be avoided or greatly diminished due to smart grid implementation.

On September 15, 2016, however, Duke applied for waiver of the distribution base rate case requirement. Duke claims that two events – the PUCO's investigation into the retail electric market and Duke's subsequent filing to provide customer energy usage

³ Stipulation and Recommendation (February 24, 2012) at 5-6.

⁴ *Id.* at 7.

⁵ There are 14 years left in the 20-year period. $\$12.933 \text{ million} \times 14 = \181.86 million . Adding the \$40 million in benefits already returned to customers makes the total \$221.86 million.

⁶ Settlement at 7.

⁷ *Id.*

data (“CEUD”) to retail electric marketers – justify waiver of the distribution base rate case requirement.⁸ Duke seeks expedited treatment of its application.⁹

The Office of the Ohio Consumers’ Counsel (“OCC”) – a signatory to the Settlement – files this Memorandum Contra Duke’s application. Duke’s application is faulty because it erroneously seeks a waiver of the PUCO’s June 13, 2012 Opinion and Order (“Order”) in this case. The distribution base rate case requirement arose from the Settlement, not from the Order. Thus, although the PUCO has continuing oversight of the Settlement,¹⁰ the rate case requirement should be changed only through amendment of the Settlement. This would require reopening negotiations and the agreement of all the signatory parties to the Settlement, and asking the PUCO to approve any change agreed upon by the signatory parties. In addition, Duke has not justified the waiver it seeks. The PUCO should enforce the Settlement and deny Duke’s application.

II. RECOMMENDATIONS

A. The requirement for a distribution base rate case after full deployment of Duke’s smart grid was a negotiated provision in the Settlement for the benefit of consumers, which the PUCO should not disturb.

In its application, Duke contends that the requirement for a distribution base rate case upon full deployment of its smart grid was “one condition” of the PUCO’s Order.¹¹ Duke’s statement is in error.

⁸ Application of Duke Energy Ohio, Inc. for Waiver (September 15, 2016) at 3.

⁹ *Id.* at 8-9. For this expedited treatment, Duke cites to Ohio Adm. Code 4901-1-12(C). *Id.* at 9. That rule, however, applies to motions, not to applications. Nevertheless, OCC is filing this Memorandum Contra in the time allotted under Ohio Adm. Code 4901-1-12(C).

¹⁰ See, e.g., *In the Matter of the Joint Application of Frontier Communications Corporation, New Communications Holdings, Inc. and Verizon Communications Inc. for Consent and Approval of a Change in Control*, Case No. 09-454-TP-ACO, Entry (February 20, 2013) at 2.

¹¹ See Application at 1.

In fact, the PUCO did not add the distribution base rate case requirement as a condition of its approval of the Settlement. Rather, the requirement that Duke file a distribution base rate case within one year after its smart grid is fully deployed was negotiated among the parties to the Settlement. Under provision II.d. of the Settlement, Duke “commits to filing an electric distribution rate case in the first year after full deployment of SmartGrid as defined herein.”¹² This is one of many provisions in the Settlement that were “negotiated among all parties to the proceeding.”¹³ It is part of the “package” that “benefits customers and the public interest” and that “represents a reasonable resolution of all issues in this proceeding....”¹⁴

Indeed, the requirement that Duke file a distribution base rate case was a key element of the Settlement in this proceeding. A major issue raised by OCC was the significant up-front costs that customers must pay, even though they might not receive benefits for many years.¹⁵ Although levelization of the benefits helped to alleviate part of this problem, levelization alone would not capture all the benefits. To date, customers have received only about \$40 million of the anticipated \$382 million in operational savings. The remaining \$342 million is presently being credited to customers at a rate of \$12.933 million per year. At this rate, it will be nearly 30 years before Ohioans receive the full benefits of Duke’s smart grid.

That is why the Settlement included the provision that the revenue requirement in the distribution base rate case reflect the actual level of benefits attributable to Duke’s

¹² Settlement at 7.

¹³ *Id.* at 1-2.

¹⁴ *Id.* at 2.

¹⁵ OCC Comments (November 4, 2011) at 5-9.

smart grid deployment.¹⁶ Moreover, a full distribution rate case will allow for a thorough review of Duke's smart grid deployment to ensure the services deployed are used and useful in providing service to consumers and that the rates charged are just and reasonable.

The distribution base rate case requirement was included in the Settlement as part of the give-and-take of negotiations. The PUCO did not alter this provision. The only discussion of the base rate case in the Order is in the summary of the Settlement.¹⁷ Hence, the PUCO did not "condition" its approval of the Settlement on Duke filing a distribution base rate case. As a result, the PUCO should not modify what was agreed-upon in the Settlement it has approved.

Instead of asking the PUCO for a waiver, Duke should have sought to reopen negotiations with the signatory parties for the purpose of amending the Settlement.¹⁸ Duke did not. The first time OCC learned of Duke's desire to delay the distribution base rate case was when OCC received a service copy of the application after it had been filed.

The PUCO has established a long-standing policy encouraging settlements.¹⁹ Duke's waiver application circumventing the signatory parties is contrary to this policy. If the PUCO alters settlement agreements years after the agreements have been negotiated and approved, parties may have less incentive to enter into settlements. The public interest will be disserved.

¹⁶ Settlement at 7.

¹⁷ Order at 15.

¹⁸ See, e.g., *In the Matter of the Joint Application of Frontier Communications Corporation, New Communications Holdings, Inc. and Verizon Communications Inc. for Consent and Approval of a Change in Control*, Case No. 09-454-TP-ACO, Entry (February 26, 2014).

¹⁹ See, e.g., *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, Approval of Tariff Changes and New Tariffs, Authority to Modify Current Accounting Procedures, and Approval to Transfer its Generating Assets to an Exempt Wholesale Generator*, Case No. 99-1658-EL-ETP, et al., Opinion and Order (August 31, 2000) at 58-59.

Further, denying parties the distribution base rate case that was agreed upon in the Settlement is a material modification of the agreement. Parties have the right to determine what constitutes a material modification of the Settlement.²⁰ Under ordinary circumstances, if the PUCO were to materially modify the Settlement, a signatory party could withdraw from and terminate the Settlement.²¹ In this instance, however, the material modification would occur after all the terms of the Settlement – except for the distribution base rate case provision – have expired. Hence, parties would have lost their rights to withdraw from the Settlement. The Supreme Court of Ohio has overturned a PUCO decision that resulted in a similar circumstance.²²

The PUCO's Order did not add the requirement that Duke file a distribution base rate case after full smart grid deployment. Instead, the rate case requirement was a key aspect of the negotiations among the signatory parties. The PUCO should not abrogate the rights of the parties who bargained in good faith for the distribution base rate case.

Duke has enjoyed the benefit of its bargain. Consumers, however, agreed to receive their benefit of the bargain once full deployment of smart grid was achieved and a distribution rate case was filed. Per the terms of the Settlement, the PUCO Staff has determined Duke's smart grid is fully deployed. Now it's time for Duke to file the distribution rate case as agreed. Consumers deserve the benefit of their bargain. The PUCO should enforce the Settlement as approved in 2012 and deny Duke's application.

²⁰ Settlement at 3, n. 2.

²¹ *Id.* at 3.

²² *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056.

B. Duke's application is based on pure speculation, and is intended to deny consumers the benefit they bargained for in the Settlement.

Duke claims that the PUCO's investigation into the retail electric market and Duke's subsequent filing to provide CEUD to retail electric marketers justify the waiver sought in the application. Duke's assertions, however, are purely speculative.

Duke contends that resolution of the issues in the pending CEUD tariff case²³ have "the *potential* to impact" the costs and attributes associated with Duke's current advanced metering infrastructure ("AMI").²⁴ Duke also claims that modifying AMI and related systems "has the *potential* to amend the benefits" attributed to its smart grid.²⁵ Duke does not elaborate on the nature or extent of the impact that the pending CEUD case may have on costs, attributes, and benefits of AMI. Duke, therefore, bases its waiver request on "potential" effects the CEUD tariff case may have on the distribution base rate case Duke is required to file. This is not sufficient for granting the waiver.

Duke's statements are based solely on conjecture. The statements certainly do not provide the PUCO with the basis for amending a key provision of the Settlement that was negotiated in good faith by the signatory parties.

Duke has the burden of proof regarding the waiver. Duke, however, has not shown that there are changed circumstances sufficient to delay the distribution base rate case that would help capture smart grid benefits for customers. The issues could be raised and considered in the distribution base rate case that Duke is required to file by October 22, 2016 under the terms of the Settlement. The rate case could proceed, and the

²³ Case No. 14-2209-EL-ATA.

²⁴ Application at 6 (emphasis added).

²⁵ *Id.* (emphasis added). *See also id.* at 8.

parties to the case could take into consideration any impacts of the events identified by Duke in its application.²⁶

Duke has not carried its burden of proof regarding its waiver request. To protect consumers, the PUCO should enforce the Settlement and deny Duke's application.

III. CONCLUSION

Duke's application is an improper attempt to have the PUCO alter an agreement among the signatory parties to the Settlement. The PUCO did not condition its approval of the Settlement on Duke filing a distribution base rate case. Instead, the distribution rate case was part of the bargain among the signatory parties for the benefit of consumers. As such, any amendment of the Settlement should be done through negotiations among the signatory parties, not by PUCO order.

The PUCO should not abrogate the rights of the signatory parties. The PUCO should enforce the Settlement by rejecting Duke's inappropriate and baseless application.

Respectfully submitted,

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²⁶ Duke also discussed objections of "various intervenors" in Case No. 14-2209-EL-ATA, and stated that they contradicted the PUCO Staff's determination regarding full deployment of Duke's smart grid. *Id.* at 5. However, the Settlement, approved in the PUCO's Order, controls the determination of whether Duke's smart grid is fully deployed. The CEUD issue can be addressed in the distribution base rate case.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served on the persons stated below on this 22nd day of September 2016.

/s/ Terry L. Etter
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Summary: Memorandum Memorandum Contra Duke's Application for Waiver That Would Delay Consumers Receiving Operational Savings of Smart Grid Promised Under a PUCO-Approved Settlement by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.