

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of The Application of Duke)
Energy Ohio, Inc. to Adjust its Alternative) Case No. 17-2215-EL-RDR
Energy Recovery Rider, Rider AER-R.)

**COMMENTS ON DUKE’S APPLICATION TO INCREASE CHARGES TO
CONSUMERS UNDER ITS ALTERNATIVE ENERGY RECOVERY RIDER
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

The Public Utilities Commission of Ohio (“PUCO”) should protect 629,000 residential customers of Duke Energy Ohio, Inc. (“Duke”) from paying too much for renewable energy. Duke proposes new tariff language that its alternative energy recovery rider (“Rider AER-R”) will be subject to “reconciliation.” But the PUCO should modify this language to provide more certainty that Ohioans will get their money back if charges under this rider are later found unreasonable, imprudent, or unlawful.

This case involves the charges that consumers pay to Duke for renewable energy. Through Rider AER-R, Duke charges its customers for the costs Duke incurs to comply with Ohio’s alternative energy portfolio standards.¹

On February 26, 2018, Duke filed an application proposing a 50% increase to the amount that it charges customers for renewable energy under Rider AER-R.² Thereafter, on March 19, 2018, Duke filed a revised application proposing to amend the tariff language to

¹ R.C. 4928.64.

² See *In re Application of Duke Energy Ohio, Inc. to Adjust its Alternative Energy Recovery Rider, Rider AER-R*, Case No. 17-2215-EL-RDR, Revised Tariff Filing (Nov. 21, 2017) (showing rate of \$0.000581 per kWh), Revised Tariff Filing (Feb. 26, 2018) (showing rate of \$0.000876 per kWh); $0.000876 / 0.000581 = 1.508$.

indicate that Rider AER-R be subject to future reconciliation if Duke overcharges consumers. Under the 30-day automatic approval process adopted by the PUCO, the new rate and tariff language will go into effect with the first billing cycle in April, unless the PUCO orders otherwise.³ In fairness to consumers, the tariffs for Rider AER should reflect the lower corporate tax rate effective January 1, 2018 resulting from the federal Tax Cuts and Jobs Act.⁴ As filed, it does not. Additionally, in the interest of fairness and to protect consumers, the PUCO should:

- 1) End the automatic approval process for riders that are updated quarterly, including Rider AER-R;
- 2) Modify Duke's proposed refund language in the tariff for Rider AER-R to better protect customers if the PUCO or Supreme Court of Ohio later determine that charges under this rider were unreasonable, imprudent, or unlawful;
- 3) Ensure the tariff for Rider AER-R captures the lower corporate tax rate effective January 1, 2018.

Unless the PUCO adopts these recommendations, each quarterly update of Rider AER-R could be considered a "filed" rate that cannot be refunded to consumers even if the rider overcharges consumers.⁵ The PUCO should seek to prevent this, as it would contravene Duke's proposal and the PUCO's Order in Duke's electric security plan that the

³ *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer*, Case No. 11-3549-EL-SSO, Opinion and Order at 19-20 (Nov. 22, 2011) ("Rider AER-R will be filed quarterly and will include true-up provisions, with annual audits . . .").

⁴ Tax Cuts and Jobs Act of 2017, Public Law No. 115-97.

⁵ *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229, (holding that that the automatic approval of quarterly rate filings constituted PUCO approval of new rates).

rider be audited annually and trued up so as not to overcharge consumers.⁶ Without action by the PUCO, Duke could overcharge consumers through Rider AER-R without recourse, which would be unjust and unreasonable for consumers who are charged under the rider.

II. RECOMMENDATIONS

A. **To protect consumers, the PUCO should end the automatic approval process for riders that are updated quarterly, including Rider AER-R.**

The Supreme Court of Ohio (“Court”) recently held that quarterly rider updates are “filed rates” authorized by the PUCO under the filed rate doctrine in R.C. 4905.32.⁷ Therefore, unless stated in the tariff, the PUCO may be prohibited from later ordering a disallowance or refund of money collected, even if the annual audit determines that the utility overcharged consumers. To prevent consumers from being overcharged, the PUCO should end the automatic approval process for riders such as Rider AER-R, which are updated on a quarterly basis.

B. **The PUCO should modify Duke’s proposed tariff language to remove any potential ambiguity with regard to refunds to consumers for overcharges.**

When the Court held that the PUCO could not order refunds to consumers even after the utility unreasonably overcharged them, the Court emphasized that the tariff for the rider at issue did not state that the rates were subject to refund.⁸ Even though the PUCO’s order approving the rider stated that the utility could only collect prudently

⁶ *In re Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer, et al.*, Case No. 11-3549-EL-SSO Opinion and Order (Nov. 22, 2011) at 17, 19-20 (“Rider AER-R will, according to Duke witness Wathen, recover Duke’s costs to comply with Ohio’s AER Requirements, will be implemented through quarterly filings, will include true-up provisions, and will be subject to annual audits.”).

⁷ *Id.*, ¶18.

⁸ *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229 at ¶19-20.

incurred costs, the Court held that the PUCO's subsequent order directing a refund to consumers for unreasonably overcharging consumers constituted unlawful retroactive ratemaking.⁹

The Court's ruling is especially relevant here: the rider charge involved in the *FirstEnergy* appeal (alternative energy) is the same rider at issue in this case for Duke. Duke's March 19 update to the tariff, by adding refund language, appears designed to address the *FirstEnergy* decision. And while OCC appreciates Duke's effort to include refund language in this rider, OCC is concerned with potential ambiguity in the language that Duke proposes. Its focus on these riders being subject to "reconciliation" is potentially vague and ambiguous. For example, it is unclear whether "reconciliation" would include the situation where a rider is audited and past charges are found imprudent, unreasonable, or otherwise unlawful. Furthermore, the reference to the opinion and order in Case No. 14-841-EL-SSO could be confusing because that order merely continued Rider AER-R as approved in Duke's previous SSO case, Case No. 11-3549-EL-SSO.¹⁰ The order in Case No. 11-3549-EL-SSO establishes the audit process for Rider AER-R, so the tariff language should cite both the order from Case No. 11-3549-EL-SSO and from Case No. 14-841-EL-SSO.

To better protect customers from an unjust result like the one in *FirstEnergy*, OCC proposes the following remove any ambiguity in Duke's proposed tariff language. These riders should also state: **"Any charge collected from customers under this tariff later determined to be unlawful, imprudent, or unreasonable by the PUCO or the**

⁹ *Id.*

¹⁰ See *In re Duke Energy Ohio, Inc.*, Case No. 11-3549-EL-SSO, Opinion & Order at 17, 20 (Nov. 22, 2011).

Supreme Court of Ohio is refundable to customers.” This modification would make clearer the PUCO’s intent to protect consumers from potential future rulings that utility charges under these riders were imprudent or otherwise unlawful or unreasonable. This language should be a permanent addition to the tariff for Rider AER-R, as well as all other riders subject to quarterly updates and automatic approval, including Rider DCI, Rider AER-R, Rider SCR, Rider RE, Rider RC, Rider LFA, and Rider ECF.¹¹

C. The PUCO should ensure Rider AER-R includes the lower federal corporate tax rates, which became effective January 1, 2018 to ensure consumers are not overcharged.

The Tax Cuts and Jobs Act of 2017 lowered the corporate income tax rate from 35 percent to 21 percent.¹² The lower tax rates became effective January 1, 2018.¹³ In fairness to consumers, the tariffs for Rider AER-R should reflect the lower corporate tax rate effective January 1, 2018. Further, the PUCO should ensure that the annual audit or prudence review considers whether the tariff for Rider AER-R reflects the lower tax rates dating back to the effective date of the tax (January 1, 2018). Because the lower tax rate became effective on January 1, 2018, customers should receive the benefit of the lower charge beginning on January 1, 2018.

¹¹ See *In re The Audit of Duke Energy Ohio, Inc.’s Riders Supplier Cost Reconciliation, Retail Capacity, Retail Energy, Load Factor Adjustment, Electric Security Stability Charge, and Economic Competitiveness Fund*, Case No. 17-28-EL-RDR, Finding and Order (Aug. 2, 2017) at ¶5 (“Informational filings are those filings related to riders where quarterly reports and true-ups are necessary and audits are conducted at the discretion of the Commission ... Riders that require informational filings during the term of the ESP include [Rider SCR], [Rider RE], [Rider RC], [Rider LFA], and [Rider ECF].”)

¹² See Tax Cuts and Jobs Act of 2017, Public Law No. 115-97.

¹³ *Id.*

III. CONCLUSION

The PUCO should protect Ohio's residential utility consumers by not allowing automatic approval of quarterly updates to the tariff for Rider AER-R. Further, the PUCO should protect consumers from overpaying Duke, by modifying Duke's proposed tariff language to clarify that Rider AER-R is subject to refund if such charges are found to be unreasonable, imprudent, or unlawful. Finally, the PUCO should ensure that consumers receive the full benefit of the lower corporate tax rate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these Comments was served on the persons stated below via electronic transmission, this 21st day of March 2018.

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Summary: Comments Comments on Duke's Application to Increase Charges to Consumers Under its Alternative Energy Recovery Rider by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of McKenney, Bryce