

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy)
Ohio, Inc. to Adjust its Distribution Capital)
Investment Rider.)

**COMMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

In this case Duke Energy Ohio, Inc. (“Duke” or “Utility”) seeks to adjust the amount it charges consumers for electric service under its Distribution Capital Investment Rider (“DCI Rider”). Duke collected more than \$48 million during 2017 from customers under the DCI Rider.¹ Duke now proposes to adjust its DCI Rider charge from 15.319%² of the customer’s applicable base distribution charges to 11.944%.³ The proposed adjustment to the DCI Rider is based on investment data from the fourth quarter of 2017 and will be implemented with the first billing cycle of April 2018.⁴ The purpose of the DCI is to provide funding for Duke’s proposed infrastructure modernization plan and improve service reliability.⁵ To ensure that the DCI Rider charges are calculated lawfully Duke is obligated to file quarterly Rider DCI tariff updates for PUCO review.⁶

¹ See Case No. 17-2088-EL-RDR, Duke DCI Quarterly Filing, Attachment B at 12 (February 20, 2018).

² Duke Tariff PUCO Electric No. 19, Sheet No. 103.10, page 1 of 1.

³ Case No. 17-2088-EL-RDR, Duke DCI Quarterly Filing (March 19, 2018).

⁴ Case No. 17-2088-EL-RDR, Duke DCI Quarterly Filing, at 1 (January 26, 2018).

⁵ *In the Matter of application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, Opinion and Order at 72 (April 2, 2015).

⁶ See *Id* at 70, 72.

In response to Duke's latest quarterly update and additional tariff changes, OCC files these comments on behalf of Duke's 629,000 residential electric customers to advocate that Duke's rates and tariff language fully protect consumers. Specifically, OCC takes this opportunity to advocate that consumers are (1) permitted to receive a refund of DCI Rider charges that are later found to be unlawful, imprudent, and/or unreasonable; and (2) immediately receiving their rightful utility bill reductions as a result of the Tax Cuts and Jobs Act of 2017 ("Tax Cuts Act").⁷

II. BACKGROUND

On January 26, 2018, as amended on February 20, 2018, Duke filed its latest quarterly Rider DCI tariff update. The tariff changes will be automatically approved in 60 days (March 27, 2018) unless otherwise ordered by the PUCO.⁸ On March 19, 2018, as amended on March 21, 2018, Duke filed a letter and revised tariff sheets for Rider DCI in this docket. Duke's proposed modifications to the Rider DCI tariff state that the rider is subject to reconciliation, including refunds or additional charges, as ordered by the PUCO as a result of an audit.⁹ The tariff changes also state that the rider is subject to refunds or additional charges based upon the Tax Cuts Act and the PUCO's related investigation in Case No. 18-47-AU-COI.¹⁰

On March 20, 2018, PUCO Staff filed a review and recommendation in this docket, as well as two other dockets. Pertaining to this case, Staff concluded that the tariff

⁷ See Tax Cuts and Jobs Act of 2017, Public Law No. 115-97.

⁸ Case No. 14-841-EL-SSO, Opinion and Order at 70, 72 (April 2, 2015).

⁹ See Case No. 17-2088-EL-RDR, Duke Letter and Revised Tariff Sheets at 2 (March 19, 2018).

¹⁰ See Case No. 17-2088-EL-RDR, Duke Letter and Revised Tariff Sheets at 2 (March 19, 2018).

changes should be approved because they appropriately clarify the PUCO's authority with respect to reconciliations and adjustments to the DCI Rider.¹¹

III. RECOMMENDATION

A. **Duke's proposed modifications to its DCI Rider tariff do not adequately permit refunds for unlawful, imprudent, or unreasonable charges to consumers.**

On January 24, 2018, the Supreme Court of Ohio ("Court") issued a decision in an appeal of the Public Utilities Commission of Ohio's ("PUCO") Order in FirstEnergy's alternative energy rider case.¹² The PUCO audited FirstEnergy's rider, and based on the audit, ordered it to return more than \$43 million in imprudently incurred charges to customers.¹³

In FirstEnergy's appeal, the Court determined that the automatic approval of FirstEnergy's quarterly filings constituted PUCO approval of new rates.¹⁴ The Court also emphasized that the alternative energy rider tariff did not state that the rates were subject to refund.¹⁵ Thus, even though the order approving FirstEnergy's alternative energy rider stated that it could only collect prudently incurred costs,¹⁶ the Court held that the PUCO's order that FirstEnergy refund the overcharges to customers involved unlawful retroactive ratemaking.¹⁷

¹¹ See Case No. 17-2088-EL-RDR, Staff Review and Recommendation at 2-3 (March 20, 2018).

¹² *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229 ("FirstEnergy").

¹³ See *id.*, ¶10.

¹⁴ See *id.*, ¶18.

¹⁵ *Id.*, ¶19.

¹⁶ See *id.*, ¶8.

¹⁷ *Id.*, ¶20.

In reaching this decision, the Court relied on the “filed rate doctrine” of R.C. 4905.32. The Court stated that because FirstEnergy had collected costs from customers under a “filed” rate schedule, the PUCO was prohibited from later ordering a disallowance or refund of those costs.¹⁸ The Court noted that although FirstEnergy was entitled to collect only prudently incurred costs from customers, “there can be no remedy in this case because the costs were already recovered.”¹⁹

The Court’s decision has far-reaching and negative ramifications for consumers who pay utility charges that include riders that the PUCO periodically reviews. Unless the PUCO takes action to conform these riders to the Court’s decision, any subsequently conducted review of the riders could be rendered meaningless.²⁰ This circumstance can result in an unfair windfall for utilities who are already benefiting (to the detriment of consumers) from an exception to traditional regulation that allows single-issue ratemaking for electric distribution utilities. (R.C. Chapter 4928).²¹

Duke’s proposed modification to its DCI Rider tariff is inadequate to deal with *FirstEnergy* because it raises the prospect of consumers paying unlawful, imprudent, or unreasonable charges. The risk of harm to consumers would increase substantially were Duke’s proposed modification adopted by the PUCO. It does not address the situation where the PUCO approves a charge and the charge is later found unlawful, imprudent, or unreasonable by the Supreme Court of Ohio. Further, its focus on the Rider being subject to “reconciliation” is vague and ambiguous at best. “Reconciliation” is most often used, if

¹⁸ *Id.*, ¶18.

¹⁹ *Id.*

²⁰ *See id.*, ¶85 (dissent of Justice French).

²¹ *Id.* ¶ 18.

not exclusively used, in the context of financial reviews of utilities' programs – reconciling projected versus actual expenditures, for example. Focusing on “reconciliation” thus does not accurately reflect the type of review to which the DCI Rider is subject (prudence, for example) and therefore limits the type of review that may give rise to a refund in the event a charge is later found to be unlawful, imprudent, or unreasonable.

To better protect consumers against the prospect of paying unlawful and unreasonable charges, the DCI Rider tariff should state: **“Any charges to customers under this tariff that are later determined unlawful, imprudent, or unreasonable by the PUCO or the Ohio Supreme Court are refundable to customers.”** This modification would make clear that any charges paid by consumers later found to be unlawful, imprudent, or unreasonable will be refunded to them.

B. The PUCO should ensure that Rider DCI immediately includes the lower federal corporate tax rates from the Tax Cuts and Jobs Act of 2017, to ensure consumers are not overcharged.

Duke's proposed modification to its DCI Rider tariff also states that the rider is subject to refunds of additional charges based upon impact to rates from the Tax Cuts and Jobs Act of 2017 (“Tax Cuts Act”) and the PUCO's investigation into the Tax Cuts Act in Case No. 18-47-AU-COI. The Tax Cuts Act lowered the corporate income tax rate from 35% to 21%.²² The lower tax rates became effective January 1, 2018.²³

Duke's current quarterly update, states that the pre-tax return on rate base has been adjusted to reflect the corporate income tax reduction.²⁴ However, Duke also states

²² See Tax Cuts and Jobs Act of 2017, Public Law No. 115-97.

²³ *Id.*

²⁴ Case No. 17-2088-EL-RDR, Duke DCI Quarterly Filing, Attachment B at 2 n. (1) (February 20, 2018).

that the plant-related accumulated deferred income tax (“ADIT”) amounts used to determine the DCI Rider rate are before adjustments from the Tax Cuts Act.²⁵ Duke states that it plans to reclassify portions of the ADIT amounts as regulatory liabilities that would also be deducted from net plant for purposes of calculating net rate base.²⁶ This is unreasonable.

In fairness to consumers, the tariffs for Rider DCI should fully reflect the lower corporate tax rate, including ADIT, now—not at an undetermined later date. Consistent with OCC’s position in Case No. 18-47-AU-COI, Duke should estimate the amount of excess ADIT, for the DCI Rider, resulting from the Tax Cut Act and should immediately begin providing a monthly credit to customers based on that estimate. 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. Only then will consumers receive the full benefit, through a decrease to their utility bills, which they deserve from the Tax Cuts Act.

IV. CONCLUSION

Duke should amend the language in its tariff for the DCI Rider to ensure that customers are refunded for unlawful, imprudent, or unreasonable overcharges, in accordance with the Court’s decision in *FirstEnergy*. In addition, the PUCO should order that the DCI Rider charges fully address the reduced corporate federal income tax rate. This reduction to taxes should be passed back to consumers now—not at a later date.

²⁵ Case No. 17-2088-EL-RDR, Duke DCI Quarterly Filing, Attachment B at 1 n. (b) (February 20, 2018).

²⁶ *Id.*

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 27th day of March 2018.

/s/ Kevin F. Moore

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Summary: Comments Comments by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Moore, Kevin F. Mr.