

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy)
Ohio, Inc. for the Annual Audit of Rider SCR,) Case No. 18-0046-EL-RDR
Rider RE, Rider RC, Rider LFA, Rider ESSC,)
and Rider ECF.)

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

I. INTRODUCTION

In this case, Duke Energy Ohio, Inc. (“Duke”) 2017 charges to customers for expenses associated with its competitively bid standard offer and provisions of its electric security plan are being audited. The charges include the Supplier Cost Reconciliation Rider (“Rider SCR”), Retail Energy Rider (“Rider RE”), Retail Capacity Rider (“Rider RC”), Load Factor Adjustment Rider (“Rider LFA”), and Economic Competitiveness Fund (“Rider ECF”). This proceeding will examine whether the 2017 charges that have already been collected by Duke under these riders are reasonable and comply with Public Utilities Commission of Ohio (“PUCO”) Orders.¹ OCC is filing on behalf of the 629,000 residential utility customers of Duke.

On January 31, 2018, Duke filed an application for audit and review of Rider RC, Rider RE, Rider SCR, Rider LFA, and Rider ECF.² On March 19, 2018, Duke filed a letter and revised tariff sheets for Rider SCR in this docket. Duke states that the Rider

¹ Duke’s ESSC Rider was terminated by PUCO Order. See *In the Matter of the 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-ELSSO, Opinion and Order at 66 (April 2, 2015). Duke’s current Tariff states that the ESSC Rider has been cancelled and withdrawn. See Duke PUCO Electric No. 19, Sheet 113.8.

² See Case No. 18-0046-EL-SSO, Duke Application (January 31, 2018).

SCR tariff changes clarify that “the tariff shall be subject to future reconciliation following audits conducted by the Staff of the Public Utilities Commission of Ohio as subsequently approved by the Commission.”³

On March 20, 2018, PUCO Staff filed a review and recommendation in this docket, as well as two other dockets. As it pertains to this case, Staff concluded that Duke’s proposed tariff changes appropriately clarify the PUCO’s authority with respect to reconciliations and adjustments to the SCR Rider and that the tariff changes be approved.⁴

II. RECOMMENDATION

A. Duke’s proposed modification to its tariffs for the SCR Rider do not adequately protect customers from the prospect of paying unreasonable and unlawful charges.

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.⁵ 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.⁶

On FirstEnergy’s appeal, the Court determined that the automatic approval of FirstEnergy’s quarterly filings constituted PUCO approval of new rates.⁷ The Court also emphasized that the alternative energy rider tariff did not state that the rates were subject

³ Case No. 18-0046-EL-SSO, Duke Compliance Tariff (March 19, 2018).

⁴ See Case No. 18-0046-EL-SSO, Staff Review and Recommendation at 2-3 (March 20, 2018).

⁵ *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229 (“*FirstEnergy*”).

⁶ *See id.*, ¶10.

⁷ *See id.*, ¶18.

to refund.⁸ Thus, even though the order approving FirstEnergy’s alternative energy rider stated that it could only collect prudently incurred costs,⁹ the Court held that the PUCO’s order that FirstEnergy refund the overcharges to customers involved unlawful retroactive ratemaking.¹⁰

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.¹¹ 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.”¹²

The Court’s decision has far-reaching and harmful 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.¹³ 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).¹⁴

⁸ *Id.*, ¶19.

⁹ *See id.*, ¶8.

¹⁰ *Id.*, ¶20.

¹¹ *Id.*, ¶18.

¹² *Id.*

¹³ *See id.*, ¶85 (dissent of Justice French).

¹⁴ *Id.* ¶ 18.

Duke's proposed modification to its SCR Rider is inadequate to deal with *FirstEnergy* and the prospect it raises of consumers paying unlawful and unreasonable charges. The risk of harm to consumers would increase substantially were Duke's proposed modification adopted. It does not address the situation where the PUCO approves a charge and the charge is later found unlawful, unreasonable, or imprudent by the Supreme Court of Ohio. Further, its focus on the Rider being subject to "reconciliation" is vague and ambiguous at best. 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. It also unreasonably and unnecessarily limits the situations that may give rise to a refund in the event a charge is later found to be imprudent, unreasonable, or unlawful.

To better protect consumers against the prospect of paying unlawful and unreasonable charges, the SCR Rider tariff should state: **"Any charges to customers under this tariff that are later determined unlawful, imprudent, unreasonable by the PUCO or Supreme Court of Ohio 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. Duke's proposed tariff changes should apply to all riders including the riders identified in this proceeding in order to protect consumers.

Duke only proposed tariff changes in this docket to the SCR Rider. It did not propose tariff changes to other Duke riders including the other five riders: Rider RC, Rider RE, Rider LFA, Rider ESSC, and Rider ECF identified in this proceeding. While

Rider ESSC has been terminated and withdrawn¹⁵ the other riders should also receive the tariff language changes OCC recommended above. This will ensure that the PUCO is permitted to refund unlawful, imprudent, or unreasonable charges to consumers stemming from any and all of the riders including those contemplated in this proceeding, not just Rider SCR.

C. The PUCO Staff failed to conduct an audit/review of the riders in this proceeding before issuing its Staff Review and Recommendation.

In its Application, Duke requested that all of the riders in this proceeding be audited and provided workpapers and other associated documents in order for the PUCO Staff review to occur.¹⁶ The PUCO Staff Review and Recommendation that was filed on March 20, 2018, recommended that Duke's March 19, 2018 proposed tariff changes for Rider SCR be approved.¹⁷ However, the PUCO Staff did not state that it performed the requested audit and true-up of Rider SCR nor Rider's RC, RE, LFA, or ECF. Indeed, there is no mention of a review or audit of the rider's at all in the PUCO Staff's Review and Recommendation. Consistent with past audits of these riders, OCC assumes that a full PUCO Staff review and recommendation of all the riders in this proceeding is forthcoming.¹⁸ But, out of an abundance of caution, OCC recommends that none of the riders in this case, including Rider SCR, be approved by the PUCO before a PUCO Staff

¹⁵ See *In the Matter of the 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-ELSSO, Opinion and Order at 66 (April 2, 2015); Duke's current Tariff states that the ESSC Rider has been cancelled and withdrawn. See Duke PUCO Electric No. 19, Sheet 113.8.

¹⁶ See Application at 3, Attachments A-D.

¹⁷ See Staff Review and Recommendation at 3 (March 20, 2018).

¹⁸ See *In the Matter of the Audit of Duke Energy Ohio, Inc.'s Riders Supplier Cost Reconciliation, Retail Capacity, Retail Energy, Load Factor Adjustment, Electric Security Stabilization Charge, and Economic Competitiveness Fund*, Case No. 17-28-EL-RDR, Staff Review and Recommendation (April 28, 2017).

audit and review occurs. This Staff audit and review is a necessary consumer protection to ensure that the riders, which are being funded by consumers, are calculated correctly and are in compliance with PUCO Orders.

III. CONCLUSION

The PUCO should adopt language that addresses the refundability of charges to customers for all of Duke's tariffs at issue in this proceeding. OCC has proposed language that it recommends to protect customers. The PUCO should adopt OCC's proposed language. In addition, the PUCO should order that the PUCO Staff perform a full audit and review of all riders including those identified in this proceeding consistent with Duke's request and past practice.

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.

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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.