

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Application of Duke)
Energy Ohio, Inc. for Authority to) Case No. 14-841-EL-SSO
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.)

In the Matter of Application of Duke)
Energy Ohio, Inc. for Authority to) Case No. 14-842-EL-ATA
Amend its Certified Supplier Tariff,)
P.U.C.O. No. 20.)

**MEMORANDUM CONTRA DUKE ENERGY OHIO, INC.'S
APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

The ratemaking provisions of the 2008 energy law that provide for Electric Security Plans (“ESP”) are skewed in favor of the utilities and to the detriment of consumers. The Duke Energy Ohio, Inc. (“Duke”) ESP includes customer-funded economic development programs that give Duke no reason for concern. However, Duke has challenged the Public Utilities Commission of Ohio (“PUCO”) modification to Duke’s ESP to include a shareholder funded economic development program. The PUCO should protect consumers and deny Duke’s challenge to the PUCO’s modification of its ESP.

The Office of the Ohio Consumers’ Counsel (“OCC”) opposes the application for rehearing filed by Duke. Duke's request would deny its customers (and the state of Ohio)

the benefits of new investment and job growth, funded by Duke's shareholders. When the PUCO approved Duke's ESP, it modified the plan by, inter alia, adding in an economic development program. Under the economic development program, \$2 million in shareholder funding per year will be used to create private sector economic development resources. These resources will support and work in conjunction with other resources to attract new investment and improve job growth in Ohio.

Duke opposes the program.¹ Duke argues the program is unreasonable and outside the scope of the PUCO's authority.² But the PUCO has already rejected Duke's arguments once. Because Duke has raised nothing new in its application for rehearing, the PUCO should reject these same arguments again.³ It is well settled that the PUCO will deny applications for rehearing that "simply reiterate arguments that were considered and rejected by the Commission."⁴ Further, the PUCO is authorized by law to modify and approve an ESP. When the PUCO approved Duke's ESP, the PUCO considered state policy under R.C. 4928.02, the provisions set forth in R.C. 4928.143, the evidentiary record, and precedent in determining to approve an economic development program. Accordingly, Duke's arguments lack merit and its Application for Rehearing should be denied.

¹ Opinion and Order (Apr. 2, 2015) at 91.

² Duke Application for Rehearing (Apr. 20, 2018).

³ Entry on Rehearing (Mar. 21, 2018) at 45.

⁴ *Wiley v. Duke Energy Ohio, Inc.*, Case No. 10-2463-GE-CSS, Entry on Rehearing (Nov. 29, 2011) at 6-7; *See also In re Duke Energy Ohio*, Case No. 10-2586-EL-SSO, Entry on Rehearing (May 4, 2011) at 15-16 (rejecting an application for rehearing that "raised nothing new"); *City of Reynoldsburg v. Columbus Southern Power Co.*, Case No. 08-846-EL-CSS, Entry on Rehearing (June 1, 2011) at 19-20 (holding that no grounds for rehearing existed where no new arguments had been raised); *In re Columbia Gas of Ohio, Inc.*, Case No. 08-1344-GA-EXM, Entry on Rehearing (Nov. 1, 2011) at 9-10 (denying application for rehearing because applicant "raised nothing new on rehearing that was not thoroughly considered" in the PUCO order at issue).

II. RECOMMENDATIONS

A. **The PUCO has already considered and denied Duke’s arguments, and should do so again by denying Duke’s Application for Rehearing.**

The PUCO has already denied Duke’s arguments.⁵ Regardless, Duke rehashes its arguments and now strenuously objects to the PUCO’s modification of its ESP to allow for a shareholder funded economic development program.⁶ Duke argues that the PUCO’s “justifications for its shareholder funded economic development program are unreasonable, and not based on evidence or law.”⁷

But the PUCO has already determined that Duke’s economic development program is explicitly permitted by law, is voluntary, and is substantially identical to similar programs implemented by Ohio’s other electric utilities.⁸ On these bases, the PUCO’s Order was just and reasonable. The PUCO stated plainly, “Duke’s request for rehearing regarding the economic development fund provisions should be denied.”⁹ It is well settled that the PUCO will deny applications for rehearing that “simply reiterate arguments that were considered and rejected by the Commission.”¹⁰

⁵ Entry on Rehearing (Mar. 21, 2018) at 45-46.

⁶ Application for Rehearing (Apr. 20, 2018).

⁷ *Id.*

⁸ R.C. 4928.143(B)(2)(i); *See also In re Duke Energy Ohio, Inc.*, Case No. 11-3549-EL-SSO, et al., Opinion and Order (Nov. 22, 2011) at 43; *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, Opinion and Order (Feb. 25, 2015) at 69-70; *In re Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, Opinion and Order (Sept. 4, 2013) at 42-43.

⁹ Entry on Rehearing (Mar. 21, 2018) at 46.

¹⁰ *Wiley v. Duke Energy Ohio, Inc.*, Case No. 10-2463-GE-CSS, Entry on Rehearing (Nov. 29, 2011) at 6-7; *See also In re Duke Energy Ohio*, Case No. 10-2586-EL-SSO, Entry on Rehearing (May 4, 2011) at 15-16 (rejecting an application for rehearing that “raised nothing new”); *City of Reynoldsburg v. Columbus Southern Power Co.*, Case No. 08-846-EL-CSS, Entry on Rehearing (June 1, 2011) at 19-20 (holding that no grounds for rehearing existed where no new arguments had been raised); *In re Columbia Gas of Ohio, Inc.*, Case No. 08-1344-GA-EXM, Entry on Rehearing (Nov. 1, 2011) at 9-10 (denying application for rehearing because applicant “raised nothing new on rehearing that was not thoroughly considered” in the PUCO order at issue).

B. The PUCO is authorized by law to modify and approve an Electric Security Plan.

The PUCO has the authority to modify and approve an ESP. When an application for an ESP is filed, the PUCO must hold a proceeding.¹¹ Under R.C. 4928.143(C)(1), at that proceeding the utility must prove that the ESP, with pricing and all other terms and conditions, is “more favorable in the aggregate” to customers than a Market Rate Offer (“MRO”).¹² The PUCO may approve, or modify and approve the ESP if it passes the “more favorable in the aggregate” test. Otherwise, the PUCO must reject the utility’s ESP.

In this case, the PUCO repeatedly recognized that the economic development program was one of the other terms and conditions considered by the PUCO to determine that the ESP was more favorable than an MRO. The PUCO stated:

As we determined in our ESP versus an MRO analysis, many of the provisions of the modified ESP, which includes Duke’s contribution to an economic development program, advance the state policy under R.C. 4928.02 and support our finding that the modified ESP is more favorable.

The PUCO considered all of the provisions of the ESP, taken together.

All of the provisions and modifications adopted by the Commission as set forth in the ESP 3 Order taken together led the Commission to determine that the ESP should be approved, as modified.¹³

While Duke’s ESP is already less favorable than an MRO, Duke’s ESP is even worse for consumers without the economic development program (i.e., *all* of the provisions and modifications adopted by the Commission) and *must* be rejected.¹⁴ At the very least, the

¹¹ R.C. 4928.141.

¹² R.C. 4928.143(C)(1).

¹³ Entry on Rehearing (Mar. 21, 2018) at 46.

¹⁴ R.C. 4928.143(C)(1).

PUCO would need to reconsider the ESP versus MRO test to determine whether the ESP, minus the economic development program, would be more favorable than an MRO.

C. The PUCO considered state policy, the provisions set forth in R.C. 4928.143, the evidentiary record, and PUCO precedent in determining to approve an economic development program.

In deciding an ESP case, the PUCO must consider both state policy and the provisions in R.C. 4928.143. These provisions give the PUCO both the right to implement an economic development program and to modify an ESP. In denying Duke's arguments the first time, the PUCO found that it considered state policy and all of the provisions of R.C. 4928.143. According to R.C. 4928.02, it is the policy of the state of Ohio to facilitate the state's effectiveness in the global economy.¹⁵ That is, almost by definition, economic development.¹⁶ In approving the economic development program, the PUCO stated that it will create private sector economic development resources to support and work in conjunction with other resources to attract new investment and improve job growth in Ohio.¹⁷

The PUCO also pointed out that R.C. 4928.143(B)(2)(i) specifically allows ESPs to include provisions related to economic development.¹⁸ Further, the PUCO noted that the economic development program is voluntary, because R.C. 4928.143(C)(2)(a) provides Duke the opportunity to withdraw the ESP. If Duke doesn't want to contribute to economic development for the benefit of its customers, then it can withdraw its ESP.

¹⁵ R.C. 4928.02(N).

¹⁶ See *Encyclopedia Britannica*, "Economic Development" – ("generally it is employed to describe a change in a country's economy involving qualitative as well as quantitative improvements.")

¹⁷ Opinion and Order (Apr. 2, 2015) at 91; Entry on Rehearing (Mar. 21, 2018) at 46.

¹⁸ R.C. 4928.143(B)(2)(i), ("Provisions under which the electric distribution utility may implement economic development . . .").

Duke asserts that the PUCO violated the Court's holding in *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87 (1999), which held that for the PUCO to render an opinion without record support is reversible error. But *Tongren* involved a merger application and gas cost recovery proceedings, not an ESP application.¹⁹

Further, Duke's argument regarding *Tongren* lacks merit, as the issue of economic development was addressed in the record of this proceeding (by Duke's witness, nonetheless). William Don Wathen, Jr. testified for Duke that other parts of its ESP were intended to promote economic development. For instance, Mr. Wathen testified the utility's proposed Price Stability Rider ("PSR") was related to economic development, in that it provided some insurance against price spikes and limited price volatility.²⁰ Mr. Wathen also testified that a program like Duke's PowerShare program can provide economic development benefits.²¹ Additionally, OEG witness Stephen Baron testified that "[i]ninterruptible load programs can bolster economic development by allowing large customers, who must compete both nationally and internationally, to secure more competitive electric rates by choosing to take a lower quality of service from their utility."²² Further, Mr. Baron testified at hearing that there are multiple economic development programs in Ohio, including interruptible programs and reasonable arrangements.²³

¹⁹ *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87 (1999).

²⁰ Tr. Vol. II at 466.

²¹ Tr. Vol. III at 634 ("Q. Can a program like Duke's PowerShare program provide economic development benefits? A. I assume that a customer would enter into an arrangement like that for its economic benefits, so I would assume that's an economic development benefit.").

²² OEG Ex. 2 at 12.

²³ Tr. Vol. VIII at 2338 ("Q. ... You've also stated that the interruptible programs is a form of economic development; is that correct? A. Yes. ... Q. And you are aware that there are other economic development mechanisms in the state of Ohio; is that correct? A. Yes.")

The record supports the need for economic development. So the PUCO approved a shareholder funded economic development program that will actually attract new investment and improve job growth for the benefit of Duke's customers. The PUCO is allowed to exercise discretion regarding the mechanism to be employed, as it often does in ESP proceedings, and did so in this case. But now, upon the PUCO's approval of a shareholder funded economic development program to benefit Duke's customers and the state of Ohio, Duke balks. Instead of supporting more jobs for its customers, Duke argues that such a program is unreasonable and outside the scope of the PUCO's authority. Duke's arguments should be rejected.

III. CONCLUSION

The PUCO should once again deny Duke's arguments that the PUCO's approval of an economic development program is unreasonable, arbitrary, unconstitutional, and outside the scope of the PUCO's authority. The PUCO has already determined that Duke's economic development program is explicitly permitted by law, is voluntary, and is substantially identical to similar programs implemented by Ohio's other electric utilities.²⁴ Duke's arguments lack merit now as they did before. The PUCO should reject Duke's arguments and deny rehearing on this issue.

²⁴ R.C. 4928.143(B)(2)(i); *See also In re Duke Energy Ohio, Inc.*, Case No. 11-3549-EL-SSO, et al., Opinion and Order (Nov. 22, 2011) at 43; *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, Opinion and Order (Feb. 25, 2015) at 69-70; *In re Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, Opinion and Order (Sept. 4, 2013) at 42-43.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served via electronic transmission upon the parties this 30th of April, 2018.

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

4/30/2018 4:47:34 PM

in

Case No(s). 14-0841-EL-SSO, 14-0842-EL-ATA

Summary: Memorandum Memorandum Contra Duke Energy Ohio, Inc.'s Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.