

**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.)

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

In this case, the Public Utilities Commission of Ohio (“PUCO”) issued an Entry authorizing Duke Energy Ohio, Inc. (“Duke”) to continue charging customers under its Electric Security Plan (“ESP”) even though the rate plan to customers expired on May 31, 2018.¹ To protect Duke’s approximately 630,000 residential electric consumers, the Office of the Ohio Consumers’ Counsel (“OCC”) files this Application for Rehearing regarding the PUCO’s unlawful determination that it has the authority to extend an ESP.

The PUCO’s Entry harms customers and is unreasonable and unlawful in the following respects:

ASSIGNMENT OF ERROR 1: The PUCO’s Entry is unjust, unreasonable, and unlawful because it extended the term of Duke’s ESP, to the detriment of consumers, without any statutory authority for doing so.

¹ Entry (May 30, 2018) at 7-8; Opinion and Order (Apr. 2, 2015) at 15, 51, 79-80.

ASSIGNMENT OF ERROR 2: The PUCO's Entry allowing Duke to charge its customers an expired ESP and its accompanying riders is unlawful and unreasonable because it will cause irreparable harm to customers.

ASSIGNMENT OF ERROR 3: The PUCO's Entry is unjust and unreasonable because it continues Rider DCI even though Rider DCI has not improved Duke's reliability or aligned customer expectations as required by R.C. 4928.143(B)(2)(h) and intended by the PUCO.

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I. INTRODUCTION

Duke's ESP expired on May 31, 2018.² However, on May 30, 2018, the PUCO issued an Entry authorizing Duke to continue charging customers under the ESP, including all of its riders, until a subsequent standard service offer is approved. The riders that Duke charges customers under its ESP include, but are not limited to, a Price Stabilization Rider ("PSR") to subsidize two old coal-fired power plants and a \$170 million Distribution Capital Investment Rider ("Rider DCI"). OCC challenged the ESP and each of these riders when this case was originally litigated back in 2015. However, the PUCO has taken nearly three years to issue a final appealable order in this case. And before parties even have had the opportunity to appeal the unlawful ESP and its riders, the PUCO issued an Entry extending the ESP beyond its initial term.

² Opinion and Order (Apr. 2, 2015) at 15, 51, 79-80.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.” OCC entered an appearance and filed testimony regarding AEP’s Application and the Settlement. It participated in the evidentiary hearing on the Settlement.

R.C. 4903.10 requires that an application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” Additionally, Ohio Adm. Code 4901-1-35(A) states: “An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing.”

In considering an application for rehearing, R.C. 4903.10 provides that “the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.” The statute also provides: “[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.”

The statutory standard for abrogating some portions of the Opinion and Order and modifying other portions are met here. The PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Opinion and Order.

III. RECOMMENDATIONS.

A. The PUCO's Entry is unjust, unreasonable, and unlawful because it extended the term of Duke's ESP, to the detriment of consumers, without any statutory authority for doing so.

There are only two reasons under the law that allows the PUCO to continue a standard service offer: when (1) the PUCO disapproves an SSO application or (2) the utility withdraws a PUCO-modified SSO application.³ Both of these conditions for continuing a standard service offer are set forth under R.C. 4928.143(C)(2)(b). Neither has occurred in this case.

The PUCO noted in its Entry granting Duke's motion to extend the ESP that "the Revised Code does not provide specific guidance regarding a gap between an expiring SSO and a still-pending SSO application."⁴ Despite this acknowledgement, the PUCO found that extending the ESP is not dissimilar to the statutory conditions found in R.C. 4928.143(C)(2)(b). But the PUCO is a creature of statute, its authority comes only from that granted by the General Assembly.⁵ The General Assembly has not authorized the PUCO to extend an electric security plan that has expired.

According to R.C. 4928.143(C)(2)(b), there are only two statutory conditions that allow the PUCO to continue the utility's most recent standard service, when (1) the PUCO disapproves an SSO application or (2) the utility withdraws a PUCO-modified

³ See R.C. 4928.143.

⁴ Entry (May 30, 2018) at 7.

⁵ See, e.g., *Canton Storage and Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St. 3d 1, 647 N.E.2d 136.

SSO application. Neither has occurred in this case. For this reason, the PUCO's Entry extending Duke's ESP is unlawful.

Further, the PUCO further found that extending the ESP is consistent with commission precedent in the DP&L Extension Case.⁶ But the present case is factually distinguishable from the DP&L Extension Case, as there is no MRO application here. In the DP&L Extension Case, the PUCO determined there was no statutory guidance "where the company has proposed an MRO, which is still pending before the Commission at the time of the termination of the previous ESP."⁷ There is no pending MRO in this case, and the procedure in the DP&L Extension Case was unusual (DP&L filed an MRO Application, then an ESP Application, and then an Amended ESP Application).

More important than the factual difference between the present case and the DP&L Extension Case, the lack of statutory authority remains. The PUCO acted outside the scope of its statutory authority then, but that does not make it lawful to do so now. In this case, the PUCO noted that it extended Duke's ESP to address "an approaching dilemma," which was the end of Duke's ESP.⁸ But, the ends, however legitimate, must be arrived at through lawful means. They were not.

Moreover, the PUCO's own contribution to its dilemma should be noted. The PUCO issued its Opinion and Order on April 2, 2015. Parties then filed Applications for Rehearing within 30 days pursuant to the statutory 30-day deadline.⁹ After that, the

⁶ See *In re Dayton Power & Light Co.*, Case No. 12-426-EL-SSO, et al., Entry at 3-4 (Dec. 19, 2012).

⁷ See *In re Dayton Power & Light Co.*, Case No. 12-426-EL-SSO, et al., Entry on Rehearing at 5-6 (Feb. 19, 2013).

⁸ Entry (May 30, 2018) at 7.

⁹ R.C. 4903.10.

PUCO waited nearly three years, until March 21, 2018, to issue an Entry on Rehearing addressing the parties' arguments. This "approaching dilemma" was exacerbated by the PUCO's dilatory response to the parties' applications for rehearing.

B. The PUCO's Entry Allowing Duke To Charge Its Customers An Expired ESP And Its Accompanying Riders Is Unlawful And Unreasonable Because It Will Cause Irreparable Harm To Customers.

Harm is irreparable "when there could be no plain, adequate and complete remedy at law for its occurrence and when any attempt at monetary restitution would be 'impossible, difficult, or incomplete.'"¹⁰ In the context of judicial orders, the Court traditionally looks to whether there is an effective legal remedy if the order takes effect, in order to determine whether to stay the proceedings.¹¹ In this case, the PUCO's Entry is unlawful and unreasonable because it will cause irreparable harm to customers, and obtaining a refund may be impossible or difficult.

In this case, the legal remedy for the ESP and its riders is a refund, but such refund would be "impossible, difficult, or incomplete" due to the Court's holding in *Keco Industries, Inc. v Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957) and *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229. The Court's holdings in these cases direct that recovery of costs under a filed rate schedule prohibits the PUCO from later ordering a disallowance or refund of those costs. Accordingly, if Duke's ESP and its

¹⁰ *FOP v. City of Cleveland* (8th Dist. 2001), 141 Ohio App.3d 63, 81, citing *Cleveland v. Cleveland Elec. Illuminating Co.* (8th Dist. 1996), 115 Ohio App.3d 1, 12, appeal dismissed, 78 Ohio St.3d 1419 (1997).

¹¹ See, e.g., *Tilberry v. Body* (1986), 24 Ohio St. 3d 117; *Sinnott v. Aqua-Chem, Inc.* (2007), 116 Ohio St. 3d 158, 161.

riders are allowed to continue beyond the expired term of the ESP, customers will be charged by Duke and any legal remedy will be at best difficult and at worst impossible.

While Justice Rehnquist observed that “the temporary loss of income, *ultimately to be recovered*, does not usually constitute irreparable injury,” the Court’s holdings in limit the chance of ultimate recovery. Economic harm becomes irreparable where the loss cannot be recovered.¹² The PUCO should prevent such irreparable harm to consumers by granting this Application for Rehearing and directing Duke’s riders be collected subject to refund.

C. The PUCO’s Entry Is Unjust And Unreasonable Because It Continues Rider DCI Even Though Rider DCI Has Not Improved Duke’s Reliability Or Aligned Customer Expectations As Required By R.C. 4928.143(B)(2)(h) And Intended By The PUCO.

According to R.C. 4928.143(B)(2)(h), when deciding whether to approve an ESP containing a provision for distribution service, the PUCO must examine the reliability of the EDU’s distribution system and ensure that customers and the EDU’s expectations are aligned. The PUCO must determine that the EDU is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.¹³ Accordingly, when the PUCO initially approved Rider DCI in 2015, it determined that the rider would improve reliability and align customer and EDU expectations.

But Rider DCI has done nothing of the sort. Since Rider DCI was approved, Duke has missed both its CAIDI (Customer Average Interruption Duration Index) and SAIFI

¹² *Sampson v. Murray* (1974), 415 U.S. 61, 90.

¹³ R.C. 4928.143(B)(2)(h); Opinion and Order (April 2, 2015) at 66-72.

(System Average Interruption Frequency Index) reliability standards.¹⁴ Accordingly, Rider DCI is an unjust and unreasonable charge that does not meet the PUCO's intent or the requirements in R.C. 4928.143(B)(2)(h). The PUCO's Entry was unjust and unreasonable in that it continued Rider DCI until August 31, 2018.

IV. CONCLUSION

In order to avoid unjust and unreasonable results, results that harm Duke's customers by imposing higher rates, the PUCO should grant this Application for Rehearing. Quite simply, the PUCO extended the term of Duke's ESP without any statutory authority for doing so. Worse, it continued a charge that does not meet the requirements of R.C. 4928.143(B)(2)(h) or the PUCO's original intent.

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¹⁴ See *In re Duke Energy Ohio, Inc., for Approval of Proposed Reliability Standards*, Case No. 13-1539-EL-ESS (Sep. 17, 2014) at 4 (“The SAIFI standard shall be set at 1.05 for each of the years 2015 and 2016. The CAIDI standard shall be set at 122.81 for each of the years 2015 and 2016.”); *In re Annual Report of Electric Distribution System Reliability*, Case No. 17-760-EL-ESS (Mar. 30, 2017).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was served via electronic transmission upon the parties this 29th of June 2018.

/s/ Maureen R. Willis

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Summary: App for Rehearing 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.