BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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. 14-0841-EL-SSO
In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20.	))))	Case No. 14-0842-EL-ATA

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

In this case, the Public Utilities Commission of Ohio ("PUCO") authorized Duke Energy Ohio, Inc. ("Duke") to charge customers an additional $5 million per month. The PUCO allowed Duke to charge customers under the utility's Distribution Capital Investment Rider ("Rider DCI") even though the rider charges to customers were supposed to end 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 unjust and unreasonable determination to extend Rider DCI and require Duke's customers to pay tens of millions of dollars more over the next few months.

On, July 25, 2018 the PUCO issued an Entry that harms Duke's customers and is unreasonable and unlawful in the following respects:

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

ASSIGNMENT OF ERROR 1: The PUCO's Entry is unjust, unreasonable, and unlawful because it allows Duke to charge its customers millions of dollars based on facts not in the record in violation of R.C. 4903.09.

ASSIGNMENT OF ERROR 2: The PUCO's Entry is Unjust and Unreasonable because it authorizes Duke to continue charging its customers Rider DCI based upon information that with reasonable diligence could have been provided sooner by Duke, as required by R.C. 4903.10.

Respectfully submitted,

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I. INTRODUCTION

Duke's Distribution Capital Investment Rider ("Rider DCI") was set to expire on May 31, 2018.[2] However, just one day before the expiration date, the PUCO issued an Entry authorizing Duke to continue charging customers under Rider DCI through August 1, 2018. Now the PUCO has increased the amount Duke can charge customers to $5 million per month and further extended the term of Rider DCI. The PUCO should grant rehearing and deny Duke the ability to charge customers $5 million per month for Rider DCI.

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

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

appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." OCC has entered an appearance, filed testimony, participated in the hearing, and filed Applications for Rehearing in this proceeding.

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." However, the PUCO "shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing." The statute then 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 allows Duke to charge its customers millions of dollars based on facts not in the record in violation of R.C. 4903.09.

On May 30, the PUCO issued an Entry authorizing Duke to continue charging customers under Duke's electric security plan ("ESP"), even though the ESP was set to expire on May 31. In that Entry, the PUCO determined that Rider DCI was part of the ESP and should continue until August 1. However, the PUCO "decline[d] to increase the hard cap that was approved in ESP 3."[3] That cap was a $35 million limit on the amount Duke could charge customers under Rider DCI in 2018. But on July 25, the PUCO changed its mind and issued an Entry extending the term of the rider and increased the amount that Duke could charge customers to $5 million per month.

The PUCO's decision to increase the amount customers will pay under Rider DCI was based upon unverified assertions by Duke that its Return on Equity ("ROE") would decrease from 9.84 percent to 1.90 percent if it did not receive approval to extend Rider DCI. Duke's assertions were presented for the first time in its June 7, 2018 application for rehearing. Those assertions have never been exposed to the light of day. Contrary to the fundamental due process protection that all litigants should have, parties were not given the opportunity to challenge the information through discovery or by cross-examination at an evidentiary hearing.

When the PUCO relied upon the information that Duke presented, and made the information the basis of its ruling, the PUCO violated R.C. 4903.09. That law requires

[3] Entry (May 30, 2018) at 7.

the PUCO to base its decision on evidence in the record. Assertions or information presented in a party's application for rehearing is not evidence in the record.

In *Ohio Consumers' Counsel v. PUC*, 111 Ohio St.3d 300, the Court held that the PUCO violated R.C. 4903.09 when it modified an order on rehearing without citing record evidence or setting forth any basis for its decision. The Court determined that simple assertions that modifications to a PUCO Order are necessary to provide rate certainty for consumers or ensure financial stability for the utility are insufficient to justify a rate increase on rehearing. Additionally, the Court has noted that "PUCO orders which merely [make] summary rulings and conclusions without developing the supporting rationale or record have been reversed and remanded."[4]

Consistent with this precedent, the PUCO should find that it erred in relying upon the outside-the-record assertions and information presented by Duke. The PUCO should grant rehearing. The PUCO should not allow Duke to charge customers even a penny more than the $35 million it approved for Rider DCI in 2018.

B. The PUCO's Entry is unjust, unreasonable, and unlawful because it authorizes Duke to continue charging its customers under Rider DCI based upon information that with reasonable diligence could have been provided sooner by Duke, as required by R.C. 4903.10.

In considering an application for rehearing, R.C. 4903.10 provides that the PUCO "shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing." But that is exactly what happened here. The

[4] *MCI Telecommunications*, 32 Ohio St.3d at 312, 513 N.E.2d 337.

PUCO extended Rider DCI and increased the amount customers will be charged based upon what the PUCO describes as Duke's "more extensive arguments."[5]

Those more extensive arguments are Duke's assertions that ending Rider DCI would reduce Duke's ROE from the approved 9.84 percent to 1.90 percent and not provide Duke enough operating income to cover its costs.[6] Duke's profit calculation without Rider DCI could have been offered upon the original hearing (or in Duke's original application for rehearing). These "more extensive arguments" relied upon by the PUCO are simply additional information that with reasonable diligence could have been offered sooner by Duke. The PUCO should not have allowed the information to be submitted on rehearing. The PUCO erred in this respect because it did not follow the requirements of R.C. 4903.10.

Further, the PUCO's rationale for increasing the Rider DCI charge is that its business would suffer without it. In other words, the PUCO increased the amount that Duke could charge customers under Rider DCI to protect the financial integrity of the utility. And therein lies another problem. Rider DCI was approved under R.C. 4928.143(B)(2)(h) as a distribution modernization charge. It had nothing to do with financial integrity. Financial integrity charges under an electric security plan do not have a place on their own in an ESP unless they are anchored to R.C. 4928.143(B)(2)(d). To approve a charge under R.C. 4928.143(B)(2)(d), the utility must show three things.

[5] Entry (July 25, 2018) at 7.

[6] Id; *See* Duke Application for Rehearing (June 7, 2018) at 11 ("Abruptly eliminating $53 million of the Company's revenue will have the impact of reducing its ROE from the approved 9.84 percent to 1.90 percent. It is difficult to imagine that the Commission can achieve its goal of supporting the financial integrity of the [sic] Duke Energy Ohio and promoting infrastructure investment to modernize the grid by putting the Company in jeopardy of not having enough operating income to cover its costs").

First, the utility must show that there is a charge. Second, that the charge relates to "limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service." And third the charge must "have the effect of stabilizing or providing certainty regarding retail electric service."

Based upon the record before the PUCO, Rider DCI does not meet these requirements. The PUCO took no evidence (and Duke provided no evidence) regarding whether Rider DCI meets these requirements. Instead, the PUCO unilaterally increased and extended Rider DCI as a financial integrity charge to ensure that Duke's ROE does not drop from 9.84 percent to 1.90 percent. Nothing in R.C. 4928.143(B)(2)(h) gives the PUCO authority to implement a financial integrity charge, and certainly not without the taking of additional evidence. Any information that Duke's ROE would decrease without an extension and increase to Rider DCI is information that with reasonable diligence could have been previously offered by Duke. For these reasons, the PUCO should reverse its finding allowing Duke to charge customers an additional $5 million per month under Rider DCI. Instead, Rider DCI should be terminated and any further collection of charges from customers should not be allowed.

IV. CONCLUSION

The PUCO should grant this Application for Rehearing to protect consumers from being unreasonably charged increased rates by Duke. As the PUCO itself noted when it approved Rider DCI, the caps on how much the utility can charge customers ensured "that spending is prudent and not too onerous for customers."[7] But now the PUCO has unilaterally increased the amount that Duke can charge customers under Rider DCI based upon information that has not been presented as record evidence and has not been subject to challenge through discovery or under cross-examination at an evidentiary hearing, all in violation of R.C. 4903.09. Additionally, the information Duke presented (and that the PUCO relied upon) to justify increasing rates to customers was information that could have been presented earlier by Duke. As such, the information was not a proper basis for the PUCO to grant rehearing under R.C. 4903.10. The PUCO should reverse its decision and order Duke to discontinue charging customers under Rider DCI, consistent with its earlier ruling to limit the amount customers would have to pay in 2018 for Rider DCI.

Respectfully submitted,

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[7] Opinion and Order (April 2, 2015) at 72.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was served via electronic transmission upon the parties this 24th of August 2018.

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