

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy)
Ohio, Inc. for Recovery of Program Costs, Lost)
Distribution Revenue, and Performance) Case No. 19-0622-EL-RDR
Incentives Related to its Energy Efficiency and)
Demand Response Programs.)

**INTERLOCUTORY APPEAL:
REQUEST FOR CERTIFICATION TO COMMISSIONERS
AND
APPLICATION FOR REVIEW
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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May 7, 2019

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Since 2016, Duke’s residential customers have overpaid **\$33 million** for Duke’s energy efficiency programs, solely because the Public Utilities Commission of Ohio (“PUCO”) has not ruled on any of Duke’s recent applications to lower its energy efficiency rider rate. Duke continues to hold this customer money, interest free.

There is no reason for further delay in this case. Duke filed its Application on March 29, 2019.¹ The PUCO’s rules allowed any person to object to that Application within thirty days after it was filed.² The Office of the Ohio Consumers’ Counsel (“OCC”) followed that rule and filed objections on April 26, 2019.³ In its objections, OCC asked the PUCO to do just one thing: approve Duke’s application as filed so that customers can finally get their money back.⁴ No other party filed objections.

¹ Application (Mar. 29, 2019).

² Ohio Adm. Code 4901:1-39-07(B).

³ Consumer Protection Objections by the Office of the Ohio Consumers’ Counsel (Apr. 26, 2019) (the “OCC Objections”).

⁴ See generally OCC Objections.

Despite there already having been an opportunity for parties to be heard in this case, and despite there being no dispute among parties, a procedural schedule was set that will substantially delay the resolution of this case, to the detriment of customers.⁵ Under the Entry, the case will be delayed at least another three months (likely more⁶), with initial comments not due until July 26, 2019, and reply comments not due until August 8, 2019. In that three-month period alone, residential customers will over-pay an additional **\$10.7 million**.⁷

It is not clear what purpose these additional comment deadlines serve. There was already an opportunity for parties to file objections, and OCC took advantage of that opportunity, per the PUCO's rules. If other parties wanted to weigh in, they could have filed objections under those same rules. They chose not to.

In this interlocutory appeal, OCC asks the PUCO Commissioners to (i) reverse the Entry, which unnecessarily delays the case and denies customers a right to timely get their money back and (ii) immediately approve the Application as filed, subject to future adjustment based on any review and investigation by the PUCO Staff.

Time is of the essence. With each passing day, Duke's residential customers continue to be overcharged for Duke's energy efficiency programs, essentially making interest-free loans to Duke, and continue to be out of pocket for that funding. There is no justification for further delaying this case by allowing parties to wait three more months

⁵ Entry (May 2, 2019) (the "Ruling").

⁶ Comments are due in three months. After that, it will take time for the Attorney Examiner and Commissioners to review those comments and issue a decision, so a three-month delay is conservative.

⁷ Customers will pay \$3.44 a month instead of receiving a \$2.16 per month credit. $(\$3.44 + \$2.16) * 3 \text{ months} * 640,000 \text{ customers} = \$10,752,000$.

before filing comments that could have been filed in April under the PUCO's already-existing procedural rules.

This interlocutory appeal should be certified by the Attorney Examiners to the full Commission for review, under Ohio Admin. Code 4901-1-15(B). The Interlocutory Appeal should be certified to the PUCO because (i) the appeal presents new or novel questions of interpretation, law, or policy, (ii) the Ruling departs from past precedent, and (iii) an immediate determination by the Commission is needed to prevent undue prejudice and expense to residential consumers.

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MEMORANDUM IN SUPPORT

I. BACKGROUND

Duke’s customers have been paying the same rate, \$0.003443 per kWh, for its energy efficiency programs since May 1, 2014⁸—more than five years ago—even though Duke has filed an application every year seeking to update that rate. Inexplicably, the PUCO has not ruled on any of Duke’s applications, so customers continue to pay \$0.003443 per kWh (\$3.44 per month for a typical customer using 1,000 kWh per month).

In 2016, Duke filed an application to lower the rate to \$0.002642 per kWh, which would be a monthly charge of \$2.64 for a typical customer.⁹ The PUCO never ruled on Duke’s application, so customers continued to pay the higher \$3.44 monthly charge.

In 2017, Duke filed an application to lower the rate to \$0.001544 per kWh, which would be a monthly charge of \$1.54 for a typical customer.¹⁰ The PUCO never ruled on Duke’s application, so customers continued to pay the higher \$3.44 monthly charge.

⁸ Duke Tariff Sheet No. 119.02 (effective date May 1, 2014).

⁹ Case No. 16-664-EL-RDR, Ziolkowski Testimony, Exhibit at 10.

¹⁰ Case No. 17-781-EL-RDR, Ziolkowski Testimony, Attachment at 10.

In 2018, Duke filed an application to lower the rate to *negative* \$0.001172 per kWh, which would be a monthly *credit* of \$1.17 for a typical customer.¹¹ Again, the PUCO never ruled on Duke’s application, so customers continued to pay the higher \$3.44 monthly charge.

As a result of the PUCO’s inaction, in the last three years alone, residential customers have paid an extra **\$33.3 million** for Duke’s energy efficiency programs:¹²

Year	Actual Program Costs & Shared Savings	Charges to Customers	Overcharges
2016	\$12,949,286	\$25,072,795	\$12,123,509
2017	\$9,085,353	\$23,832,826	\$14,747,473
2018	\$20,381,008	\$26,861,932	\$6,480,924
Total	\$42,415,647	\$75,767,553	<u>\$33,351,906</u>

In this case, Duke filed an application to lower the rate to *negative* \$0.002157 per kWh, which would be a monthly *credit* of \$2.16 for a typical customer.¹³

OCC filed timely objections in this case under Ohio Adm. Code 4901:1-39-07, which allow any person to file objections within 30 days of a utility’s energy efficiency rider filing. In its objections, OCC highlighted all of the information above regarding customers’ substantial overpayments for energy efficiency programs. To stop the bleeding, OCC asked the PUCO to immediately approve Duke’s application without modification. Every month that goes by, Duke’s residential customers over-pay for Duke’s energy efficiency programs by **\$3.6 million.**¹⁴

¹¹ Case No. 18-397-EL-RDR, Ziolkowski Testimony, Attachment JEZ-1 at 15.

¹² Ziolkowski Testimony, Attachment JEZ-1 at 15.

¹³ Ziolkowski Testimony, Attachment JEZ-1 at 15.

¹⁴ (\$3.44 + \$2.16) * 640,000 customers = \$3,584,000.

The PUCO has not yet ruled on Duke’s application. Instead, a procedural schedule was set allowing parties to file comments by July 25, 2019 and reply comments by August 8, 2019 (the “Ruling”).¹⁵

II. STANDARD OF REVIEW

Under Ohio Adm. Code 4901-1-15(B), a party may take an interlocutory appeal to the PUCO Commissioners if the appeal is certified by the Examiners under Ohio Adm. Code 4901-1-15(B). The standard applicable to certifying such an appeal is “that the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice ... to one or more of the parties, should the commission ultimately reverse the ruling in question.”¹⁶

Once an appeal has been certified under Ohio Adm. Code 4901-1-15(B), the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.¹⁷

III. REQUEST FOR CERTIFICATION

The Ruling satisfies the criteria for certification of an interlocutory appeal because (i) the appeal raises new or novel questions of interpretation, law, or policy, (ii) the Ruling departs from past precedent, and (iii) an immediate determination by the

¹⁵ Entry (May 2, 2019).

¹⁶ Ohio Admin. Code 4901-1-15(B).

¹⁷ Ohio Admin. Code 4901-1-15(E).

Commission is needed to prevent the likelihood of undue prejudice to Duke's residential customers, which OCC represents.¹⁸

A. The appeal presents new and novel questions of law and policy.

This interlocutory appeal presents new and novel questions of law and policy. What is novel about this case is the impact on customers as a result of years of PUCO inaction. Riders like Duke's energy efficiency rider are intended to allow a utility to charge customers the actual cost of energy efficiency programs (plus utility profits, aka shared savings). Because the utility does not know exactly how much the programs will cost or exactly how much it will collect from customers, an annual true-up process is necessary to make relatively minor adjustments based on actual results of the programs. Sometimes the rate goes up a little bit; sometimes the rate goes down a little bit.

Unfortunately, that is not what happened here. Here, the PUCO did not rule on any of Duke's recent applications for five years. What should have been incremental, year-to-year adjustments snowballed into \$33 million in overcharges and counting. That's double the entire cost of the residential programs for an entire year.

This is an unprecedented and novel situation. OCC is not aware of any similar rider whose rates have become so stale and unrepresentative of the costs they are intended to represent. The PUCO is therefore faced with the novel issue of how to protect customers from this unfair result, both now and in the future. The Ruling exacerbates the problem by unnecessarily delaying resolution of this case, and during that delay, customers will continue to overpay for Duke's energy efficiency programs instead of receiving the bill credits that they deserve.

¹⁸ See Ohio Adm. Code 4901-1-15(B).

B. The Ruling departs from past precedent.

The Ruling departs from past precedent because it allows parties to file comments and reply comments in addition to the objections that are already permitted under the PUCO's rules. A survey of similar, recent energy efficiency rider filings shows no other case in which a procedural schedule was set allowing parties to file comments in addition to the objections, which are allowed by rule.¹⁹ The Ruling, which delays the case by providing for new comment deadlines long after the deadline for objections under the PUCO's rules is a departure from past precedent.

C. An immediate determination by the PUCO is needed to prevent the likelihood of undue prejudice to Duke's residential customers, which OCC represents.

In the absence of an immediate determination by the PUCO, the case will be delayed at least another three months, and Duke's residential customers will continue to be harmed in multiple ways.

First, while this case is pending, Duke will continue to hold onto the \$33 million in customer money, interest free, that customers have overpaid for Duke's energy efficiency programs since 2016. Customers deserve to get their money back, and they deserve to get it back now. They should not have to wait another three months or more. They have already waited years.

¹⁹ See, e.g., Case No. 18-1646-EL-RDR (FirstEnergy energy efficiency rider with no procedural schedule allowing comments in addition to objections); Case No. 18-874-EL-RDR (AEP Ohio energy efficiency rider with no procedural schedule allowing comments in addition to objections); Case No. 16-664-EL-RDR (Duke energy efficiency rider with no procedural schedule allowing comments in addition to objections); Case No. 16-2167-EL-RDR (FirstEnergy energy efficiency rider with no procedural schedule allowing comments in addition to objections); Case No. 17-1266-EL-RDR (AEP Ohio energy efficiency rider with no procedural schedule allowing comments in addition to objections); Case No. 15-1843-EL-RDR (FirstEnergy energy efficiency rider with no procedural schedule allowing comments in addition to objections); Case No. 17-781-EL-RDR (Duke energy efficiency rider with no procedural schedule allowing comments in addition to objections).

Second, while this case is pending, Duke will continue to charge customers the current five-year-old rate of \$0.003443 per kWh, or \$3.44 per month for a typical customer using 1,000 kWh per month. With 640,000 residential customers, Duke will continue *charging* customers \$2.2 million per month,²⁰ even though customers should be getting a *credit* of \$1.4 million.²¹ By the time parties file comments under the Ruling, residential customers will have overpaid another \$10 million.

Third, while this case is pending, some customers will undoubtedly move out of Duke's service territory. Those customers moving out of Duke's territory will forever lose out on the ability to get their money back, even though they should have gotten it back long ago. The longer it takes the PUCO to rule in this case, the more customers are harmed by this problem.

IV. APPLICATION FOR REVIEW

The Ruling setting a delayed procedural schedule should be reversed. There is no need for an additional comments in this case because the PUCO's rules already allow parties to file objections, and all parties wanting to file them had an opportunity to do so. The PUCO should rule on this case now and fix the problem that it created by not ruling on Duke's previous energy efficiency applications.

²⁰ \$0.003443 * 1,000 * 640,000 customers.

²¹ -\$0.002157 * 1,000 * 640,000 customers.

- A. The PUCO Commissioners should reverse the Ruling because it will substantially harm customers by delaying resolution of this case and resulting in customers continuing to pay millions of dollars in overcharges for Duke's energy efficiency programs.**

With each passing day, Duke continues to hold \$33 million in residential customers' money that customers overpaid since 2016. With each passing day, residential customers continue to pay \$3.44 per month for Duke's energy efficiency programs, even though they should be getting a credit of \$2.16 per month.

This needs to stop.

As explained in detail above, customers continue to overpay for Duke's programs solely because the PUCO has not ruled on Duke's pending applications. Duke itself admits that customers should get their money back, as evidenced by its application, which proposes to give customers their money back over the next 12 months. The PUCO should reverse the Ruling, and rather than allowing more comments to be filed three months from now, the PUCO should approve the Application now.

- B. The PUCO Commissioners should grant Duke's application in this case immediately because all parties have had an opportunity to be heard, and no party has objected to Duke's application as filed.**

OCC understands that the PUCO Staff may still be auditing Duke's energy efficiency charges from 2017 and 2018. Nonetheless, because of the extraordinary nature of these cases—in which customers have been harmed to the tune of \$33 million and counting—the PUCO should grant customers relief now by approving Duke's application as filed. The order should state that the rate remains subject to further reconciliation based on any Staff audit of the rider. Any reconciliation resulting from the PUCO Staff's review is likely to pale in comparison to the \$33 million in overcharges that have accrued

in recent years. This adequately balances the interests of all parties by allowing customers to start getting their money back now, but without prejudicing the PUCO Staff's efforts to review Duke's rider charges.

V. CONCLUSION

The saga of Duke's energy efficiency rider filings should come to an end, with customers finally getting their money back. No rider rate should continue indefinitely as a result of PUCO inaction. Riders with annual updates should be filed, reviewed, and ruled upon each year in a timely manner so that customers pay rates that are just and reasonable, as well as accurate. Duke's customers have been overpaying for energy efficiency programs for years. The PUCO can remedy this problem by reversing the Ruling and ordering Duke to update its residential energy efficiency rider rate to negative \$0.002157 per kWh. Any further delay harms customers. Justice demands that the PUCO act now.

Respectfully submitted,

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/s/ Christopher Healey

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Interlocutory Appeal was served by electronic service to the counsel identified below (provided electronically to the Attorney Examiners) this 7th day of May 2019.

/s/ Christopher Healey _____
Christopher Healey
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THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC. FOR
RECOVERY OF PROGRAM COSTS, LOST
DISTRIBUTION REVENUE, AND
PERFORMANCE INCENTIVES RELATED TO
ITS ENERGY EFFICIENCY AND DEMAND
RESPONSE PROGRAMS.

CASE NO. 19-622-EL-RDR

ENTRY

Entered in the Journal on May 2, 2019

{¶ 1} Duke Energy Ohio, Inc. (Duke or the Company) is an electric distribution utility (EDU) as defined in R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 2} R.C. 4928.141 provides that an EDU shall provide customers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO must be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 3} Pursuant to R.C. 4928.66, EDUs are required to implement energy efficiency and peak demand response (EE/PDR) programs. Through these programs, the EDUs are mandated to achieve a specific amount of energy savings every year.

{¶ 4} By Opinion and Order issued August 15, 2012, the Commission approved a stipulation entered into between Duke and some of the parties. *In re Duke Energy Ohio, Inc.*, Case No. 11-4393-EL-RDR. Specifically, among other things, the Commission approved the recovery of program costs, lost distribution revenue, and performance incentives related to Duke's EE/PDR programs.

{¶ 5} On March 29, 2019, Duke filed an application for recovery of program costs, lost distribution revenue, and performance incentives related to its energy efficiency and demand response programs for 2018.

{¶ 6} In order to accomplish the review of Duke's application, the attorney examiner finds that all motions to intervene and intervenor comments should be filed by July 25, 2019. Reply comments should be filed by August 8, 2019.

{¶ 7} It is, therefore,

{¶ 8} ORDERED, That motions to intervene and intervenor comments be filed by July 25, 2019, and reply comments be filed by August 8, 2019. It is, further,

{¶ 9} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Nicholas J. Walstra

By: Nicholas J. Walstra
Attorney Examiner

MJA/hac

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in

Case No(s). 19-0622-EL-RDR

Summary: Attorney Examiner Entry setting deadline to file motions to intervene, intervenor comments and reply comments electronically filed by Heather A Chilcote on behalf of Nicholas Walstra, Attorney Examiner, Public Utilities Commission

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Commission of Ohio Docketing Information System on

5/7/2019 4:43:40 PM

in

Case No(s). 19-0622-EL-RDR

Summary: Text Interlocutory Appeal: Request for Certification to Commissioners and Application for Review by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.