

In the Matter of the Review of Duke)
Energy Ohio, Inc.'s Distribution Capital) Case No. 18-1036-EL-RDR
Investment Rider.)

**INITIAL BRIEF OPPOSING THE SETTLEMENT
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. BACKGROUND.....	2
III. STANDARD OF REVIEW	4
IV. RECOMMENDATIONS	5
A. The PUCO should reject the Settlement because it does not benefit customers and the public interest.	5
1. The Settlement is not in the public interest and should be rejected because it requires Duke’s customers to pay for transmission plant costs that Duke inappropriately included in in the Distribution Charge.	5
2. The Settlement is not in the public interest and should be rejected because it includes electric plant costs that were found by the auditor to be not used and useful.	8
3. The Settlement is not in the public interest and should be rejected because Duke’s unitization of plant accounting is not in compliance with its own policies.	9
B. To protect consumers, the PUCO should reject the Settlement because it violates important regulatory principles and practices.	11
V. CONCLUSION.....	13

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I. INTRODUCTION

Duke Energy Ohio, Inc. (“Duke”) is attempting to charge consumers over three million dollars through a single-issue ratemaking charge called the Distribution Capital Investment Rider (“Distribution Charge” or “Charge”). But the expenses Duke seeks to collect from customers through this charge, that are in dispute, have nothing to do with electricity distribution. The charges – indisputably – do not belong in the Distribution Charge. And in fact, were it not for the Charge, Duke would have no choice but to seek approval of these charges through the appropriate regulatory body – the Federal Energy Regulatory Commission (“FERC”).

The Staff of the Public Utilities Commission of Ohio (“PUCO Staff”) and Duke have nevertheless entered into a settlement that allows Duke to collect from consumers the transmission-related expenses. That is wrong. It harms consumers and Ohioans. It is not in the public interest and violates regulatory principles and practices.

The Office of the Ohio Consumers' Counsel (“OCC”), on behalf of Duke’s nearly 640,000 residential utility consumers, recommends that the PUCO find that the settlement is unreasonable because among other things it does not meet the three-prong test that the PUCO uses to evaluate settlements.

II. BACKGROUND

Duke proposed the Distribution Charge as part of its Electric Security Plan (“ESP”) under R.C. 4928.143(B)(2)(h). The purpose of the Charge is to enable Duke to expedite the collection of charges on customers for certain distribution plant investment that Duke considers vital to maintaining customer service reliability.¹ The Charge as approved by the PUCO allows Duke to collect property taxes, Commercial Activity Tax (“CAT”), and to earn a return on and of distribution plant investments associated with FERC accounts 360-374 that have been made since March 31, 2012.² To expedite the collection of charges from consumers, the Charge is updated on a quarterly basis and provides an almost immediate return on and of investments Duke makes in its distribution plant.

But the PUCO placed certain controls on the Charge, including specifying the type of distribution plant that is eligible for recovery through the Charge and an annual audit of the Charge to determine the accuracy and reasonableness of the charges that Duke intends to pass on to consumers.³

Rehmann Consulting performed its 2017-2018 compliance audit of Duke’s Distribution Charge and found that Duke had inappropriately added transmission costs to it.⁴ The transmission costs that Duke inappropriately included in the Charge have nothing

¹ *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 14-841-EL-SSO, Opinion and Order (April 2, 2015) at 66.

² Compliance Audit of the July 1, 2017 to June 30, 2018 Distribution Capital Investment Rider (“Rider DCI”) Duke Energy Ohio, Rehmann Consulting (Compliance Audit), Dec. 6, 2018 (Staff Exhibit 1) at page 2.

³ *Id.*

⁴ Compliance Audit at page 19.

to do with its distribution service. Requiring customers to pay these charges through the Distribution Charge is not in the public interest and violates important regulatory principles and practices.⁵

Additionally, the compliance audit by Rehmann Consulting provided a detailed description that Duke's unitization⁶ of construction costs does not comply with its own policies. Those policies require that unitization and movement from Construction Work in Progress (CWIP) (FERC Account 106) to Plant-in-Service (FERC Account 101) is to be done within one year of being charged to FERC Account 106. The unitization process allows Duke to correct errors in charging the proper accounts (e.g. charging transmission accounts instead of distribution accounts). The auditor noted that Duke had significant distribution plant-in-service charges that remained un-unitized (thus not moved into the appropriate FERC accounts and remaining in CWIP) for several years.⁷ This involved the unitization of charges and the assignment of the costs to FERC Plant Accounts 360-374.⁸ Because of this backlog, customers are (and have been) charged under the Distribution Charge for costs that are not authorized under the Charge. Assets' costs were not broken down on a per-unit basis and moved to the proper FERC account.

This discrepancy in asset accounting results in transmission-related costs being assigned to distribution plant accounts and unjustly collected from customers through the Distribution Charge. This accounting practice (which is not sufficiently remedied in the

⁵ See, e.g., R.C. 4928.02.

⁶ "Unitization" means breaking down the total work order costs into capitalized unit costs on a per-unit basis. The unit is the measurement used for capitalization purposes. Unitization facilitates assignment to the proper FERC plant accounts (360-374).

⁷ *Id.*

⁸ Compliance Audit at page 10.

Settlement) has harmed customers and violated regulatory principles and practices. Therefore, the Settlement should not be approved by the PUCO.

III. STANDARD OF REVIEW

OCC opposes the settlement entered into by Duke and the PUCO Staff because it is unreasonable and does not meet the three-prong test that the PUCO uses to determine whether a settlement should be adopted. It is well-established that the PUCO will adopt a settlement only if it meets all of the three criteria delineated below. The PUCO must evaluate the Settlement and decide the following:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?⁹
2. Does the settlement, as a package, benefit customers and the public interest?
3. Does the settlement package violate any important regulatory principle or practice?¹⁰

The PUCO should reject the Settlement that PUCO Staff and Duke reached in this case because it fails to meet the PUCO's adopted criteria, including that the Settlement does not benefit customers and the public interest and violates regulatory principles and practices. The proposed Settlement does not adequately address or resolve the significant compliance issues found by the auditor. In fact, the terms of the Settlement do not incorporate the recommendations made by the auditor. Specifically, the Settlement results

⁹ The PUCO takes into account the "diversity of interests" as part of the first part of the stipulation assessment. *See: In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer, Case No. 10-388-EL-SSO*, Opinion and Order at 48 (August 25, 2010).

¹⁰ *Consumers' Counsel v. Pub. Util. Comm'n.* (1992), 64 Ohio St.3d 123, 126.

in customers paying for transmission costs that the auditor found Duke has inappropriately been charging consumers through this Distribution Charge. The Settlement also results in customers paying through the Charge for electric distribution plant that is being held for future use even though this plant is not used and useful in serving Duke's customers at the present time. Further, the Settlement fails to require Duke to comply with its own capitalization policy guidelines or verify that only eligible distribution plant is being collected from customers through the Charge. Thus, the Settlement does not benefit customers and the public interest and violates regulatory principles and practices.

IV. RECOMMENDATIONS

- A. The PUCO should reject the Settlement because it does not benefit customers and the public interest.**
 - 1. The Settlement is not in the public interest and should be rejected because it requires Duke's customers to pay for transmission plant costs that Duke inappropriately included in in the Distribution Charge.**

Under the Settlement Duke's customers pay for transmission plant costs through a Distribution Charge. While reviewing documentation related to quarterly Distribution Charge filings, the auditor found that Duke had made an adjustment to reduce the distribution plant in service by \$20,341,971 in connection with the December 31, 2017 and March 30, 2018 Charge filings.¹¹ These costs were associated with transmission plant that Duke had added to the Distribution Charge during the September 30, 2016 quarterly

¹¹ Compliance Audit at page 19.

filing.¹² Based upon the auditor's data request (Rehmann DR-07-004), the work orders associated with the transmission plant reflect in-service dates as early as 2010.¹³

The correction to remove the transmission plant from the Distribution Charge did not occur until the June 2018 quarterly Charge filing.¹⁴ The auditor noted that Duke's rates department had made manual adjustments to remove these costs during both the quarterly Charge filings on December 31, 2017 and March 30, 2018.¹⁵ To make sure that customers are made whole for improper transmission plant charges that they had paid for through the Distribution Charge, the auditor recommended that the Charge's revenue requirement be reduced by \$2,763,853 for five quarterly Charge filings (the length of time the error went undetected).¹⁶ But the Settlement provides only for a reduction in the revenue requirement for one quarter after the PUCO issues an Order in this case.¹⁷

Duke inappropriately collected transmission charges through the Distribution Charge. To remedy this, the PUCO should require Duke to follow Rehmann's recommendation and reduce the Charge's revenue requirement by \$2,763,853 for five quarterly Charge filings. In his Direct Testimony, Mr. James D. Williams from OCC further recommended that the PUCO require Duke to pay interest on the \$20,341,971 for the period of time (five quarters) that Duke inappropriately collected for transmission

¹² *Id.*

¹³ There are two work orders associated these transmission investments that are titled GLPRDOH and NBOH. The in-service date for NBOH is 1/1/2010 and the total cost was \$15,018,263.04. The in-service date for GLPRDOH is 1/1/2016 and the total cost was \$5,275,447.54. *See* Direct Testimony of James D. Williams, Case No. 18-1036, July 8, 2019 (OCC Exhibit 1) at 6-7. Discovery responses cited herein were attached to the testimony of Mr. Williams.

¹⁴ Compliance Audit at page 19.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Settlement (Joint Exhibit 1) page 5.

investments through the Distribution Charge to ensure that customers are made whole.¹⁸

Mr. Williams also recommended that as part of the next annual Charge audit, the auditor verify that the inappropriately collected funds were returned to customers.¹⁹

It would be fundamentally unfair for customers if the PUCO were to permit Duke to financially benefit from costs that it included inappropriately in the Distribution Charge. Duke earned a return on and of investment funded through the Distribution Charge (specifically, transmission investments) that are ineligible for collection from customers through the Charge. The PUCO should also require the auditor to validate the amount that was collected from customers and verify the accuracy of the amount refunded to customers in the next Distribution Charge audit.

In fact, Duke's tariff specifically supports providing refunds to customers based on the results of compliance audits and orders rendered by the PUCO.²⁰ Thus, there are no limitations in the tariff that preclude the PUCO from doing the right thing and ordering Duke to refund charges that it inappropriately collected from customers in the Charge. This means Duke reducing its Distribution Charge revenue requirement by \$2,763,853 over five quarters, plus interest at Duke's long-term cost of debt on the \$20,341,971 for the period of time (five quarters) that Duke inappropriately collected for transmission investments through the Distribution Charge.

¹⁸ Direct Testimony of James D. Williams at 8.

¹⁹ *See id.*

²⁰ Duke Energy Ohio Tariff P.U.C.O. Electric No. 19, Sheet No. 103.15. Rider DCI Distribution Capital Investment Rider.

2. The Settlement is not in the public interest and should be rejected because it includes electric plant costs that were found by the auditor to be not used and useful.

The auditor found that Duke had included \$631,853 of Electric Plant Held for Future Use that was added to the March 31, 2015 Distribution Charge filing.²¹ The auditor concluded that because the electric plant is held for future use it is not used and useful plant.²² Therefore, it should be eliminated from the Distribution Charge back to the June 30, 2018 Charge filing. Considering that the PUCO approved the Charge on April 2, 2015, Duke passing along costs associated with electric plant held for future use that was not used and useful through the Distribution Charge appears to have occurred almost immediately with the PUCO's approval of the Charge.²³ To address the overcharge to consumers, the auditor recommended that the revenue requirement for the Distribution Charge should be reduced for 14 quarterly Charge filings.²⁴ This is the length of time that consumers paid for the Electric Plant Held for Future Use inappropriately in the Distribution Charge.²⁵

Under the proposed Settlement, Staff and Duke agreed to reduce the revenue requirement by \$62,464 each quarter during only four quarterly Charge filings.²⁶ Therefore, customers will continue to be overcharged through the Distribution Charge for

²¹ Compliance Audit at page 5.

²² *Id.*

²³ *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 14-481-EL-SSO, Opinion and Order (April 2, 2015) at 71.

²⁴ Compliance Audit at page 5.

²⁵ *Id.*

²⁶ Settlement at page 5.

at least ten quarters where Duke will financially benefit from the return on and of non-used and useful electric plant.

According to Duke's response to OCC-RFA-STP-01-002, Duke has apparently chosen to limit the refund of the overcharges to four quarters because Duke alleges this is the scope of the Rehmann audit.²⁷ The Charge's tariff does not include limitations on the scope of audits or the length of time that the PUCO can order refunds.²⁸

To protect consumers from continuing to pay overcharges to Duke, Mr. Williams recommended that the PUCO order Duke to refund \$62,464 in each of 14 quarterly Distribution Charge filings as recommended by the auditor. In addition, Mr. Williams recommended that the PUCO require Duke to pay interest on the overcharges so that customers are made whole. It is not in the public interest for Duke to be permitted to earn a return on and of distribution plant that is not used and useful.

3. The Settlement is not in the public interest and should be rejected because Duke's unitization of plant accounting is not in compliance with its own policies.

As explained by the auditor, unitization is an assignment and allocation of construction work in progress (FERC Account 106) to the appropriate distribution plant accounts under FERC Account 101. Unitization involves the verification and validation that distribution plant in service that Duke is seeking to collect from customers through the Distribution Charge is properly assigned to the correct FERC account. Only the distribution plant accounts that are properly recorded under FERC Account 101 in subaccounts 360-374 should be eligible to be included in the Distribution Charge.

²⁷ OCC RFA-STIP-01-002 (June 10, 2019); *see* Direct Testimony of James D. Williams at 10.

²⁸ Duke Energy Ohio Tariff P.U.C.O. Electric No. 19, Sheet No. 103.15. Rider DCI Distribution Capital Investment Rider; Direct Testimony of James D. Williams at 9.

But the audit found that Duke's accounting processes for the unitization of plant into FERC Account 101 is not in compliance with its own policies. Duke's Capitalization Guidelines require charges in FERC Account 106 to be unitized within one year of being charged to FERC Account 106. But the audit found that Duke has significant distribution plant-in-service charges in FERC Account 106 that are several years old and remain ununitized. This means that there can be significant errors in expenditures that are being charged to distribution plant, work orders that are not being properly accounted for, and plant that is not being charged to the proper FERC accounts.²⁹

The audit provided an example of the impact that untimely unitization of plant accounts has on the Distribution Charge. Out of 15 work orders that were sampled, work order G1486 was charged \$1,035,480 to distribution plant and FERC Account 106 on December 28, 2011.³⁰ The work order was unitized on October 1, 2017 for \$1,015,895. Therefore, in this one limited example, a reduction of \$19,585 in the Distribution Charge was necessary from the time the charges were originally placed in Account 106.

The auditor recommended that Duke establish a date on which the backlog of ununitized amounts in FERC Account 106 will be caught up.³¹ As shown in the example above, the amount that is collected from consumers through the Distribution Charge will require updating as the unitization occurs. Therefore, the auditor further recommended that as an incentive to encourage Duke to catch up with the backlog, the revenue requirement impact of all adjustments made in the unitization process should be

²⁹ *Id.*

³⁰ Compliance Audit at page 28.

³¹ *Id.*

quantified over the period of time that customers have been overcharged through the Charge.³²

Under the proposed Settlement, PUCO Staff and Duke agreed that the ununitized plant backlog will be caught up within one year of the PUCO Order in this proceeding.³³ But the proposed Settlement does not include any enforcement provisions when (and if) Duke fails to catch up with the ununitized backlog within one year.³⁴ Further, the proposed Settlement does not require Duke to quantify adjustments that are made through the unitization process that reduce the Charge plant in service balance over the period of time that customers were overcharged through the Distribution Charge.

OCC witness Williams recommended that the PUCO accept the auditor recommendation and require Duke to quantify adjustments that are made through the unitization process that reduce the Charge plant-in-service balance over the entire period of time that customers were overcharged through the Distribution Charge.³⁵ These overcharges (with interest) should be refunded to customers through the Distribution Charge based on the number of quarters that customers inappropriately paid for the charges. It would be fundamentally unfair for consumers to pay unjust and unreasonable charges that were avoidable had Duke followed its own accounting policies.

B. To protect consumers, the PUCO should reject the Settlement because it violates important regulatory principles and practices.

By allowing Duke to charge consumers for transmission costs through a distribution rider, the Settlement violates Ohio Revised Code 4928.143. Riders like the

³² *Id.*

³³ Settlement at page 6.

³⁴ Duke response to OCC-RFA-STIP-01-008; *see* Direct Testimony of James D. Williams at 12.

³⁵ Direct Testimony of James D. Williams at 13.

Charge that are approved as part of an electric security plan under Ohio Revised Code 4928.143 are intended to support distribution service – *not* transmission. The transmission costs that Duke inappropriately included in the Charge have nothing to do with distribution service. Requiring customers to pay transmission costs through a Distribution Charge therefore violates regulatory principles and practice.

Additionally, the policy of the state enumerated in Ohio Revised Code 4928.02 requires utilities to provide consumers with adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service. Ohio Revised Code 4905.22 permits utilities to charge only just and reasonable rates. Duke’s practice of charging customers for transmission costs and charging customers for electric plant that is not used and useful contradicts state policy by contributing to unreasonably priced retail electric service. Further, it violates the bedrock principle of utility ratemaking – that utilities can only earn a return on plant that is used and useful.³⁶

The proposed Settlement violates the PUCO order that approved the Distribution Charge. That order permits Duke to recover only certain costs associated with investments in its distribution plant.³⁷ By allowing Duke to charge consumers for costs associated with transmission investments through a distribution rider, the Settlement results in inaccurate and unreasonable charges being passed along to consumers. OCC witness James Williams stated: “[t]he PUCO should require Duke to refund all money

³⁶ See, e.g., R.C. 4909.15; *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470, 475 (1938); *Bluefield Water Works Co. v. Public Service Comm’n*, 262 U.S. 679 (1923).

³⁷ Case 14-841-EL-SSO, Opinion and Order (April 2, 2015) at 66.

collected from customers as a result of inappropriately including these transmission costs in the DCI Rider for the entire five quarters that it collected these charges.”³⁸

V. CONCLUSION

The PUCO should not approve the Settlement. The Settlement does not benefit customers and is not in the public interest. Customers are not being made whole for inappropriate charges that they have paid under the Distribution Charge. The Settlement limits the refund for transmission costs that Duke inappropriately collected under the Charge. It does not require Duke to refund customers’ money for electric plant that is not used and useful. It does not require Duke to quantify and refund to customers overcharges associated with its ununitized accounting backlog that is in non-conformance with Duke’s own capitalization policies. In addition, the proposed Settlement violates regulatory principles and practices by recommending approval of charges for transmission investments through a Distribution Charge.

The PUCO should instead adopt the recommendations contained within the compliance audit and supported by OCC, identified herein.

³⁸ Williams Testimony at 8.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these Initial Brief has been served via electronic transmission upon the following parties of record this 28th day of August 2019.

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