

**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)	Case No. 18-0397-EL-RDR
Revenues, and Performance Incentives)	
Related to its Energy Efficiency and)	
Demand Response Programs.)	

**MEMORANDUM CONTRA DUKE ENERGY’S APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

In this case, the Public Utilities Commission of Ohio (“PUCO”) ruled that for 2017, Duke cannot charge customers for incentive payments to Duke employees tied to the utility’s financial goals.¹ The PUCO recently made a similar ruling for Duke’s 2016 charges.² And 2015 charges.³ And 2014 charges.⁴

Duke previously challenged these past rulings and lost.⁵ Duke is again challenging the PUCO’s ruling.⁶ But nothing has changed in the two months since Duke’s last challenge failed. Duke has not established that this ruling was unreasonable or unlawful, as required by R.C. 4903.10(B). The PUCO should deny Duke’s application for rehearing.

¹ Finding & Order ¶ 17 (July 31, 2019).

² Case No. 17-781-EL-RDR, Finding & Order (May 15, 2019).

³ Case No. 16-664-EL-RDR, Finding & Order (May 15, 2019).

⁴ Case No. 15-534-EL-RDR, Opinion & Order (Oct. 26, 2016).

⁵ Case Nos. 16-664-EL-RDR, 17-781-EL-RDR, Application for Rehearing of Duke Energy Ohio, Inc. (June 14, 2019) (denied by operation of law under R.C. 4903.10(B)).

⁶ Application for Rehearing of Duke Energy Ohio, Inc. (August 30, 2019) (the “Duke AFR”).

I. RECOMMENDATIONS

A. Duke’s application for rehearing seeks an unlawful advisory opinion from the PUCO that would set bad precedent for customers.

As Duke explained in its application for rehearing, it is seeking “clarification that, while incentive pay conditioned solely on achieving financial goals may be excluded, incentive pay conditioned on other types of improved performance (safety, operational, etc.) is recoverable under both Commission precedent and Ohio law, even when it ‘correlates’ with shareholder benefits.”⁷ There is no evidence that any of the excluded amounts in this case were for incentive pay conditioned on safety, operational, or other similar types of improved performance. So that question is not before the PUCO.

In the Staff review in this case, Staff made the following recommendation regarding incentive pay:

Staff discovered within Rider EE-PDR expenses related to incentive pay, performance awards, executive short-term incentives, and restricted stock units *that were linked to the financial performance of the Company*. Consistent with past practices, Staff does not support the recovery of financial incentives, based upon a utility’s financial goals, being passed on to its ratepayers.⁸

Staff also noted that as part of its investigation, it attempted to separate financial from non-financial incentives, but Duke did not provide sufficient information for Staff to do so.⁹ Thus, Staff had no basis to conclude that *any* of the incentive payments were for things like safety or operational performance, and it reasonably excluded all incentive pay. The PUCO agreed. In its

⁷ Duke AFR at 5.

⁸ Staff Review & Recommendation (June 12, 2019) (emphasis added).

⁹ *Id.*

Order, the PUCO ruled: “we agree with Staff’s exclusion of incentive pay tied to financial goals and find Staff’s evaluation was appropriate.”¹⁰

Yet now, in its application for rehearing, Duke seeks “clarification” that non-financial incentives may be charged to customers.¹¹ The PUCO cannot rule on this issue in this case. The PUCO did not find any evidence that any of the incentive pay in question was tied to non-financial goals. Thus, any ruling that incentive pay tied to non-financial goals can be included in Duke’s rider would be an unlawful advisory opinion.¹²

B. Duke’s application for rehearing is an unlawful collateral attack on the PUCO’s rulings protecting customers in prior cases, not this case.

In two prior cases involving Duke’s energy efficiency rider, the PUCO ruled that incentive payments must be excluded from the rider if “they are correlated with Duke’s bottom line and meeting shareholder interests.”¹³ The PUCO did not rule that incentive payments are excluded from the rider only if they are “explicitly tied to financial objectives.”¹⁴ Duke challenged the PUCO’s ruling in those cases by filing an application for rehearing, and that application for rehearing was denied.¹⁵

The PUCO did not make the same ruling in the current case. As explained above, in the current case, the PUCO excluded only “incentive pay tied to financial goals.”¹⁶ It did not exclude any incentive pay for non-financial incentives on the grounds that the incentive payments were

¹⁰ Opinion & Order ¶ 17 (July 31, 2019).

¹¹ Duke AFR at 5.

¹² *In re Complaint of the Office of the Consumers’ Counsel*, Case No. 92-1525-TP-CSS, Entry on Rehearing (May 18, 1994) (“The Commission does not give advisory opinions on issues not before us.”).

¹³ Case Nos. 16-664-EL-RDR, 17-781-EL-RDR, Finding & Order ¶ 16 (May 15, 2019).

¹⁴ *Id.*

¹⁵ Case Nos. 16-664-EL-RDR, 17-781-EL-RDR, Application for Rehearing of Duke Energy Ohio, Inc. (June 14, 2019) (denied by operation of law under R.C. 4903.10(B)).

¹⁶ Opinion & Order ¶ 17 (July 31, 2019).

“correlated with Duke’s bottom line and meeting shareholder interests,” as it did in the prior cases, because in this case, no such non-financial incentives were found.¹⁷ Yet it is this language regarding “correlation” that Duke is challenging through its application for rehearing in this case.¹⁸

Duke had its chance to challenge the PUCO’s prior order, it took advantage of that chance, and it was unsuccessful. If Duke wished to further challenge the PUCO’s ruling in those cases, it could consider pursuing an appeal to the Supreme Court of Ohio. But it cannot collaterally attack the PUCO’s prior order in the current case where the issue is not even before the PUCO.¹⁹

C. The PUCO denied Duke’s request to charge customers for incentive compensation paid to utility employees in Duke’s previous energy efficiency rider cases, so the Order is consistent with PUCO precedent.

Duke argues that it should be allowed to charge customers for utility employee incentive pay.²⁰ In support of its position, Duke cites three PUCO base rate cases (one natural gas, one electric, and one water), and three cherry-picked cases from other jurisdictions (California, Massachusetts, and Illinois).²¹ Duke cited these same six cases in its application for rehearing in the prior cases (Nos. 16-664-EL-RDR and 17-781-EL-RDR), and the PUCO denied that application for rehearing by operation of law.²² It should do the same here.

¹⁷ *Id.*

¹⁸ Duke AFR at 5.

¹⁹ R.C. 4903.10.

²⁰ Duke AFR at 3-7.

²¹ Duke AFR at 3-7.

²² Case Nos. 16-664-EL-RDR, 17-781-EL-RDR, Application for Rehearing of Duke Energy Ohio, Inc. (June 14, 2019) (denied by operation of law under R.C. 4903.10(B)).

The PUCO Staff's findings in this case are clear: the incentive pay provided to Duke's employees in question is related to Duke's financial performance and thus should not be charged to customers. In the 2015 rider case (Case No. 16-664-EL-RDR), the PUCO Staff report concluded: "Staff discovered expenses related to incentive pay, performance awards, and restricted stock units *linked to the financial performance of the Company*."²³ Likewise, in the 2016 rider case (Case No. 17-781-EL-RDR), the PUCO Staff report concluded: "Staff discovered within Rider EE-PDR, expenses related to incentive pay, performance awards, and restricted stock units *linked to the financial performance of the Company*."²⁴

Further, the very cases that Duke cites in support of its application for rehearing confirm that the charges in question should be disallowed. For example, Duke cites *In re Application of Ohio American Water Company* in support of its application for rehearing.²⁵ In that case, the PUCO found that certain employee incentives were tied to the financial performance of the utility, and it ruled that the utility could not charge customers for that incentive pay.²⁶ Duke also cites *In re Application of [FirstEnergy]*.²⁷ But again, in that case, the PUCO disallowed all charges related to employee incentives for achieving financial goals, stating that "the primary benefit of such financial incentives accrues to shareholders and that portion of incentive compensation should not be recovered from ratepayers."²⁸

²³ Case No. 16-664-EL-RDR, PUCO Staff Review & Recommendation (Nov. 13, 2017) (emphasis added).

²⁴ Case No. 17-781-EL-RDR, PUCO Staff Review & Recommendation (Sept. 11, 2018) (emphasis added).

²⁵ Case No. 09-391-WS-AIR.

²⁶ Case No. 09-391-WS-AIR, Opinion & Order at 21-22 (disallowing all employee compensation that was "related to financial goals").

²⁷ Case No. 07-551-EL-AIR.

²⁸ Case No. 07-551-EL-AIR, Opinion & Order at 17 (Jan. 21, 2009).

PUCO precedent confirms that payments to utility employees intended to compensate them for the financial success of the utility shall not be charged to customers. The PUCO Staff found that the incentive payments included in Duke's energy efficiency rider in these cases were "linked to the financial performance of the Company."²⁹ The PUCO's ruling to exclude the incentive payments from rates customers pay was reasonable. The PUCO should continue to follow its precedent and not allow Duke to charge these amounts to customers.³⁰

II. CONCLUSION

The PUCO has consistently ruled that customers should not be charged for incentives that a utility pays to its employees in which the compensation is based on the financial performance of the utility. This includes each of the three Duke energy efficiency rider cases preceding this one. The PUCO followed that precedent in its Order, and it should continue to follow it on rehearing. The Office of the Ohio Consumers' counsel respectfully requests that the PUCO deny Duke's application for rehearing in its entirety.

²⁹ PUCO Staff Review & Recommendation (June 12, 2019).

³⁰ See *In re Duke Energy Ohio, Inc.*, 150 Ohio St.3d 437, ¶ 23 (2017) (the PUCO must "respect its own precedents in its decisions to assure the predictability which is essential in all areas of law, including administrative law") (quoting *Cleveland Elec. Illuminating Co. v. PUCO*, 42 Ohio St.2d 403 (1975)); *Cleveland Elec.*, 42 Ohio St.2d at 423 (PUCO should change its position "when the need therefor is clear and it is shown that prior decisions are in error").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic transmission, this 9th day of September 2019.

/s/ Christopher Healey
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Summary: Memorandum Memorandum Contra Duke Energy's Application for Rehearing by
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