

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

**IN THE MATTER OF THE APPLICATION OF  
DUKE ENERGY OHIO, INC., FOR AN  
INCREASE IN ELECTRIC DISTRIBUTION  
RATES.**

**CASE No. 17-32-EL-AIR**

**IN THE MATTER OF THE APPLICATION OF  
DUKE ENERGY OHIO, INC., FOR TARIFF  
APPROVAL.**

**CASE No. 17-33-EL-ATA**

**IN THE MATTER OF THE APPLICATION OF  
DUKE ENERGY OHIO, INC., FOR APPROVAL  
TO CHANGE ACCOUNTING METHODS.**

**CASE No. 17-34-EL-AAM**

**IN THE MATTER OF THE APPLICATION OF  
DUKE ENERGY OHIO, INC., FOR APPROVAL  
TO MODIFY RIDER PSR.**

**CASE No. 17-872-EL-RDR**

**IN THE MATTER OF THE APPLICATION OF  
DUKE ENERGY OHIO, INC., FOR APPROVAL  
TO AMEND RIDER PSR.**

**CASE No. 17-873-EL-ATA**

**IN THE MATTER OF THE APPLICATION OF  
DUKE ENERGY OHIO, INC., FOR APPROVAL  
TO CHANGE ACCOUNTING METHODS.**

**CASE No. 17-874-EL-AAM**

**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. 17-1263-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. 17-1264-EL-ATA**

**IN THE MATTER OF THE APPLICATION OF  
DUKE ENERGY OHIO, INC., FOR  
AUTHORITY TO DEFER VEGETATION  
MANAGEMENT COSTS.**

**CASE No. 17-1265-EL-AAM**

IN THE MATTER OF THE APPLICATION OF  
DUKE ENERGY OHIO, INC., TO ESTABLISH  
MINIMUM RELIABILITY PERFORMANCE  
STANDARDS PURSUANT TO OHIO  
ADM.CODE CHAPTER 4901:1-10.

CASE NO. 16-1602-EL-ESS

### THIRD ENTRY ON REHEARING

Entered in the Journal on September 11, 2019

#### I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by the Ohio Consumers' Counsel.

#### II. PROCEDURAL HISTORY

{¶ 2} 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.

{¶ 3} On April 13, 2018, Duke and certain parties filed a stipulation and recommendation (Stipulation) that purported to resolve issues in four pending cases. The cases included in the Stipulation are:

- *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case 17-32-EL-AIR, et al. (Rate Case);
- *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Modify Rider PSR*, Case No. 17-872-EL-RDR, et al. (PSR Case);
- *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer*, Case No. 17-1263-EL-SSO, et al. (ESP Case); and
- *In the Matter of the Application of Duke Energy Ohio, Inc., to Establish Minimum Reliability Performance Standards*, Case No. 16-1602-EL-ESS (Standards Case).

The parties that signed the Stipulation are: Duke, Staff, the City of Cincinnati, Ohio Partners for Affordable Energy, Ohio Energy Group, Ohio Hospital Association, and People Working Cooperatively, Inc. Non-opposing signatories are the Kroger Company, Industrial Energy Users-Ohio, Ohio Manufacturers' Association Energy Group, and Wal-Mart Stores East LP and Sam's East, Inc.

{¶ 4} On May 9, 2018, the attorney examiner granted Duke's motion to consolidate the cases and set forth a procedural schedule. Thereafter, the evidentiary hearing began on July 9, 2018, and concluded on July 24, 2018, with rebuttal testimony being heard on August 6, 2018.

{¶ 5} On December 19, 2018, the Commission issued an Opinion and Order that approved the Stipulation and thus resolved the Rate Case, the PSR Case, the ESP Case and the Standards Case.

{¶ 6} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 7} On January 18, 2019, the Ohio Consumers' Counsel (OCC), in addition to multiple other parties, filed an application for rehearing of the December 19, 2018 Opinion and Order. On February 6, 2019, the Commission granted the applications for rehearing for further consideration of the matters specified in the applications for rehearing. Thereafter, on July 17, 2019, the Commission issued a Second Entry on Rehearing that denied all applications.

{¶ 8} On August 16, 2019, OCC filed a second application for rehearing. On August 20, 2019, Duke filed a motion to strike OCC's application.

{¶ 9} On August 26, 2019, Duke filed a memorandum contra OCC's application for rehearing. OCC filed a memorandum contra Duke's motion to strike on August 27, 2019.

### III. DISCUSSION

{¶ 10} OCC's second application for rehearing submits two assignments of error. Both assignments of error relate to the Commission's decision to authorize Duke to go forward with Rider PSR, which, in sum, allows the Company to recover or credit the costs or proceeds associated with Duke's portion of the Ohio Valley Electric Company (OVEC).

{¶ 11} First, OCC contends the Commission wrongly relied on the Supreme Court of Ohio's decision in *In re Application of Ohio Power Co.*, 155 Ohio St.3d 326, 2018-Ohio-4698 (*AEP Case*), to deny OCC's initial application for rehearing. According to OCC, its initial application for rehearing made a factual argument that there was not evidence on record to support a determination that Rider PSR was a limitation on customer shopping. OCC maintains that the *AEP Case* only resolved a legal argument as to whether an EDU could authorize an OVEC-related rider pursuant to R.C. 4928.143(B)(2)(d), which permits an EDU to include in its electric security plan (ESP) terms, conditions, or charges relating to, among other things, limitations on customer shopping. In allowing Duke to implement Rider PSR, OCC argues the Commission did not rely on evidence, as required by R.C. 4903.09. OCC explains that it made this factual argument in its application for rehearing, but the Commission wrongly denied its application as a legal argument, relying on the *AEP Case*.

{¶ 12} Duke asks that OCC's first assignment of error be denied. First, the Company maintains that the Commission's reliance on the *AEP Case* was proper. According to Duke, the OVEC rider in the *AEP Case* is structurally identical to Rider PSR and both were approved by the Commission on similar grounds. Further, Duke explains that OCC's original application for rehearing was dismissed for multiple reasons and not solely based on the *AEP Case*. Specifically, Duke avers that, in the Second Entry on Rehearing, the Commission dismissed OCC's argument regarding whether Rider PSR is a limitation on customer shopping by acknowledging that Rider PSR was previously approved in *In re Duke*

*Energy Ohio, Inc.*, Case No. 14-841-EL-SSO, et al., Opinion and Order (Apr. 2, 2015) (*ESP 3 Order*).

{¶ 13} OCC additionally submits that it was denied due process to argue the validity of Rider PSR. OCC explains that Rider PSR was initially approved by the Commission – as a placeholder rider – in Duke’s previous ESP application, *In re Duke Energy Ohio, Inc.*, Case No. 14-841-EL-SSO, et al. (*ESP 3 Case*), Opinion and Order (Apr. 2, 2015) (*ESP 3 Order*). Thereafter, in the *ESP 3 Case*, OCC filed an application for rehearing alleging, among other things, that there was no record evidence to support the Commission’s finding that Rider PSR was a limitation on customer shopping. According to OCC, once the Commission issued an Entry on Rehearing denying OCC’s application, Duke had already filed the ESP application and Rider PSR application in the current proceedings. OCC submits that it timely filed an appeal with the Supreme Court of Ohio, but the appeal was dismissed as moot because of the current proceedings. In authorizing Duke to recover Rider PSR, OCC states the Commission relied on its previous finding in the *ESP 3 Order* that Rider PSR is a limitation on customer shopping. OCC avers the Commission inappropriately relied on its decision in the *ESP 3 Order* because, in the *ESP 3 Order*, the Commission wrongly determined that Rider PSR was a limitation on customer shopping. OCC argues that because the Commission did not promptly issue its Entry on Rehearing in the *ESP 3 Case*, OCC was deprived of the ability to have its argument be properly considered by the Supreme Court of Ohio. And in relying on its previous order, OCC maintains that the Commission therefore denied OCC an opportunity to be heard.

{¶ 14} Duke states OCC’s second assignment of error is without merit. Duke asserts that Rider PSR was initially approved in the *ESP 3 Case* after a 16-day evidentiary hearing and three entries on rehearing. Thereafter, in the current proceedings, the Commission allowed Duke to populate Rider PSR after a 13-day evidentiary hearing. Duke contends OCC was a party to both proceedings, where OCC cross-examined witnesses and presented its own witnesses. According to Duke, the Commission properly considered OCC’s

opposition to Rider PSR in both proceedings. Duke therefore maintains that OCC's argument that it was denied an opportunity to be heard is without merit.

{¶ 15} In its motion, Duke asserts that OCC's second application for rehearing is procedurally improper and should be stricken from the record. As Duke explains, pursuant to R.C. 4903.10, applications for rehearing are proper after any Commission order. Further, if the Commission abrogates or modifies an order on rehearing, the entry on rehearing is to be treated as an original order. Here, however, Duke states the July 17, 2019 Second Entry on Rehearing denied all applications for rehearing, including OCC's application. Accordingly, Duke asserts the July 17, 2019 Second Entry on Rehearing did not modify the December 19, 2018 Opinion and Order and, therefore, OCC's second application for rehearing is improper and should be stricken.

{¶ 16} In response, OCC states applications for rehearing are permissible under R.C. 4903.10 after any order by the Commission. Under OCC's analysis, this includes any entry on rehearing. Further, OCC contends that the Commission's reliance on the *AEP Case* differs from the Commission's previous rationale for denying OCC's argument and thus should be considered a modification to the original order. For these reasons, OCC asserts Duke's motion to strike should be denied.

{¶ 17} Initially, we note that OCC's application for rehearing is improper. R.C. 4903.10(B) expressly states "If, 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. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order\* \* \*." In the Second Entry on Rehearing, all applications for rehearing were denied and the original Opinion and Order was in no way abrogated or modified; thus, the original order was affirmed. As stated by the Supreme Court of Ohio, subsequent applications for rehearing are only permitted to "challenge entries on rehearing that modify earlier orders." *In re Columbus S. Power Co.*, 2011-Ohio-958,

¶12 (2011). OCC's argument that the Commission modified its reasoning in the Second Entry on Rehearing is baseless. While OCC claims the Second Entry on Rehearing was the first time the Commission cited the *AEP Case*, OCC inexplicably ignored that we reviewed the *AEP Case* in the Opinion and Order at ¶ 266 and specifically referenced that discussion in the Second Entry on Rehearing at ¶ 13.

{¶ 18} While the Commission finds that OCC's second application for rehearing is improper, we additionally note that the assignments of error lack merit. Initially, we are unpersuaded by OCC's argument that the order should be abrogated due to the Commission's consideration of the *AEP Case*. In its first application for rehearing, OCC attempted to relitigate the *ESP 3 Case* by claiming there was an insufficient record in that proceeding to determine Rider PSR was a limitation on customer shopping and, therefore, there was an insufficient record in this present proceeding. In the Second Entry on Rehearing, the Commission dismissed OCC's argument because whether Rider PSR is a limitation on customer shopping was not at issue in this proceeding as that determination was already made in the *ESP 3 Case*. Second Entry on Rehearing at ¶ 13, citing *ESP 3 Case*, Opinion and Order (Apr. 2, 2015) at 48. Although our approval of Rider PSR in the *ESP 3 Case* is a final order, we referenced the Supreme Court of Ohio's endorsement of our authorization of a nearly identical OVEC-related rider in the *AEP Case*. Our discussion of the *AEP Case* provided further rationale as to why OCC's argument should be dismissed.

{¶ 19} OCC's second assignment of error is similarly unpersuasive. OCC's argument that it was denied a right to a hearing regarding whether Rider PSR is a limitation on customer shopping is untenable. As discussed, Rider PSR was initially approved in the *ESP 3 Case*. As Duke calculated, that proceeding included a 16-day evidentiary hearing, to which OCC was a party. Parties submitted briefs, and an opinion and order and multiple entries on rehearing were issued by the Commission. Ultimately, the Commission approved Rider PSR and found, based on the record, that the rider would serve as a limitation on customer shopping. The current proceedings gave rise to a 13-day evidentiary hearing. Thereafter,

parties submitted initial briefs and, notably, OCC did not argue at that time whether Rider PSR was a limitation on customer shopping. After issuing our Opinion and Order, we heard applications for rehearing and eventually affirmed that Duke could populate Rider PSR. We are now entertaining an improper, second application for rehearing. Accordingly, we find OCC's argument that it was denied due process to be without merit.

#### IV. ORDER

{¶ 20} It is, therefore,

{¶ 21} ORDERED, That the application for rehearing filed by OCC be denied. It is, further,

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

COMMISSIONERS:

*Approving:*

Sam Randazzo, Chairman  
M. Beth Trombold  
Lawrence K. Friedeman  
Daniel R. Conway  
Dennis P. Deters

NJW/hac

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Summary: Entry that the Commission denies the application for rehearing filed by the Ohio Consumers' Counsel. electronically filed by Docketing Staff on behalf of Docketing