

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**REPLY BRIEF OF DUKE ENERGY OHIO, INC.**

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**I. Introduction**

The Commission employs a three-part test to evaluate stipulations. The Stipulation agreed to by Duke Energy Ohio, Inc., (Duke Energy Ohio) and the Staff of the Public Utilities Commission of Ohio (Staff) meets all the standards under that test and the Stipulation must be approved. The Office of the Ohio Consumers' Counsel (OCC) opposes the Stipulation, but OCC's view overlooks value that the settlement provides and OCC is unable to make an authoritative or compelling argument to support its position. Accordingly, OCC's arguments should be rejected.

**II. Discussion**

OCC disagrees with the resolution of the issues that Staff and the Company agreed to and resolved. Accordingly, OCC opposes the Stipulation, but OCC's logic in doing so is flawed. For the reasons discussed below, the Stipulation represents a reasonable outcome, avoids potential protracted litigation, and establishes value for customers. The Stipulation should be approved.

**1. Many of the Auditor's Recommendations Were Accepted Prior to the Stipulation.**

The issues raised by OCC result from an audit that was performed on behalf of Staff regarding Duke Energy Ohio's Distribution Capital Investment rider, (Rider DCI). The Staff's auditor, Rehmann Consulting (Rehmann or the Auditor) submitted a report to the Commission

with its findings and recommendations.<sup>1</sup> Many of the recommendations in the report were not contested and consequently have not become the subject of the case. OCC overlooks the fact that the Company has accepted many of those recommendations. Having done so, the Company is adding value to the overall settlement.

For example, as described by Duke Energy Ohio witness Sarah E. Lawler, the Company agreed to make revenue requirement adjustments in its future Rider DCI filings for all adjustments proposed by the Auditor for the period within the scope of the audit.<sup>2</sup> Additionally, the Company has already taken action to make corrections to the underlying plant-in-service values included in the Rider DCI filings that gave rise to the necessity for the revenue requirement adjustments, in accordance with the Auditor's findings.<sup>3</sup> OCC neglects to recognize this already realized value and instead focuses on its more myopic view.

The benefits to ratepayers that flow from the Company's willingness to agree to those recommendations from the Auditor must be taken into account when considering the stipulation.

## **2. Transmission Costs Were Properly Recoverable in Rider BTR at a Higher Rate.**

Despite the value already demonstrated, OCC raises a few matters that remain in contention. The first of these relates to Rehmann's recommendation concerning revenue requirement adjustments for costs associated with transmission plant, which costs were incorrectly recorded as distribution plant.<sup>4</sup> As explained in the Company's initial brief, the costs associated with this transmission plant would have been recoverable in the Company's Rider BTR if properly recorded. OCC witness James D. Williams, who is not an accountant, was critical of the terms of

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<sup>1</sup> Staff Ex. 1, Compliance Audit, Rehman Consulting (Dec. 7, 2018).

<sup>2</sup> Duke Energy Ohio Ex. 1, Direct Testimony of Sarah E. Lawler, pg. 3.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*, pg. 6.

the Stipulation because it does not include a reduction in revenue requirement for the transmission plant costs.<sup>5</sup> Mr. Williams offered this opinion even though he admitted that he had “no firsthand experience related to recovery of costs in Rider BTR outside of what was reported by the auditor”<sup>6</sup>, However, as Ms. Lawler explained, if the costs incorrectly recovered in Rider DCI had been properly recovered in Rider BTR, customers would have paid more than they did through Rider DCI. Thus, the Company’s error in this instance actually worked to the customers’ benefit.<sup>7</sup> Further, one of the adjustments the Company has already agreed to make related to the inclusion of this transmission plant in Rider DCI in one quarter within the scope of the audit, even though those costs would not be recovered in Rider BTR for that same period.

Because OCC’s witness had no understanding of this issue other than what was explained by the auditor, OCC has failed to support its argument and its opposition should be rejected.

**3. Duke Energy Ohio’s Tariff Supports Refunds Only During Current Audit Periods.**

The Stipulation provides that Duke Energy Ohio will refund an annualized \$62,464 for Electric Plant Held for Future Use that was added to the Company’s March 31, 2015, distribution charge filing for the four quarters of the audit under the audit in this case. OCC argues that the Company should be required to refund 14 quarters of such charges. OCC asserts that the Company’s existing tariff supports an out-of-audit-period refund. OCC is mistaken. The Commission has already audited the Company’s Rider DCI for prior periods and has issued final decisions based upon those audits.<sup>8</sup> It is contrary to Ohio law and Commission precedent, not to

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<sup>5</sup> Tr., pg. 36.

<sup>6</sup> Tr., pg. 42.

<sup>7</sup> Tr., pg. 27.

<sup>8</sup> *In the Matter of the Review of Duke Energy Ohio, Inc.’s Distribution Capital Investment Rider*, Opinion and Order, Case No. 16-1437-EL-RDR (September 26, 2018) and *In the Matter of the Review of Duke Energy Ohio, Inc.’s Distribution Capital Investment Rider*, Opinion and Order, Case No. 17-1118-EL-RDR (September 26, 2018).

mention contrary to positions taken by the OCC in other similar instances to adjust for prior audit periods.

The Supreme Court of Ohio has ruled, “[t]he process of public utility rate-making in Ohio is wholly controlled by statute.”<sup>9</sup> Thus, to resolve this issue the Commission must first look to applicable law. R.C. 4905.32 provides as follows:

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the Public Utilities Commission which is in effect at the time.

No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule or regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

As the Court declared in the landmark case of *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, based upon these statutory mandates, “a utility has no choice but to collect the rates set by the order of the commission.”<sup>10</sup> Further, it is axiomatic that an order of the Commission is effective immediately upon journalization, unless a different time is specified by the Commission.<sup>11</sup> The *Keco* Court held that “rates set by the Public Utilities Commission are the lawful rates until such time as they are set aside as being unreasonable and unlawful by the Supreme Court . . .”<sup>12</sup> Thus, a customer was found, in *Keco*, to have no right to restitution. The current situation is no different: where the Commission has issued a final approval of a rate and a utility has charged that rate, a customer has no right to a refund, unless the tariff approved by the Commission provides otherwise.

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<sup>9</sup> *The Cleveland Electric Illuminating Company v. Public Utilities Commission of Ohio*, 46 Ohio St.2d 105, 107 (1976).

<sup>10</sup> *Keco Industries, Inc. v. The Cincinnati & Suburban Bell Telephone Company*, 166 Ohio St. 254, 258 (1957) (*Keco*).

<sup>11</sup> R.C. 4903.15.

<sup>12</sup> *Keco* at 259.

In the present situation, the tariff that controls Rider DCI, in pertinent part, states as follows:

This Rider is subject to reconciliation, including, but not limited to, refunds or additional charges to customers, ordered by the Commission as the result of audits by the Commission in accordance with the December 19, 2018, Opinion and Order in Case Nos.17-1263-EL-SSO, et al., . . .<sup>13</sup>

In the Commission's Opinion and Order in the proceedings referenced in the tariff, the Commission approved Rider DCI to continue, subject to annual audits. Thus, it is the annual outcome of those audits that is referenced in the tariff. There is no language in either the stipulation in those proceedings or in the Commission's Opinion and Order that would override the law and make it possible for the Commission to consider matters and order refunds that relate to periods that are not under audit.

As noted above, OCC's position in this case also contradicts its own position taken in previous cases. For example, in an Ohio Power case involving recovery of transmission costs, OCC argued against adjusting a rider for recovery periods that have already been audited.<sup>14</sup> In its Initial Brief and in the testimony of its witness, Beth E. Hixon, in Case No. 13-1406-EL-RDR, OCC argued that Ohio Power Company be denied recovery of certain costs that inadvertently had been excluded from its Transmission Cost Recovery Rider. OCC cited Ohio Supreme Court precedent in its Initial Brief in that case saying that "adjustments that pre-date the audit should

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<sup>13</sup> P.U.C.O. Electric No. 19, Sheet No. 103.16.

<sup>14</sup> *In the Matter of the Application of Ohio Power Company to Update its Transmission Cost Recovery Rider Rates*, Case No.13-1406-EL-RDR, Staff's Review and Recommendation (Aug. 13, 2013). *See also Office of Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 475 N.E.2d 782, 1985 Ohio LEXIS 287 (1985) (limiting refund of over-recovered system loss costs to the period under review).

generally not be allowed.”<sup>15</sup> OCC’s witness Hixon echoed that statement asserting that “reconciliation is limited to the audit period under review.”<sup>16</sup>

In summary, after Duke Energy Ohio’s previous Rider DCI audit, the Company, Staff, and OCC entered into a stipulation.<sup>17</sup> The Commission approved the stipulation in that case and ordered Duke Energy Ohio take all necessary steps to carry out the terms of the Stipulation and its Opinion and Order.<sup>18</sup> Thereafter, the Company adjusted its rates as agreed to by the Parties. Pursuant to the filed-rate doctrine, a utility may charge only the rates fixed by its current, Commission-approved tariff.<sup>19</sup> And, absent some language explicitly provided in the tariff, the Commission may invalidate a rate schedule and fix new rates, but it may do so prospectively only.<sup>20</sup> The rates in this case are adjusted quarterly, with Commission oversight, and reviewed annually for prudence and compliance with previous Commission orders related to this rider. Although OCC may believe that it is entitled to a refund or adjustment over a 14-quarter period, such a refund would be contrary to Ohio law.<sup>21</sup>

#### **4. The Stipulation Provides a Reasonable Time Frame and Commitments Related to Unitization Plant Accounting.**

OCC’s third and final argument is simply that, in OCC’s estimation, the Stipulation agreed to by the Company and Staff does not contain sufficient “enforcement provisions.”<sup>22</sup> But Duke

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<sup>15</sup> See *In the Matter of the Application of Ohio Power Company to Update Its Transmission Cost Recovery Rider Rates*, Case No. 13-406-EL-RDR, Comments of Ohio Consumers’ Counsel, pg. 5 (July. 29, 2013).

<sup>16</sup> See *In the Matter of the Application of Ohio Power Company to Update Its Transmission Cost Recovery Rider Rates*, Case No. 13-406-EL-RDR, Direct Testimony of Beth Hixon, pg. 6 (Oct. 18, 2013); citing *In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of The Cleveland Electric Illuminating Company and Related Matters*, Case No. 83-38-EL-EFC, 1984 Ohio PUC LEXIS 65, pg. 36, (Feb. 28, 1984), affirmed, *Office of Consumers’ Counsel v. Public Utilities Com.*, 16 Ohio St.3d 9, 475 N.E.2d 782 (1985).

<sup>17</sup> *In the Matter of the Review of Duke Energy Ohio, Inc.’s Distribution Capital Investment Rider*, Case No.17-1118-EL-RDR, Stipulation and Recommendation (June 22, 2018).

<sup>18</sup> *Id.*, Opinion and Order, pg. 10.

<sup>19</sup> R.C. 4905.32.

<sup>20</sup> *In re Alternative Energy Rider Contained in the Tariffs of Ohio Edison Co.*, 153 Ohio St. 3d 289, 2018-Ohio-229.

<sup>21</sup> *Id.*

<sup>22</sup> Initial Brief Opposing the Settlement by The Office of the Ohio Consumers’ Counsel, pg. 11.

Energy Ohio witness Sarah Lawler testified at the hearing and in her written testimony that the Company has already taken action to make corrections to the underlying plant in-service values included in the Rider DCI filings that gave rise to the necessity for these revenue requirement adjustments, in accordance with the auditor's findings. The Company has agreed to catch up on the un-unitized Plant and RWIP backlog within one year of the Commission's order in this proceeding. The Company has also agreed to review its processes and procedures as they relate to billing of Contributions in Aid of Construction (CIAC) and work order estimating.<sup>23</sup>

**5. The Settlement Meets the Commission's Standards.**

The Commission's three-part test for approval of stipulations includes the following considerations:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?
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?

OCC does not argue that the settlement is not the product of serious bargaining among capable, knowledgeable parties. Indeed, OCC was included in settlement discussions and had ample opportunity to engage in discussion. Thus, the Stipulation clearly meets this first standard.

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<sup>23</sup> Duke Energy Ohio Ex. 1, Direct Testimony of Sarah E. Lawler, pg. 3; Tr. pp. 21-22.

It is manifest that the settlement as a package benefits customers and the public interest. The Staff's audit was thorough and the Auditor's recommendations have been incorporated into the resulting Stipulation. Indeed, many of the Auditor's recommendations for improvement have already been acted upon or are in the process of being acted upon. Customers will benefit from receiving an overall revenue requirement reduction in the amount of \$2,299,414 for one quarter and \$146,329 thereafter for three quarters.

Finally, OCC argues its case without pointing to any principle or policy other than a very general "policy of the state" provision. The policy of the state with respect to providing adequate, reliable, safe, efficient, non-discriminatory, and reasonably priced retail electric service is a very broad and worthy goal. Indeed, the policy is actually much longer than just the portion cited by OCC. But achieving the goals stated therein can be accomplished in many different ways. The Stipulation in this case manifestly achieves state policy goals and does not violate any state law in the process. Accordingly, OCC's arguments should be rejected.

### **III. Conclusion**

The Company and Staff have agreed to significant terms for the benefit of customers. In negotiating any settlement, many matters are raised and addressed as needed to achieve an effective outcome that benefits everyone. The bargain struck in this case is reasonable, fair, efficient, beneficial, and of demonstrable value to customers. For the reasons set forth above, Duke Energy Ohio respectfully requests that the Commission adopt and approve the Stipulation that was filed in this proceeding.



Respectfully submitted,  
Duke Energy Ohio, Inc.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal delivery, or electronic mail on this 11<sup>th</sup> day of September, 2019, to the following parties.

/s/ Elizabeth H. Watts

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