BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY BRIEF OPPOSING THE SETTLEMENT
BY
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There are fundamental regulatory principles that are under consideration in this case that should not be violated in a settlement. A utility should not be allowed to charge consumers for transmission-related costs through a distribution charge, but the Settlement in this case allows it. Also, a utility should not be allowed to charge customers for distribution investments that are not used and useful, but the Settlement in this case allows it. Finally, a utility should not be allowed to profit from its customers as a result of its failure to appropriately account for its distribution investments, but in this case, the Settlement allows it. These are all issues that the Staff's own auditor identified, and the Settlement fails to protect consumers or adequately remedy.

Under the proposed Settlement with the Staff of the Public Utilities Commission of Ohio ("PUCO"), Duke Energy Ohio, Inc. ("Duke") is allowed to circumvent the Federal Energy Regulatory Commission ("FERC")[1] and charge consumers over three million dollars for transmission-related expenses through a distribution charge – the Distribution Capital Investment Rider ("Distribution Charge"). Further, Duke is allowed under the Settlement to charge consumers for plant that is neither used nor useful. And Duke is allowed to continue violating its own accounting policies. The Settlement is bad for consumers. It is against the public interest and violates important regulatory principles and practices. The PUCO should reject it. Instead the PUCO

should adopt the recommendations of OCC, on behalf of nearly 640,000 residential utility consumers and the recommendations of the PUCO's independent auditor, Rehman Consulting.

[1] FERC is the regulatory body with jurisdiction over electricity transmission. *See generally* Hearing Transcript at 32-33.

I. BACKGROUND

Duke proposed the Distribution Charge as part of its electric security plan under R.C. 4928.143(B)(2)(h). The purpose of the Distribution 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.[2] But the PUCO placed certain controls on the Distribution Charge, including specifying the type of distribution plant investment that can be collected from customers through the Distribution Charge. The PUCO also ordered an annual audit of the Distribution Charge to determine the accuracy and reasonableness of the charges that Duke intends to pass on to consumers.[3]

Rehman Consulting performed the 2017-2018 compliance audit of Duke's Distribution Charge. As Duke acknowledges, a purpose of the audit is "ensuring that what is included in the rider filing is appropriate, that it's correctly included all of the associated expenses, that everything that's supposed to be in the rider filing is in there as accurately as possible."[4] And by the same token, Duke acknowledges that the audit ensures that charges that are not supposed to be in the Distribution Charge are removed.[5] Unfortunately for consumers, the Settlement does not fulfill the purpose of the Distribution Charge audit as Duke itself describes it.

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[2] *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.

[3] *Id.*

[4] *See* Hearing Transcript at 12.

[5] *See id.* Of note, PUCO Staff witness McCarter was in the hearing room during the cross-examination of Duke witness Lawler. Ms. McCarter testified that there was nothing in Ms. Lawler's testimony with which she disagreed. *See id.* at 31.

II. RECOMMENDATIONS

A. The PUCO should reject the Settlement to protect consumers because it is not in the public interest and violates important regulatory principles and practices by requiring Duke's customers to pay for transmission plant costs that Duke inappropriately included in the Distribution Charge.

1. The Settlement is not in the public interest and should be rejected to protect consumers.

The assertions of PUCO Staff and Duke that the Settlement is a "fair and reasonable result" is wrong.[6] It is not in the public interest to allow Duke to improperly charge consumers transmission costs through its Distribution Charge.

It is not in dispute that Duke inappropriately collected transmission charges through the Distribution Charge.[7] Duke was solely responsible for the error.[8] Rehman Consulting found that Duke had added $20,341,971 in costs associated with transmission plant to the Distribution Charge during the September 30, 2016 quarterly filing.[9] The correction to remove these erroneous and unwarranted charges on consumers for the transmission plant included with the Distribution Charge did not occur until the June 2018 quarterly Distribution Charge filing.[10]

In the interim, Duke incorrectly charged consumers $2,763,853 on an annualized basis as a return on and of the transmission plant improperly included in the Distribution Charge.[11] Duke witness Lawler admitted that the revenue requirement adjustment in this

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[6] *See* Duke's Initial Brief at 3; PUCO Staff's Initial Brief at 5.

[7] Rehman Compliance Audit (Staff Exhibit 1) at 19; Duke's Initial Brief; Hearing Transcript at 8.

[8] *See* Hearing Transcript at 8.

[9] *Id.*

[10] Compliance Audit at page 19.

[11] *See* Hearing Transcript at 9.

case to correct for Duke's error was necessary because transmission costs were inappropriately included in the Distribution Charge.[12]

Ms. Lawler admitted that the Settlement does not address or correct for Duke's errors in charging consumers for transmission costs through the Distribution Charge outside of the audit period.[13] The Settlement provides only for a reduction in the revenue requirement for *one* quarter after the PUCO issues an Order in this case.[14]

The Settlement is not in the public interest and should be rejected.

2. The Settlement violates important regulatory principles and practices and should be rejected to protect consumers.

The Settlement violates the PUCO's standards for approval of an agreement. The claims by PUCO Staff and Duke that the Settlement does not violate any important regulatory principle or practice are also incorrect.[15] Charging consumers for transmission plant in distribution rates does not comply with the law. Ohio Revised Code 4928.143(B)(2)(h) (unfortunately) permits single-issue ratemaking riders like Duke's Distribution Charge for the explicit purpose of *distribution modernization*. Duke charging consumers for transmission plant has nothing to do with distribution modernization. Further, the authority for approving transmission costs resides with FERC and not the PUCO.[16] The Settlement permits Duke to inappropriately charge consumers for

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[12] *See id.* at 13.

[13] *See id.* at 16.

[14] Settlement (Joint Exhibit 1) page 5.

[15] Duke's Initial Brief at 4-5; PUCO Staff's Initial Brief at 6.

[16] *See* Hearing Transcript at 32-33.

transmission costs without any reason to believe that FERC would have approved those costs.[17]

Further, Duke witness Lawler admitted that allowing Duke to charge consumers for transmission costs through the Distribution Charge violates the filed rate doctrine.[18] Duke "needs to abide by its tariffs" and utilities must offer service to their customers based on the terms set forth in their tariffs.[19] A utility can charge only those costs permitted in its tariffs, and only in the amounts set forth in its tariffs.[20] The Settlement violates this regulatory policy and law by not adjusting, but instead allowing Duke to charge consumers for transmission costs through the Distribution Charge, contrary to its tariffs.

The Settlement violates important regulatory principles and practices. It should not be approved by the PUCO because the agreement violates the PUCO standards for approval.

3. To protect consumers, the PUCO should adopt the recommendations of OCC and the independent auditor.,

To make sure that customers are made whole for improper transmission plant charges that they paid for through the Distribution Charge, the PUCO should follow Rehman Consulting's and OCC's recommendations. Rehman Consulting recommended that Duke reduce the Distribution Charge's revenue requirement by $2,763,853 for five

[17] *See id.* at 33.

[18] Under this doctrine, a utility can charge consumers only what is in its tariffs. *See* R.C. 4905.33; *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448 (2014).

[19] Hearing transcript at 22-23.

[20] *See id.* at 23.

quarterly Distribution Charge filings (the length of time the error went undetected).[21] OCC agrees with this recommendation.[22] OCC further recommends 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 investments through the Distribution Charge to ensure that customers are made whole.[23] As part of the next annual audit, the auditor should verify that the inappropriately collected funds were returned to customers.[24]

B. The PUCO should reject the Settlement because it is not in the public interest and violates important regulatory principles and practices by allowing Duke to charge consumers for distribution plant that was neither used nor useful.

The assertions of PUCO Staff and Duke that the Settlement is a "fair and reasonable result" is also wrong when it comes to the Settlement's treatment of Distribution Plant Held for Future Use.[25] Duke admitted that it had incorrectly included Distribution Plant Held for Future Use in the Distribution Charge.[26] Rehman Consulting recommended that Land Held for Future Use that was not used and useful be credited to consumers as a reduction in the revenue requirement of $62,464 for *fourteen* quarters.[27] This is the number of quarters that Duke charged consumers through the Distribution Charge for plant that was neither used nor useful.[28]

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[21] *See id.*

[22] *See generally* OCC's Initial Brief.

[23] Direct Testimony of James D. Williams at 8.

[24] Compliance Audit at 19.

[25] *See* Duke's Initial Brief at 3; PUCO Staff's Initial Brief at 5.

[26] Hearing Transcript at 9, 13.

[27] *See* Compliance Audit at 5.

[28] *See* Hearing Transcript at 9, 13.

But Duke concedes that the Settlement only credits customers for $62,464 over *four* quarters.[29] It will not credit customers for fourteen quarters as Rehman Consulting recommended.[30] 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. Further, it violates important regulatory principles and practices.[31]

The Settlement should be rejected. To protect consumers from continuing to pay overcharges to Duke, the PUCO should adopt OCC's recommendations (and those of Rehman Consulting) and order Duke to refund $62,464 in each of 14 quarterly Distribution Charge filings. Additionally, the PUCO should require Duke to pay interest on the overcharges so that customers are made whole.[32]

C. The PUCO should reject the Settlement because it is not in the public interest and violates important regulatory principles and practices by not correcting for Duke's accounting errors regarding unitized plant accounts.

As explained in OCC's Initial Brief, Duke's backlog of ununitized plant accounts contravenes its own account policies and results in inherent errors in the amount being charged consumers under the Distribution Charge.[33] OCC witness Williams recommended that the PUCO accept Rehman Consulting's recommendation and require Duke to quantify adjustments that are made through the unitization process that reduce the Distribution Charge plant-in-service balance over the entire period of time that

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[29] *See id.* at 9-10.

[30] *See id.* at 10.

[31] *See* OCC's Initial Brief at 11-13.

[32] *See id.* at 9.

[33] *See id.* at 9-11.

customers were overcharged through the Distribution Charge.[34] 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.[35] Duke inaccurately characterizes OCC's recommendation as "not sufficiently punitive."[36] PUCO Staff does not even address OCC's recommendation.[37]

Duke is wrong. OCC's recommendation has nothing to do with being "punitive." Instead, it supports the recommendation of the independent auditor, Rehman Consulting.[38] More importantly, OCC's recommendation seeks to make consumers whole after Duke's sloppy accounting cost them money. If adjustments that are made through the unitization process reduce the Distribution Charge plant-in-service balance, consumers should get the benefit. Because that is not the result of the Settlement, it should be rejected because the agreement is not in the public interest and violates important regulatory practices and principles.

III CONCLUSION

The PUCO should not approve the Settlement because it is not in the public interest and violates important regulatory principles and practices. The PUCO should instead adopt the recommendations made by the auditor, Rehman Consulting, and OCC.

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[34] *See id.* at 11.

[35] *See id.*

[36] *See* Duke's Initial Brief at 4.

[37] *See* PUCO Staff's Initial Brief.

[38] *See* Compliance Audit at 28.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply Brief has been served via electronic transmission upon the following parties of record this 11th day of September 2019.

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