

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

BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

This case involves a Settlement that allows Duke Energy Ohio, Inc. (“Duke”) to charge consumers through a distribution rider¹ for transmission costs, contrary to the public interest and regulatory principles and practices. It is undisputed that Duke inappropriately charged consumers for transmission costs through its Distribution Charge.² It is also undisputed that Duke was solely responsible for the error.³

But now Duke wants another bite of the apple, in the guise of a motion, after its earlier opportunities for advocacy at hearing and on briefing. Duke has now filed a baseless Motion to Strike (“Motion”) parts of OCC’s Reply Brief to prevent the Public Utilities Commission of Ohio (“PUCO” or “Commission”) from considering the entire record in the case. It claims that parts of OCC’s Reply Brief are incorrect and unfair.⁴

⁴ See Motion, Memorandum in Support at 5.

Duke is wrong. To protect consumers, and to allow the PUCO a complete record upon which to base its decision, Duke's Motion should be denied.

II. RECOMMENDATIONS

A. To protect consumers, Duke's Motion should be denied because the record supports that Duke charged consumers for transmission costs through its Distribution Charge in violation of the filed rate doctrine.

In replying to Duke's (and PUCO Staff's) assertion that the Settlement does not violate regulatory principles and practices,⁵ OCC pointed out that Duke's own witness admitted that it does.⁶ OCC said:

Further, Duke witness Lawler admitted that allowing Duke to charge consumers for transmission costs through the Distribution Charge violates the filed rate doctrine.⁷

This statement in OCC's brief was footnoted, with a reference to legal authority explaining the filed rate doctrine.⁸

Duke takes issue with OCC's assertion, claiming that there is no record support to back up OCC's claim that witness Lawler admitted to a violation of the filed rate doctrine.⁹ The authority OCC cites is the *legal* authority for the filed rate doctrine. The *factual* (record evidence) support regarding Ms. Lawler's admission comes in the next two sentences referenced in OCC's Reply Brief. There, OCC demonstrates, based on record evidence, that Duke witness Lawler acknowledged that:

⁵ Duke's Initial Brief at 4-5; *see also* PUCO Staff's Initial Brief at 6; OCC's Reply Brief at 4, n. 15 (citing to the Initial Briefs where Duke and PUCO Staff assert that the Settlement does not violate regulatory principles and practices).

⁶ *See* OCC's Reply at 5.

⁷ *Id.*

⁸ *See id.* at n. 18.

⁹ Motion at 3.

Duke “needs to abide by its tariffs” and utilities must offer service to their customers based on the terms set forth in their tariffs. A utility can charge only those costs permitted in its tariffs, and only in the amounts set forth in its tariffs.¹⁰

What Ms. Lawler is referring to, even if not by name, is the filed rate doctrine. Although it is certainly not surprising that Ms. Lawler, as a non-lawyer, is not familiar with the filed rate doctrine *by name*,¹¹ this testimony certainly confirms that she is familiar with the concepts underlying the doctrine. And because it is undisputed that Duke inappropriately collected transmission charges through the Distribution Charge tariff, Duke violated the filed rate doctrine.¹²

The undisputed record evidence is this: 1) Duke inappropriately collected transmission charges through the Distribution Charge,¹³ 2) Duke was solely responsible for the error,¹⁴ 3) Duke “needs to abide by its tariffs” and utilities must offer service to their customers based on the terms set forth in their tariffs,¹⁵ and 4) a utility can charge only those costs permitted in its tariffs and only in the amounts set forth in its tariffs.¹⁶ This record evidence confirms that the Settlement violates regulatory principles and practices – the filed rate doctrine. OCC appropriately raised the issue in its Reply Brief by *directly* responding to Duke’s (and PUCO Staff’s) assertion in its Initial Brief that the

¹⁰ See *id.* at 5 (citing to the Hearing Transcript of Ms. Lawler’s cross-examination).

¹¹ See Motion at 4.

¹² See notes 2-3, *supra*; R.C. 4905.33; *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448 (2014).

¹³ Rehman Compliance Audit (Staff Exhibit 1) at 19; Duke’s Initial Brief; Hearing Transcript at 8 (OCC cross-examination of Duke witness Lawler); *see also* OCC’s Reply Brief at 3.

¹⁴ See Hearing Transcript at 8 (OCC cross-examination of Duke witness Lawler).

¹⁵ See *id.* at 22-23 (OCC cross-examination of Duke witness Lawler).

¹⁶ See *id.* at 23 (OCC cross-examination of Duke witness Lawler).

Settlement does not violate regulatory principles and practices.¹⁷ Accordingly, the Motion is baseless. It should be denied.

B. To protect consumers, Duke's Motion should be denied because the erroneous and unwarranted transmission charges that Duke assessed through its Distribution Charge were not corrected until the June 2018 quarterly Distribution Charge filing.

Duke also moves to strike from OCC's Reply Brief an assertion that corrections (removing transmission plant from distribution charges) were not made until Duke's June 2018 quarterly Distribution Charge filing. Here is the assertion that Duke moves to strike:

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. 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.¹⁸

Duke focuses on the alleged impropriety of the June 2018 date.¹⁹ Duke claims that the statement is incorrect and contrary to the facts and record of the case. Duke claims that the June 2018 date was "merely the date when the change was automated." Duke then claims that *manual* correcting adjustments to the charges were made six to fifteen months earlier (citing to the Rehman Compliance Audit).²⁰ Duke is wrong.

¹⁷ Duke's Initial Brief at 4-5; *see also* PUCO Staff's Initial Brief at 6; OCC's Reply Brief at 4, n. 15 (citing to the Initial Briefs where Duke and PUCO Staff assert that the Settlement does not violate regulatory principles and practices).

¹⁸ *See* Motion, Memorandum Contra at 4-5.

¹⁹ *See id.*

²⁰ Rehman Compliance Audit (Staff Exhibit 1).

Rehman explained that “[t]he correction [to remove transmission costs from distribution plant] was not made in PowerPlan until June 2018.”²¹ This is when transmission costs were fully, finally, and permanently removed from distribution plant. OCC’s Reply Brief is perfectly consistent with Rehman’s Compliance Audit (and the testimony of its witness, Mr. James D. Williams).²² Duke would have the PUCO focus on the ad hoc *manual* adjustments previously made. But as explained by Rehman and OCC witness Williams, that is not when transmission costs were fully, finally, and permanently removed from distribution plant.

Contrary to Duke’s assertions,²³ OCC said in its Reply Brief almost *exactly* what it said in its Initial Brief.²⁴ Duke takes no issue with what OCC said in its Initial Brief. In fact, it asserts that “OCC itself correctly recounted the dates in its Initial Brief and correctly cited the Audit Report.”²⁵ And both OCC’s Initial and Reply Briefs are consistent with the testimony of its witness, Mr. James D. Williams.²⁶ Duke is wrong that OCC’s Reply Brief lacks record support.

²¹ See *id.* at 19. PowerPlan is Duke’s source Plant-in-Service System. See *id.* at 4.

²² See Direct Testimony of James D. Williams in Opposition to the Joint Stipulation and Recommendation filed July 8, 2019 (OCC Ex. 1) at 7 (“The correction to remove the transmission plant from the DCI did not occur until the June 2018 quarterly DCI filing.”).

²³ See *id.* at 5.

²⁴ Compare OCC’s Initial Brief at 6 (“The correction to remove the transmission plant from the Distribution Charge did not occur until the June 2018 quarterly Charge filing.”) with OCC’s Reply Brief at 3 (“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.”).

²⁵ See Motion at 5.

²⁶ See Direct Testimony of James D. Williams in Opposition to the Joint Stipulation and Recommendation filed July 8, 2019 (OCC Ex. 1) at 7 (“The correction to remove the transmission plant from the DCI did not occur until the June 2018 quarterly DCI filing.”).

C. To protect consumers, the Motion should be rejected because Duke is wrong that OCC's Reply Brief contains incorrect statements that are highly prejudicial.

Duke is also wrong in its assertion that the “inclusion of blatantly incorrect statements in OCC’s Reply Brief is highly prejudicial and unfair to the Parties in this proceeding. Had an OCC witness testified to these matters at hearing, or even included them in its initial post hearing brief, Duke and Staff would have had an opportunity to cross-examine and correct the record.”²⁷

As just described, OCC’s Reply Brief does not contain “blatantly incorrect statements.” In demonstrating that the Settlement violates the filed rate doctrine, OCC was replying *directly* to Duke’s (and PUCO Staff’s) assertion in its Initial Brief that the Settlement does not violate regulatory principles and practices.²⁸

OCC said nearly the same thing in both its Initial Brief and Reply Brief. And both briefs are entirely consistent with OCC witness Williams’ testimony. Accordingly, Duke (and PUCO Staff) had *every opportunity* “to cross-examine and correct the record.”²⁹ Including accurate, factual information in testimony that was subject to cross-examination by parties and in a Brief that was subject to a reply by parties is not highly prejudicial or unfair to the Parties in this proceeding.

Duke’s Motion is baseless. It should be denied.

²⁷ See *id.* at 5.

²⁸ Duke’s Initial Brief at 4-5; see also PUCO Staff’s Initial Brief at 6; OCC’s Reply Brief at 4, n. 15 (citing to the Initial Briefs where Duke and PUCO Staff assert that the Settlement does not violate regulatory principles and practices).

²⁹ As noted herein, the record is correct in any event.

III. CONCLUSION

The undisputed record evidence shows that the Settlement allows Duke to inappropriately charge consumers for transmission costs through the Distribution Charge. The entirely baseless Motion only confirms this, as it demonstrates that Duke is grasping at straws to prevent the PUCO from hearing the whole, definitive truth. To protect consumers, the Motion should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra has been served via electronic transmission upon the following parties of record this 30th day of September 2019.

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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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Summary: Memorandum Memorandum Contra Duke Energy Ohio's Motion to Strike Portions of OCC's Reply Brief by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.