

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matters of the Applications of Ohio)	
Power Company, Duke Energy Ohio, Inc.,)	
Ohio Edison Company, the Cleveland)	Case No. 16-574-EL-POR
Electric Illuminating Company, the Toledo)	Case No. 16-576-EL-POR
Edison Company, and the Dayton Power and)	Case No. 16-743-EL-POR
Light Company for Approval of their Energy)	Case No. 17-1398-EL-POR
Efficiency and Peak Demand Reduction)	
Programs.)	

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

In its application for rehearing, Duke Energy seeks to unnecessarily expand the scope of these energy efficiency portfolio cases to address issues that would be more properly addressed next year (if at all). The PUCO's February 26, 2020 Order that Duke seeks rehearing on requires utilities to begin winding down all programs on September 30, 2020 so that the programs can be fully terminated by December 31, 2020, as required by law.¹

Now, on rehearing, Duke is asking the PUCO to modify that Order to address the specific manner in which Duke might continue to charge customers for programs after December 31, 2020.² The PUCO should reject Duke's proposed modifications because they are outside the scope of this case and need not be resolved at this time (if they need to be resolved ever). Any issues related to a final reconciliation of energy efficiency charges can be resolved in 2021, after the programs are terminated.

¹ Finding & Order ¶¶ 42-44 (Feb. 26, 2020).

² Duke Energy Ohio, Inc.'s Application for Rehearing (Mar. 27, 2020) (the "Application for Rehearing").

I. ARGUMENT

A. **Duke’s Application for Rehearing violates R.C. 4903.10 because Duke asks for the PUCO address new issues that are not “matters determined in the proceeding.”**

R.C. 4903.10 provides the scope of acceptable applications for rehearing: “After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing *in respect to any matters determined in the proceeding.*” (emphasis added) Duke’s Application for Rehearing violates this law because the issues Duke raises are unrelated to any matters determined in the proceeding.

In its procedural entry, the PUCO sought comments on two issues: (i) “whether the Commission should terminate the energy efficiency programs once the statutory cap of 17.5 percent has been met,” and (ii) whether it is appropriate for the EDUs to continue to spend ratepayer provided funds on energy efficiency programs after the statutory cap has been met.”³ The Order includes the PUCO’s rulings on those issues.

Yet now, Duke is asking the PUCO to modify the Order to address wholly unrelated issues regarding reconciliation of Duke’s energy efficiency rider in 2021. Duke did not raise any of these issues in its comments in the case.⁴ Duke’s attempt to expand the scope of the case now, on rehearing, violates R.C. 4903.10 and should therefore be denied.

B. **If the PUCO were to rule on the issues raised in Duke’s Application for Rehearing, it would violate R.C. 4903.09 because there is no record in this case on those issues.**

As explained above, the new issues that Duke raises in its Application for Rehearing are beyond the scope of the case. Neither Duke nor any party raised those issues in the comments

³ Entry ¶ 5 (Oct. 23, 2019).

⁴ See Comments of Duke Energy Ohio, Inc. (Nov. 25, 2019).

that the PUCO solicited. Thus, were the PUCO to rule on Duke's proposal, it would violate R.C. 4903.09.

R.C. 4903.09 provides that in all contested cases before the PUCO, "a complete record of all of the proceedings shall be made," and the PUCO shall issue "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." But here there can be no such findings of fact. Neither OCC nor any other party was given an opportunity to introduce facts or file comments on the new issues that Duke raises in its Application for Rehearing. The PUCO cannot rule on Duke's new issues without violating R.C. 4903.09.

C. How utilities might complete true-ups to properly charge consumers for the year 2020 program costs is beyond the scope of this proceeding so Duke's first assignment of error should be denied.

In Duke's first assignment of error, it claims that the PUCO erred because the Order "fails to address how Duke Energy Ohio (and any other impacted electric distribution utilities) will, after December 31, 2020, complete true-ups for the year 2020 for the costs associated with energy efficiency programs."⁵ As Duke explains further in its memorandum in support, it is concerned that the PUCO failed to "state that existing cost recovery mechanisms, such as riders, will continue for as long as necessary to complete the required program costs true-up for calendar year 2020 portfolios."⁶

Duke's concern is premature. House Bill 6 (codified in relevant part in R.C. 4928.66(G)(3)) provides that energy efficiency riders will terminate once the 17.5% statutory mandate is met, "except as may be necessary to reconcile the difference between revenue collected and the allowable cost of compliance associated with compliance efforts occurring

⁵ Application for Rehearing at 1.

⁶ Application for Rehearing at 8.

prior to the date upon which full compliance [with the mandates] is deemed achieved.” The PUCO will determine, sometime after December 31, 2020, whether the mandates have been met by that date. At that point (which will necessarily be in 2021), the PUCO will also need to determine whether it is necessary to continue Duke’s energy efficiency rider to “reconcile” its revenues collected from customers and costs incurred running these programs under R.C. 4928.66(G)(3). At this time, there is no need for the PUCO to specify the precise manner in which such reconciliation might occur, which appears to be what Duke is asking for. Thus, the PUCO should reject Duke’s first assignment of error.

D. Whether and how utilities might “recovery lost distribution revenues and shared savings associated with energy efficiency programs for up through December 31, 2020” need not be decided at this time, so Duke’s second assignment of error should be denied.

Duke’s second assignment of error fails for similar reasons as the first. In its second assignment of error, Duke claims that the Order unreasonably and unlawfully “fails to address how Duke Energy Ohio (and any other impacted electric distribution utilities) will, after December 31, 2020, recover lost distribution revenues and shared savings associated with energy efficiency programs for up through December 31, 2020.”⁷

As with its first assignment of error, it is not clear why Duke believes that this issue needs to be addressed now, in the context of the PUCO’s present Order, instead of in 2021 when the PUCO will need to address final reconciliation of all Ohio electric distribution utility energy efficiency riders. Indeed, the fact that none of AEP Ohio, FirstEnergy, or Dayton Power and Light filed similar applications for rehearing suggests that Duke’s concerns are much ado about nothing. If any reconciliation of Duke’s revenues collected from customers through the energy efficiency rider and costs it incurred to run these programs is necessary to address issues related

⁷ Application for Rehearing at 1-2.

to lost revenues and shared savings, that determination can be made in 2021 and need not be made now. Duke's second assignment of error should be denied.

E. Duke's second of assignment error fails because it assumes, without support, that Duke will in fact be allowed to charge customers for lost revenues and shared savings for its 2020 programs.

In its second assignment of error, Duke faults the PUCO for not addressing how Duke will be able to "recover lost distribution revenues and shared savings associated with energy efficiency programs for up through December 31, 2020."⁸ This assignment of error is premature because it assumes, without any support, that Duke will in fact be entitled to charge customers for lost revenues and shared savings for its 2020 programs. Neither of those is a foregone conclusion.

With respect to shared savings, Duke is only allowed to charge customers for shared savings if it exceeds the annual statutory mandate and it generates net benefits for customers. Neither of those facts can be known right now. It would be premature, therefore, for the PUCO to establish a process for Duke charging customers for shared savings when Duke might not even be eligible for any. Likewise, Duke's eligibility for lost revenues depends on its ability to run programs that save money for customers in the classes that pay lost revenues. Until Duke finishes its 2020 programs, it remains to be seen whether Duke will be allowed to collect any lost revenues. Further, for Duke to charge customers for either shared savings or lost revenues, it would need to prove that both of these items are allowable under the reconciliation process

⁸ Application for Rehearing at 1-2.

contemplated by R.C. 4928.66(G)(3).⁹ That, too, is an issue that has not been raised in this docket and thus cannot be ruled upon by the PUCO at this time.

F. Duke's Application for Rehearing is unlawful as applied to the other electric distribution utilities.

Duke filed its Application in four separate dockets: Case No. 16-574-EL-POR (AEP's energy efficiency portfolio), Case No. 16-576-EL-POR (Duke's portfolio), Case No. 16-743-EL-POR (FirstEnergy's portfolio), and Case No. 17-1398-EL-POR (DP&L's portfolio). Duke's two assignments of error reference not only the Order's impact on Duke, but also the Order's impact on "any other impacted electric distribution utilities."¹⁰

By law, Duke is allowed to seek rehearing only with respect to its own case, Case No. 16-576-EL-POR. Under R.C. 4903.10, only a "party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing." Duke is not a party to Case No. 16-574-EL-POR (AEP's case), Case No. 16-743-EL-POR (FirstEnergy's case), or Case No. 17-1398-EL-POR (DP&L's case) because it never moved to intervene in any of those cases. And while the Order pertains to all four cases, the PUCO never consolidated the utility's four cases into a single case. Thus, Duke lacks standing to challenge the Order as it applies to AEP, FirstEnergy, and DP&L.

This lack of standing further justifies denial of Duke's application for rehearing. If the PUCO were to grant Duke's application for rehearing, that rehearing could only lawfully apply to Duke and not the other utilities. There is no good reason for the PUCO to decide right now

⁹ R.C. 4928.66(G)(3) allows charges under energy efficiency riders after 2020 only if "necessary to reconcile the difference between revenue collected and the allowable cost of compliance associated with compliance efforts occurring prior to the date upon which full compliance with [the mandates] is deemed achieved." The PUCO will therefore need to rule on whether lost revenues and shared savings are such "allowable costs," which it has not done in this case.

¹⁰ Application for Rehearing at 1.

what it might do in 2021 to reconcile Duke's energy efficiency rider but to defer until 2021 deciding the same issue for the other utilities.

II. CONCLUSION

Duke's Application for Rehearing asks the PUCO to address issues that were not raised in this case and which need not be addressed until next year, if at all. The PUCO should deny Duke's Application for Rehearing.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served on the persons stated below via electronic transmission, this 6th day of April 2020.

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Summary: Memorandum Memorandum Contra Duke Energy's Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.