

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc., for Approval of its)
2021 Energy Efficiency and Demand Side) Case No. 20-1444-EL-POR
Management Portfolio of Programs and)
Cost Recovery Mechanism.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for Approval of Tariff) Case No. 20-1445-EL-ATA
Amendments.)

**COMMENTS
BY
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I. INTRODUCTION

Duke wants state government's approval to charge residential consumers up to \$7 million in 2021 to run energy efficiency programs, after the legislature ended such programs in House Bill 6. And Duke wants approval to charge customers \$450,000 (or more) in utility profits for a so-called "Joint Benefit Recognition Mechanism"¹—after the PUCO just dismissed Duke's first attempt at charging customers for energy efficiency profits."² Duke should not be allowed to charge consumers for its profits on non-mandated energy efficiency. Utilities like Duke have reaped profits (hundreds of millions of dollars) at consumer expense from energy efficiency programs for the last decade. It is time to stop utilities from profiting on energy efficiency at consumer expense.

Duke has proposed a smaller charge than the recent charges for the now-ended mandated programs. But it easily can be wondered if Duke will seek higher profits and payments from

¹ Application at 7 (Oct. 9, 2020).

² *In re Application of Duke Energy Ohio, Inc., for Approval of its 2021 Energy Efficiency & Demand Side Management Portfolio of Programs & Cost Recovery Mechanism*, Case No. 20-1013-EL-POR, Entry (June 17, 2020).

consumers in future years once it gets its foot in the door with precedent for the alleged legality of the program in this case. Consumers should be protected.

Poignantly, Duke is proposing this \$7 million program in non-essential charges for energy efficiency at a time of the pandemic emergency when many consumers are desperate for financial assistance. So the PUCO (and Duke) should instead be focusing on more consumer assistance for paying energy bills under the PUCO's *emergency powers*, for Ohioans who are hurting. At most, the PUCO should only allow Duke to charge consumers to subsidize energy efficiency for low-income programs (that it proposed); the PUCO should disallow charges for Duke-run energy efficiency programs that are not for low-income consumers. But again, the state focus for utility consumer programs should be financial assistance for Ohioans to pay utility bills to stay connected to utility services during the pandemic and its aftermath.

Of course, Duke may still pursue its sustainability objectives—with its own (shareholder) money, instead of leaning on consumers for funding. And Duke has a dual “green” opportunity right now in the legislature to seek the repeal of tainted House Bill 6 that (1) ended its energy efficiency programs and that (2) contradictorily allowed it to charge consumers for subsidizing Duke's share of the polluting OVEC coal power plants. A more balanced approach for sustainability and consumer green energy (and electric bills) would be for Duke to come forward (in an appropriate forum) to propose ending its subsidy charges for polluting coal plants when it proposes new charges for energy efficiency.

In any event, Duke already used up the law's (generous) opportunity for allowable riders when Duke opted for its long-term electric security plan that does not expire until 2025. So under this consumer protection in the 2008 energy law, Duke presently has no mechanism under Ohio law to create its proposed “rider” for this new charge to customers.

Another legal barrier for Duke is that it filed its Application under Ohio Adm. Code Chapter 4901:1-39, which contains the state rules for the *former* energy efficiency programs. As explained below, Duke is mistaken in relying on these rules, as they apply only to the mandated programs that *ended* with House Bill 6. And beginning in 2021, there are no longer any statutory mandates for energy efficiency in Ohio because the Ohio General Assembly ended them for the announced purpose of saving money for Ohioans to offset spending Ohioans' money on bailouts of uneconomic power plants.

The Office of the Ohio Consumers' Counsel ("OCC") is filing these comments consistent with Ohio Adm. Code 4901:1-39-06, which provides that "any person may file comments within thirty days after the filing of an electric utility's proposed recovery mechanism." As noted, OCC does not concede that Duke's use of these rules is legal, considering that the rules apply to programs that the Ohio General Assembly ended.

II. RECOMMENDATIONS

A. **The state's energy efficiency rules (relied upon by Duke) do not apply to (or allow for) Duke's request for non-mandated energy efficiency programs.**

Throughout its Application, Duke relies on Ohio Adm. Code 4901:1-39, which contains the PUCO's rules for energy efficiency programs. For example, Duke begins by stating that it is filing the Application "pursuant to Rules 4901:1-39-04 and 4901:1-39-06, Ohio Administrative Code."³ Ohio Adm. Code 4901:1-39-04 pertains to energy efficiency portfolio plan and filing requirements. Ohio Adm. Code 4901:1-39-06 pertains to a utility's ability to charge customers for energy efficiency programs.

Duke's problem, however, is that these rules pertain only to *mandated* energy efficiency programs under R.C. 4928.66 from the 2008 energy law. By enactment of the legislature in House

³ Application at 1.

Bill 6, there no longer are mandated energy efficiency programs in 2021 and thereafter, and Duke is subject to that legislative enactment. Ohio Adm. Code 4901:1-39-02, titled “Purpose and scope,” explicitly references mandatory programs under R.C. 4928.66(A)(1)(a), stating that “each electric utility is required to implement energy efficiency programs” and later noting that the “purpose of this chapter is to establish rules for the implementation of electric utility energy efficiency and peak-demand reduction programs.” And Ohio Adm. Code 4901:1-39-04, which Duke cites as the basis for its Application, refers to a portfolio of energy efficiency programs that “will cost-effectively achieve the statutory benchmarks for energy efficiency and peak-demand reduction.” These rules make additional references throughout to statutory mandated energy efficiency programs.⁴ And every section of these rules states that it amplifies R.C. 4928.66, which again, pertains only to mandatory energy efficiency programs, *not* the non-mandatory programs that Duke is proposing.

In short, because these rules are designed for statutorily mandated energy efficiency programs, and there no longer are mandated energy efficiency programs, the rules do not apply to enable Duke’s application. The law does not allow the proposed Duke charges to consumers and the PUCO thus cannot allow Duke a foot in the door for these charges to consumers by creating the unlawful precedent of granting Duke’s proposal.

B. The PUCO lacks statutory authority to approve a new charge to customers under Duke’s proposed new energy efficiency rider (and Duke’s application should be suspended if not outright denied).

It has long been established that the “PUCO, as a create of statute, has no authority to act beyond its statutory powers.”⁵ There is no statute that allows the PUCO to approve a new rider

⁴ See, e.g., Ohio Adm. Code 4901:1-39-01(D) (referencing “statutorily required energy efficiency savings”); Ohio Adm. Code 4901:1-39-01(Y) (referencing “statutory energy efficiency and/or peak demand reduction benchmark”); Ohio Adm. Code 4901:1-39-05(E) (referencing “annual statutory requirements for energy efficiency and peak demand reduction”); Ohio Adm. Code 4901:1-39-07(B)(3) (referencing “the electric utility’s statutory requirements”).

⁵ *Disc. Cellular, Inc. v. PUCO*, 112 Ohio St. 3d 360, 373 (2007).

charge to customers like the one Duke proposes. Thus, the PUCO should reject Duke's Application. At a minimum, the PUCO should *suspend* Duke's Application to prevent any possibility of automatic approval, though there can be no automatic approval because the rules for such approval no longer apply.

Duke proposes that the PUCO create a new rider, "Rider DSM," to charge customers for its newly-proposed energy efficiency programs in 2021.⁶ In support of its request for a new rider, Duke relies on Ohio Adm. Code 4901:1-39-06.⁷ But for the reasons explained above, Ohio Adm. Code 4901:1-39-06 does not apply to Duke's proposed non-mandated programs, so it cannot be the basis for a new rider to be charged to customers.

Duke also relies on a prior PUCO ruling where it stated, "While the Commission recognizes Duke's need to seek a new cost recovery mechanism to replace the now-expired Rider SAW, we believe [that] such a mechanism may *only* be sought in the context of an ESP or pursuant to the requirements of Rule 4901:1-39-07, O.A.C., which allows a cost recovery mechanism to be sought as part of a portfolio filing."⁸ But this PUCO ruling actually demonstrates precisely why Duke's proposal is *not* lawful.

The PUCO identified *two instances* in which a new energy efficiency rider charge can be added to customers' bills: in an electric security plan case, or in a case filed under Ohio Adm. Code Chapter 4901:1-39. But Duke's current case is neither. It is obviously not for an electric security plan. And, as explained above, it is not a case under Ohio Adm. Code Chapter 4901:1-39 because those rules apply to statutorily mandated programs only, which Duke's proposed programs are not.

⁶ Application at 7-8.

⁷ *Id.*

⁸ *In re Application of Duke Energy Ohio, Inc. for an Energy Efficiency Cost Recovery Mechanism*, Case No. 11-4393-EL-RDR, Opinion & Order (Aug. 15, 2012) (emphasis added).

That being the case, there is no statutory basis for Duke’s request to add a new rider to customers’ bills in this case. Duke availed itself of the 2008 law’s generous opportunity for creating riders in an electric security plan. And Duke went for a long-term plan that, under the law’s (limited) consumer protection, ended its ability to visit upon consumers new rider charges until the plan expires in 2025. Certainly, the PUCO should not allow Duke’s proposed rider—which includes a charge for utility profits—to be *automatically* approved. Were the PUCO to apply Ohio Adm. Code 4901:1-39-06(B) –which does not apply—Duke’s proposal to add a new rider would “be automatically deemed to be reasonable” if the PUCO takes no action within 30 days of a party filing comments.

Thus, within 30 days of filing these comments, the PUCO should deny Duke’s Application. At a minimum, it should rule that Duke’s proposed rider charge is suspended and not automatically approved under Ohio Adm. Code 4901:1-39-06(B). As stated, new charges to customers for Duke’s non-mandated programs would not be legal.

C. The PUCO should reject Duke’s proposal to charge customers for utility profits on non-mandated energy efficiency programs.

In addition to nearly \$6 million in charges to run its proposed energy efficiency programs, Duke proposes a new charge to customers that it euphemistically calls the “Joint Benefit Recognition Mechanism.”⁹ Duke proposes that under this mechanism, it be allowed to charge customers “4.5% of the total avoided costs resulting from transmission and distribution savings from customer participation in the Company’s portfolio of approved programs, via a rider.”¹⁰ In other words, Duke will calculate the amount of distribution and transmission costs it believes are saved by the programs, and then it will charge customers 4.5% of that amount.

⁹ Application at 8.

¹⁰ Application at 7.

This charge is a form of utility profits. And in fact, its design is similar to the way that “shared savings” were calculated for Duke’s energy efficiency portfolio in the past. Under Duke’s shared savings mechanism, the avoided generation costs from energy efficiency programs were calculated, and Duke was then allowed to charge customers a percentage of those avoided costs, which was called “shared savings.” The primary difference between shared savings and Duke’s newly-proposed Joint Benefit Recognition Mechanism is that one was based on avoided generation costs and the other is based on avoided transmission and distribution costs.¹¹ Otherwise, they are both charges to consumers for utility profits on top of the actual costs of the programs.

And, as Duke is well aware, just five months ago the PUCO acted on its own (without any request by a party) to reject Duke’s proposal for shared savings.¹² Earlier this year, Duke filed a request for a new energy efficiency portfolio for 2021.¹³ That portfolio filing included a request to charge customers for utility profits in the form of shared savings.¹⁴ The PUCO issued an entry, *sua sponte*, striking Duke’s shared savings request from its portfolio application.¹⁵

As the PUCO explained in that Entry *a mere five months ago*, Duke’s shared savings proposal “would be against the objectives of this state which favors outcomes that provide customers with *effective choices* over the selection of supplies and suppliers and would discourage market access for cost effective supply- and demand-side services.”¹⁶ Further, the PUCO concluded that Duke failed to show that utility profits were “needed to ensure the availability to consumers of

¹¹ Another difference is that Duke’s earlier proposed shared savings mechanism was substantially larger, allowing Duke to charge customers up to \$10 million per year in utility profits, whereas Duke projects \$450,000 in utility profits under the new profit mechanism.

¹² *In re Application of Duke Energy Ohio, Inc. for Approval of its 2021 Energy Efficiency & Demand Side Management Portfolio of Programs & Cost Recovery Mechanism*, Case No. 20-1013-EL-POR (the “Withdrawn Portfolio Case”), Entry (June 17, 2020).

¹³ Withdrawn Portfolio Case, Application (June 3, 2020).

¹⁴ *Id.* at 7.

¹⁵ Withdrawn Portfolio Case, Entry (June 17, 2020).

¹⁶ *Id.* ¶ 6.

adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.”¹⁷ Rather, because PJM projects a substantial reserve margin for the foreseeable future, “there is no need to provide an incentive to Duke to offer these EE programs in order to ensure the reliability of retail electric service in this state.”¹⁸ Finally, the PUCO found that there was no statutory basis for Duke’s proposed shared savings charges.¹⁹

The PUCO’s reasoning applies here to Duke’s proposed Joint Benefit Recognition Mechanism: it does not support competitive markets for energy efficiency; it is not needed to ensure adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service; and there is no statutory basis for it. Thus, the PUCO should strike the Joint Benefit Recognition Mechanism from Duke’s Application, just as it did against Duke’s prior request for shared savings.

D. A better use of consumer (and utility) funds during and after the coronavirus pandemic and financial emergency is for bill payment assistance to keep Ohioans (many of whom are desperate for money) connected to utility services and to enable other uses of their money such as for food and housing.

Ohioans, including Cincinnati-area consumers in Duke’s service territory, continue to face financial hardship from the coronavirus pandemic and ensuing financial emergency. Cincinnati has been noted as a city with residents challenged by lack of income. The pandemic is not going away and is adding to people’s challenges. A week ago, Ohio reached 4,000 positive cases in a single day for the first time.²⁰ Days later Ohio reached a new landmark with 5,000 cases in a single day.²¹ As winter approaches, it appears things will get worse before they get better for Ohioans.

¹⁷ *Id.* ¶ 7.

¹⁸ *Id.*

¹⁹ *Id.* ¶ 8.

²⁰ <https://www.daytondailynews.com/news/coronavirus-ohio-reports-4000-daily-cases-for-second-straight-day/EFXRKNT7KVEZRH4Y6U5PQ4LFYI/>.

²¹ <https://www.cleveland.com/open/2020/11/ohio-exceeds-5000-new-coronavirus-cases-in-single-day-to-5008-friday-update.html>.

The coronavirus has caused substantial financial harm for Ohioans. Early in the pandemic, nearly 800,000 Ohioans had filed unemployment claims. And although that number has improved, there are currently more than 169,000 active claims. This is more than double the pre-pandemic number, which steadily hovered around 70,000.²² In short, Ohioans are hurting, and they will continue to need help for the foreseeable future in paying their bills, including utility bills.

Thus, if the PUCO ultimately determines that charges to consumers in this case are lawful (which, as explained above, they are not), then there should only be charges for the proposed low-income programs. Any funding that would otherwise be spent on non-low-income programs should instead be used for bill-payment assistance under the PUCO's emergency powers, which is the simplest and most direct way to help those customers most in need.

E. If the PUCO does approve the unlawful charges to customers for utility profits (which it shouldn't), there should be an annual limit on such charges.

If the PUCO does approve Duke's proposal to charge customers for utility profits (which it shouldn't), then at a minimum, it should protect consumers by strictly limiting the amount that Duke can charge for utility profits.

Under the Application, Duke says that it projects charges of \$449,014 under its proposed profit mechanism (the Joint Benefit Recognition Mechanism).²³ Duke does not, however, propose any cap on such profits. In the past, the PUCO has consistently imposed an annual cap on the amount of profits (shared savings) that utilities can charge customers.²⁴ It should do the same here.

If Duke is allowed to charge customers for profits, the profits should be capped at an amount no greater than three percent (or better, less than three percent) of the prudently incurred annual

²² <https://oui.doleta.gov/unemploy/wkclaims/report.asp>

²³ Application at 8.

²⁴ See, e.g., *In re Application of Duke Energy Ohio, Inc. for Approval of its 2017-2019 Energy Efficiency & Peak Demand Reduction Program Portfolio Plan*, Case No. 16-576-EL-POR, Opinion & Order ¶ 26 (Sept. 27, 2017) (\$8 million after-tax cap on shared savings).

program costs. For example, if Duke spends \$5 million in 2021, and the PUCO determines that this amount was prudently spent, then Duke could charge consumers for up to \$150,000 in customer-funded utility profits.

It is true that Duke proposes a \$7 million cap on total charges to customers for program costs plus utility profits.²⁵ This, however, does not provide adequate protection for consumers. Under Duke's proposal, for example, it would be permissible for Duke to spend \$5 million on programs and charge customers \$2 million in utility profits, which would be a 40% upcharge on the programs. This would be unjust and unreasonable and should not be allowed. Thus, in addition to a \$7 million cap, there should be a three percent (or lower) cap on profits (though fundamentally the PUCO should not allow any charges to consumers for Duke profits).

F. If the PUCO approves Duke's proposed unlawful rider charge, the PUCO should at least set clear boundaries on the types of costs that can be included in charges to customers for energy efficiency.

If the PUCO does approve Duke's proposal to charge customers for utility energy efficiency programs (which it shouldn't), then the PUCO should establish clear boundaries on the types of charges that can be collected from customers. In the past, Duke has consistently tried to charge customers, through its energy efficiency rider, for costs that are unrelated to energy efficiency. Most notably, in Duke's 2014, 2015, 2016, and 2017 energy efficiency rider cases, Duke attempted to include hundreds of thousands of dollars in charges for Duke employee incentive pay (*aka* bonuses), and the PUCO disallowed these charges each time.²⁶ Duke included employee incentive pay in its energy efficiency rider in 2018 as well, and the PUCO Staff and OCC recommended those charges

²⁵ Application at 7.

²⁶ See Case No. 15-534-EL-RDR, Opinion & Order (Oct. 26, 2016); Case No. 16-664-EL-RDR, Finding & Order (May 15, 2019); Case No. 17-781-EL-RDR, Finding & Order (May 15, 2019); Case No. 18-397-EL-RDR, Finding & Order (July 31, 2019).

be excluded again.²⁷ And again in 2019, Duke included these charges, which OCC recommended be excluded.²⁸ (The Staff has not yet filed its recommendation regarding 2019, but OCC expects that they will come to the same conclusion.)

Duke has also attempted to include other charges that are unrelated to energy efficiency, and which the PUCO has rejected. This includes charges for meals, snacks, drinks, Cincinnati Reds tickets, gold events, cell phones, rent, personal mileage reimbursement, and conferences.²⁹

To avoid future disputes about these charges, the PUCO should address this issue now by explicitly prohibiting Duke from including any such charges to customers under the umbrella of energy efficiency. Further, the PUCO should provide that if Duke does attempt to charge customers for these types of costs, it should pay a penalty to encourage better accounting and protect customers.

G. Duke should not be allowed to charge customers for so-called “lost revenues” (or apply any decoupling) resulting from its energy efficiency programs.

If the PUCO does approve Duke’s proposal to charge customers for energy efficiency programs (which it shouldn’t), then Duke should not be allowed to collect lost distribution revenues (or any decoupling charges) from consumers. Duke states in its Application that it “reserves the right to amend this Application to account for lost distribution revenues in the event that Rider DDR [Duke’s decoupling rider] is modified or eliminated.”³⁰ So-called lost revenues are a terrible deal for consumers and should not be approved under any circumstances.

²⁷ See Case No. 19-622-EL-RDR, Staff Review and Recommendation (Dec. 12, 2019).

²⁸ Case No. 20-613-EL-RDR, Comments (May 14, 2020).

²⁹ See Case No. 16-664-EL-RDR, Staff Review and Recommendation (Nov. 13, 2017); Case No. 17-781-EL-RDR, Staff Review and Recommendation (Sept. 11, 2018); Case No. 18-397-EL-RDR, Staff Review and Recommendation (June 12, 2019).

³⁰ Application at 2, footnote 5.

Lost revenues are always a charge to consumers. The utility estimates the energy savings from its programs and then charges customers to make up for the revenues it may have “lost” as a result of not charging customers for their usage.

Several PUCO Commissioners, almost a decade ago, expressed their concern that lost revenues were problematic for consumers. PUCO Chairman Todd Snitchler expressed his “deep concern with the collection of lost distribution revenues” and concluded that they present “a significant risk of undermining public support for” energy efficiency.³¹ PUCO Commissioner Cheryl Roberto came to a similar conclusion shortly thereafter, stating that the “lost revenue recovery mechanism has out-lived its value to customers and should be permitted to expire.”³² As of 2020, no utility is currently being allowed to charge residential customers for lost revenues resulting from energy efficiency. The PUCO should reject Duke’s insinuation that there is any chance of resurrecting lost revenues in 2021 or after.

H. The PUCO Staff or an outside auditor should audit Duke’s energy efficiency charges each year for prudence and to verify benefits to customers from the programs.

If the PUCO does approve Duke’s proposal to charge customers for utility energy efficiency programs (which it shouldn’t), then the PUCO should require an annual audit of the program. To protect consumers from paying too much for energy efficiency, and to ensure that customers actually receive benefits from Duke’s programs, the PUCO should require an annual audit, by either the PUCO Staff or an outside auditor, to assess the prudence of Duke’s expenditures, and to verify whether the savings from the programs are greater than the costs.

³¹ Case No. 09-1947-EL-POR, Opinion & Order (Mar. 3, 2011).

³² Case No. 12-1230-EL-SSO, Opinion & Order (July 18, 2012).

III. CONCLUSION

The PUCO should protect consumers from Duke's proposed new charges for energy efficiency programs and profits by adopting OCC's consumer protection recommendations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these Comments was served on the persons stated below via electronic transmission, this 9th day of November 2020.

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