

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval of an)
Alternative Form of Regulation to Establish) Case No. 19-791-GA-ALT
a Capital Expenditure Program Rider)
Mechanism.)

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

I. INTRODUCTION

In a document that no consumer advocate would sign, Duke Energy and the Staff of the Public Utilities Commission of Ohio (“PUCO”) proposed a Settlement¹ for the PUCO to adopt. Their Settlement would allow Duke to charge residential customers nearly \$105 million over the next 2.5 years for ever increasing capital investments made by Duke Energy under the Capital Expenditure Program (“CEP”).²

Consistent with the recommendations by the Office of the Ohio Consumers’ Counsel (“OCC”), the PUCO wisely modified the Settlement in its Opinion and Order to prevent rate-shock and to promote the “long-standing and important regulatory principle of gradualism, which seeks to minimize the impact of rate changes on customers.”³

¹ Joint Exs. 1 and 2 (collectively, “Settlement”).

² The Settlement’s initial \$3.69/month rate x 406,082 residential customers x 6 months = \$8,990,655. The Settlement’s November 1, 2021 – October 31, 2022 \$9.31/month rate x 406,082 residential customers x 12 months = \$45,367,481. The Settlement’s November 1, 2022 – October 31, 2023 \$10.31/month rate x 406,082 residential customers x 12 months = \$50,240,465. Therefore, \$8,990,655 + \$45,367,481 + \$50,240,465 = \$104,598,601.

³ Opinion and Order (April 21, 2021) at 46-47 (citation omitted).

Duke Energy asserts in its application for rehearing that the PUCO's modification of the Settlement in consumers' interest (delaying collection of certain charges) does not follow PUCO precedent and is unlawful and unreasonable.⁴

To protect consumers, Duke Energy's application for rehearing should be denied. Preventing rate shock and promoting the long-standing regulatory principle of gradualism protects consumers and is consistent with PUCO precedent. The PUCO's modification of the Settlement was lawful and reasonable.

II. RECOMMENDATIONS

A. **The PUCO's modification of the Settlement to protect consumers is consistent with PUCO precedent.**

Duke Energy asserts that the PUCO's modification of the Settlement to delay its ability to recover 2020 capital investments until May 2022 (rather than November 2021, as in the Settlement) is "at odds" with PUCO precedent.⁵ But Duke Energy cites no precedent. The best it can do is cite authority standing for the proposition that it is not "uncommon"⁶ for public utilities to have charges that are true-up and that the PUCO has "regularly"⁷ allowed for the collection of charges from consumers beyond a cap if warranted by a true-up.

Here the case is very different. As the PUCO recognized, under the Settlement Duke Energy and Staff proposed charging consumers beginning in November 2021 for *two years* (2019 and 2020) worth of capital investments.⁸ The PUCO considered (and agreed with)

⁴ Duke Energy's Application for Rehearing (May 21, 2021).

⁵ See Application for Rehearing at 6.

⁶ *Id.*

⁷ *Id.*

⁸ See Opinion and Order at 47.

testimony from OCC Witness Adkins regarding the rate shock that consumers would experience under the Settlement.⁹ In light of that testimony, and the PUCO's adherence to the principle of gradualism, it was perfectly appropriate for the PUCO to modify the Settlement to protect consumers (by delaying the collection of certain charges).

The PUCO was within its authority to modify the Settlement to protect consumers.¹⁰ Duke Energy's application for rehearing should be denied.

B. The PUCO's modification of the Settlement to protect consumers does not violate Ohio law, which mandates that consumers pay only just and reasonable rates.

Duke Energy asserts that it would violate Ohio law if it were not permitted to charge consumers above and beyond any rate cap for "delaying a revenue requirement[,]"¹¹ as it contends the PUCO did in modifying the Settlement. Duke Energy is wrong. The PUCO's modification to protect consumers is consistent with Ohio law.¹²

One of the elements of the test governing proposed settlements is whether the settlement violates any important regulatory principle or practice.¹³ Here, the PUCO specifically found that the Settlement's proposed rate increase was "not consistent with the longstanding and important regulatory principle of gradualism, which seeks to minimize the impact of rate changes on customers."¹⁴ It therefore modified the Settlement to protect consumers.

⁹ *See id.*

¹⁰ *See, e.g.,* O.A.C. 4901-1-30.

¹¹ *See* Application for Rehearing at 7 (discussing R.C. 4929.111).

¹² R.C. 4905.22.

¹³ *See, e.g.,* Opinion and Order at 21.

¹⁴ *Id.* at 46-47 (citation omitted).

Further, Ohio law generally,¹⁵ and the alternative regulation statute specifically,¹⁶ protect consumers by allowing public utilities to charge consumers only just and reasonable rates. Far from *requiring* the PUCO to approve an application for charging consumers for capital investments, as Duke Energy asserts,¹⁷ Ohio law gives the PUCO authority to protect consumers by prohibiting public utilities from charging them unjust and unreasonable rates. The PUCO wisely exercised this authority based on the principle of gradualism and evidence before it of the rate shock consumers would experience were the Settlement's rate increase adopted.¹⁸

The PUCO was within its authority to modify the Settlement to protect consumers from unjust and unreasonable charges.¹⁹ Duke Energy's application for rehearing should be denied.

C. The PUCO protecting consumers through modifying the Settlement was not unjust or unreasonable.

Duke Energy asserts that the PUCO's modification of the Settlement to protect consumers was unjust and unreasonable because it would purportedly result in Duke Energy forgoing revenue.²⁰ Duke Energy focuses its attention on the portion of the Opinion and Order where the PUCO concludes that the Settlement benefits consumers and is in the public interest (the *second* prong of the settlement test) and suggests that the modification under the *third* prong of the settlement test (violation of regulatory principles and practices) is inconsistent with that portion of the Opinion and Order where Duke has focused its attention.²¹ Duke Energy is wrong.

¹⁵ R.C. 4905.22.

¹⁶ R.C. 4929.05.

¹⁷ See Application for Rehearing at 7.

¹⁸ Opinion and Order at 46-47.

¹⁹ See, e.g., O.A.C. 4901-1-30.

²⁰ See Application for Rehearing at 8.

²¹ See *id.*

Duke will not forego any revenue as a result of the PUCO's consumer protection modification of the Settlement. As OCC Witness Adkins explained in his testimony, "Duke can file a base rate case any time it wants, at which point any prudent and used and useful [capital] investments on [the] date certain would be included in the rates that customers pay."²²

Further, Duke Energy sole focus on the portion of the Opinion and Order dealing with the *second* part of the three-part test that the PUCO uses to evaluate settlements (whether the settlement is in the public interest) is misplaced and too restrictive.²³ That is because the settlement test has *three* separate and distinct parts under which the PUCO evaluates settlements.²⁴ And it is under the *third part* of the three-part test (whether the Settlement violates any important regulatory practices or principles) that the PUCO modified the Settlement to protect consumers.²⁵ The Opinion and Order is not internally inconsistent at all.

The PUCO was perfectly within its authority to modify the Settlement to protect consumers.²⁶ Its modification was neither unjust nor unreasonable. Duke Energy's application for rehearing should be denied.

²² Direct Testimony of Kerry J. Adkins (OCC Ex. 1) at 28.

²³ *See id.* OCC does not concede that the Settlement is in the public interest.

²⁴ *See, e.g.,* Opinion and Order at 21.

²⁵ *Id.* at 46-47.

²⁶ *See, e.g.,* O.A.C. 4901-1-30.

III. CONCLUSION

As Ohioans are fighting every day to overcome the hardship of the coronavirus pandemic, one of the last things they need is rate shock in their utility bills. Consistent with OCC's recommendations, the PUCO modified the Settlement to protect consumers from rate shock and uphold the important regulatory principle of gradualism. OCC recommended additional consumer protections that would have reduced charges on consumers even more.

In modifying the Settlement, the PUCO acted justly, reasonably, and within the law. Duke Energy's application for rehearing should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic transmission, this 1st day of June 2021.

/s/ William J. Michael
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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 Application for Rehearing by Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of Michael, William J.