

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the)	
Reconciliation Rider of Duke Energy)	Case No. 20-167-EL-RDR
Ohio, Inc.)	

**REPLY BRIEF
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

In 2019, Duke charged \$24,635,143.47 to its Ohio consumers through the Price Stabilization Rider for unnecessary costs incurred to run two 1950s-era, coal-fired power plants (the OVEC plants), one of which is located in Indiana, that don't even serve Ohio consumers.¹ Duke has failed to satisfy its burden of demonstrating that these charges were prudent or in the best interest of consumers. The PUCO should disallow Duke's recovery of the entire \$24.6 million charged to consumers in 2019.

Duke has the burden of demonstrating that charges to consumers under the Price Stabilization Rider (“PSR”) were just, reasonable, and prudently incurred. Duke also has the burden of demonstrating its actions (or inactions) were in the best interests of consumers. Duke failed.

Instead of satisfying that burden, Duke mischaracterizes the issues and OCC's position. The PUCO should not be persuaded by Duke's arguments. Duke, and the PUCO Staff, muddy the issues by accusing OCC of trying to relitigate the PSR.² But that is simply not true. Duke claims that it should be allowed to charge consumers \$24.6 million

¹ OCC Ex. 2 (Glick Direct) at 14.

² Duke Brief at 3; Staff Brief at 1-2.

because “the Auditor confirmed . . . [Duke’s] processes, procedures, and oversight were ‘mostly adequate and consistent with good utility practices.’”³ However, “mostly adequate” does not mean prudent or the PSR charges are just and reasonable.

While the intended purpose of the PSR is to provide a purported financial “hedge” against fluctuating prices in the wholesale power market in order to stabilize consumer rates, former PUCO Chairman Haque warned that the PSR “should not be perceived as a blank check, and consumers should not be treated like a trust account.”⁴ Thus, Duke cannot simply charge Ohio consumers \$24.6 million for the imprudent operations of the OVEC plants. For the reasons set forth below, and in OCC’s Initial Brief, the PUCO should disallow Duke’s recovery of all charges to consumers under the PSR in 2019.

II. ARGUMENT

A. **Contrary to Duke’s and the PUCO Staff’s claims, OCC’s consumer protection recommendations are not an improper attempt to relitigate the PUCO’s approval of the PSR.**

The substance of OCC’s evidence that Duke’s above market costs for the operation of the OVEC plants were imprudent and not in the best interest of consumers was not refuted. The PUCO Staff and Duke claim (wrongly) that OCC’s arguments are nothing more than an attempt to relitigate the PUCO’s previous approval of the PSR.⁵ Duke claims that OCC’s “arguments can generally be boiled down to two issues: (1) [its] opposition to the approval and population of Rider PSR by the Commission, and (2)

³ *Id.* at 2.

⁴ *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Purchase Power Agreement*, PUCO Case 14-1693-EL-RDR, Opinion and Order, Concurring Opinion of Chairman Haque at p. 5 (March 31, 2016).

⁵ Duke Brief at 3; Staff Brief at 1-2.

hindsight arguments related to unit commitment decisions made during the Audit period.”⁶ Duke’s arguments should be rejected.

The testimony of OCC witnesses Ms. Glick and Mr. Haugh was not presented to relitigate the PSR or have the PUCO reject the PSR as a cost collection mechanism. Rather, Ms. Glick’s and Mr. Haugh’s testimony demonstrates that the charges to consumers through the PSR in 2019 were imprudently incurred by Duke and not in the best interest of consumers. Thus, the PSR charges to consumers are not just or reasonable and should be disallowed in their entirety. Duke and the PUCO Staff wholly deny the distinction and misrepresent OCC’s position. It is perfectly legitimate for OCC to argue that Duke should not be allowed to collect anything under the PSR from consumers for 2019 based on the imprudent operation of OVEC.

Moreover, to determine whether Duke’s charges to consumers through the PSR were prudent, the PUCO must look to evidence that provides context for Duke’s actions or inactions in 2019. The PUCO cannot properly evaluate Duke’s operation of the OVEC plants in 2019 in a vacuum. Contrary to Duke’s claims, OCC’s evidence is not improper hindsight nor is it an attempt to relitigate the PSR.

OCC witness Mr. Haugh explained that the PUCO initially approved the PSR as a placeholder rider with a zero balance (meaning there were no charges to consumers at the time).⁷ On March 31, 2017, Duke filed an application to begin collecting costs through

⁶ *Id.*

⁷ OCC Ex. 1 (Haugh Direct) at 5.

the PSR. On June 1, 2017, Duke filed its ESP IV case.⁸ With an Opinion and Order dated December 19, 2018, the PUCO approved a modified electric security plan and PSR.⁹

Under the PSR, Duke sells its share of OVEC's energy and capacity into the PJM Interconnection, LLC ("PJM") market.¹⁰ Based on the price received in the market, Duke either credits or charges consumers for the difference between Duke's share of the cost OVEC incurs for running plants versus Duke's share of the revenues from the plants. The revenues from the plants include revenue that OVEC receives from participating in the PJM energy, capacity, and ancillary services markets.¹¹

At the time Duke sought approval of the PSR, Duke claimed the rider would benefit consumers by acting as a hedge against volatility in PJM prices.¹² But as OCC witness Ms. Glick testified, during the five years that the subsidy arrangement (including the PSR) has been in place, there has never been an annual credit to consumers.¹³ That is not a challenge to the PUCO's decision to approve the Rider. It is a true account of the PSR's history, and evidence of what Duke knew (or should have known) when operating the OVEC plants in 2019.

OCC witness Mr. Haugh explained that OVEC's cost to produce electricity in 2019 was \$57.04/MWh.¹⁴ The 2019 PJM market price for energy and capacity, however,

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 6.

¹¹ *Id.*

¹² OCC Ex. 1 (Haugh Direct) at 9.

¹³ OCC Ex. 2 (Glick Direct) at 17

¹⁴ OCC Ex. 1 (Haugh Direct) at 9.

was only \$31.39/MWh.¹⁵ Duke does not dispute this. The way Duke and OVEC operated the plants in 2019, with a must-run commitment status, was neither reasonable nor prudent for Duke's consumers. The electricity produced by the OVEC plants cost \$237 million above the market price for electricity.¹⁶ Duke's consumers were charged \$24.6 million in above-market electricity costs in 2019 under Duke's Rider PSR. According to Mr. Haugh:

[i]t is imprudent for an electric power plant to run and consistently pass those losses on to its owners. As an owner, Duke lacks adequate incentives to avoid the above- market costs (losses) it is charged by OVEC because Duke is allowed to just pass those costs on to its customers (courtesy of the PUCO). In this sense, Duke has no skin in the game. Adequate incentives are lacking to keep costs down or to operate these OVEC plants efficiently.¹⁷

The PUCO should adopt OCC's recommendations and deny Duke's charges to consumers for \$24.6 million in above-market energy charges from imprudently operating the OVEC plants. The PUCO should not issue Duke a "blank check" to charge consumers unnecessary and avoidable costs for running the OVEC plants.

B. Duke witness Mr. Swez's testimony does not support charging consumers \$24.6 million for Duke's imprudent operation of the OVEC plants in 2019.

Duke admits that for "the 2019 Audit period, OVEC was committed as Must-run commitment status offer for available units except for Clifty Creek Unit 6, during ozone season."¹⁸ But according to Duke, the Auditor determined "this commitment strategy was reasonable and prudent given the nature of the units in question and the information

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 10.

¹⁸ Duke Brief at 23-24.

available at the time.”¹⁹ Duke then claims that “the economic benefit of a must-run commitment strategy was in fact realized during the Audit period.”²⁰ Duke’s argument is based on the testimony of witness John Swez that the unit’s “total interaction in the PJM energy market caused a positive margin of approximately \$33 million in 2019”²¹ Duke’s statements are misleading and should be rejected.

To begin, the Auditor did not find Duke’s must-run commitment strategy in 2019 to be prudent as Duke suggests. The Auditor stated “[the Auditor] believes [Duke’s] effort to modify OVEC’s must-run strategy as noted in Section 5.3.4 is prudent and has no recommendations except to continue doing so.”²² Section 5.3.4 of the Audit Report explains how Duke, *in 2020*, started the practice of informing OVEC when its units are expected to be out of the money and could be decommitted.²³ This practice is prudent, but Duke did not start doing this until *after* the 2019 Audit period. And the Auditor never bothered to ask if Duke considered such a strategy in 2019, even though the Auditor knew Duke was doing this in 2020.²⁴ There is no evidence that Duke and the OVEC Operating Committee ever had such a conversation in 2019, when they met only a total of three times.²⁵

¹⁹ *Id.* at 24.

²⁰ *Id.* at 26.

²¹ *Id.*

²² Staff Exhibit 1 (Audit Report) at p. 54.

²³ *Id.* at 44.

²⁴ Hearing Transcript, Vol. III at 54.

²⁵ Hearing Transcript, Vol. III at 280-81.

Duke relies on the testimony of Mr. Swez that Duke’s “must-run commitment strategy resulted in approximately \$33 million of net benefits to all customers . . .”²⁶ However, Mr. Swez’s analysis focused on variable costs and revenues and ignored fixed costs.²⁷ Mr. Swez prepared daily profit and loss reports with respect to what the anticipated revenue would be.²⁸ The three factors that went into these reports were revenue, hourly dispatch, and variable costs.²⁹ Mr. Swez explained that this was “our best indication of the forecasted margin of the unit based on, again, the forecasted forward market prices for energy in PJM.”³⁰ However, according to Mr. Swez, his analysis did not include fixed costs.³¹ When fixed costs are added to the equation, Mr. Swez admitted “there was a \$2 million average per month [loss] that was passed along to Duke Energy customers in 2019.”³² For reasons never explained, Duke did not incorporate fixed costs into its forecasting. If it had, Duke would have known of the tremendous losses that would be passed to its customers. This is not prudent action on the part of Duke, and it is not in the best interest of consumers.

Duke further relies on Mr. Swez’s testimony to support its argument that “excessive cycling [on and off] during the Audit period *could* have resulted in worse customer values and decreased, not increased returns.”³³ However, even assuming

²⁶ *Id.* at 26-27.

²⁷ Hearing Transcript, Vol. III at 250-251.

²⁸ *Id.* at 243:24.

²⁹ *Id.* at 243-244.

³⁰ *Id.* at 244.

³¹ *Id.* at 247-249.

³² *Id.* at 249:1-9; *see also Id.* at 250-251 (“The forecasts that my group does, called the daily profit and loss report, does not include fixed costs which are a component that you are using to get to a \$2 million loss.”).

³³ Duke Brief at 26 (emphasis added).

arguendo that is true, Duke presented no evidence that it discussed, calculated, analyzed, and evaluated the benefits or drawbacks, of shifting away from its must-run commitment status during the Audit period. That also was imprudent. Likewise, the Auditor never requested data to prove or disprove this. On the other hand, OCC witness Mr. Haugh testified what Duke should have done in 2019 if it had acted prudently. Mr. Haugh testified that:

[t]he plant operator should do a daily analysis of the costs and expected revenues from participating in the Day-Ahead Energy Market. The analysis should cover not only that day, but the next several days ahead for units that are not easily turned on and off. If the analysis shows that the expected revenue will cover the plant's variable operating cost, then the operator can commit the plant to the Day-Ahead Energy Market. If the plant's variable operating costs, plus shut-down and start-up costs, are projected to exceed expected revenues for a few days or longer, then the operator should either designate the plant as economic or shut down the plant until prices recover.³⁴

Duke asserts that “any determination that the costs and revenues included in the PSR Rider are unreasonable shall be made in light of the facts and circumstances known at the time such costs were committed and market revenues were received.”³⁵ Duke then claims its must-run commitment status was reasonable because the revenue margins were “very marginal” when the must-run commitment was put in place and continued for all of 2019.³⁶ But the only way Duke can make this statement is by overlooking fixed costs. While the Auditor allowed Duke to claim blind ignorance, the PUCO must demand more. Duke's operations in 2019 with respect to the OVEC plants were unreasonable, and not

³⁴ OCC Ex. 1 (Haugh Direct) at 20.

³⁵ Duke Brief at 16, note 85.

³⁶ *Id.* at 25.

in the best interest of consumers. The PUCO should disallow the entire \$24,635,143.47 Duke charged to consumers through the PSR in 2019.

III. CONCLUSION

The purported purpose of Duke's Price Stabilization Rider was to protect customers "from price volatility in the wholesale market."³⁷ But the evidence demonstrates that, due to Duke's imprudent operation of the OVEC plants, the PSR did nothing but increase costs to consumers by \$24.6 million in 2019. While the Auditor determined that Duke's actions with respect to the OVEC plants were "mostly adequate," that is not enough to warrant the \$24.6 million in charges to consumers under the PSR. Duke failed to demonstrate that it acted prudently and in the best interests of consumers in 2019. For these reasons, and the reasons set forth in OCC's testimony and Initial Brief, the PUCO should disallow the entirety of charges to consumers through Duke's PSR in 2019.

³⁷ *Id.* at p. 7.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply Brief was served on the persons stated below via electric transmission this 19th day of August 2022.

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