

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF DUKE
ENERGY OHIO, INC.'S DISTRIBUTION
STORM RIDER.

CASE NO. 23-126-EL-RDR

IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC. FOR
APPROVAL OF TARIFF AMENDMENTS.

CASE NO. 23-281-EL-ATA

ENTRY ON REHEARING

Entered in the Journal on November 30, 2023

I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by the Ohio Consumers' Counsel.

II. PROCEDURAL BACKGROUND

{¶ 2} Duke Energy Ohio, Inc. (Duke or the Company) is an electric distribution utility (EDU) as defined by R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an EDU shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} On December 19, 2018, the Commission approved a stipulation and recommendation filed by Duke and other parties that, among other things, included an ESP for the period June 1, 2018, through May 31, 2024. *In re Duke Energy Ohio, Inc.*, Case No. 17-1263-EL-SSO, et al., Opinion and Order (Dec. 19, 2018). In the Opinion and Order, the Commission continued Duke's Distribution Storm Rider (Rider DSR). In accordance with

the stipulation, Rider DSR tracks annual incremental major storm expenses, as compared to the amount recovered in base rates. Duke is required to file an annual adjustment to recover or refund the accumulated balance of the deferred storm cost deferral as of December 31, 2018.

{¶ 5} On March 29, 2023, Duke filed an application regarding 2022 storm-related restoration costs. Duke explains that Rider DSR is a nonbypassable rider that is designed to either refund or collect amounts as compared to that which is recovered in base rates. Duke states that \$4.3 million is included in base rates for Rider DSR and that the Company had \$18,384,481 in Rider DSR expenses in 2022. Thus, Duke asserts that it seeks to charge customers \$13,915,618, on a fixed monthly basis of \$0.84 per residential customer. If approved, such rates will be effective during the first billing cycle of November 2023.

{¶ 6} Staff filed its review and recommendation (Staff Report) on September 7, 2023. Staff explains that it investigated whether Duke's application was just and reasonable and whether the application complied with sound ratemaking principles. Staff recommends approval of the application with adjustments to the revenue requirement, totaling \$84,066.02. Further, after its review, Staff recommends a revenue requirement of \$13,831,788.34.

{¶ 7} On September 8, 2023, the attorney examiner issued an Entry that granted intervention to the Ohio Consumers' Counsel (OCC) and established deadlines for submitting any comments and reply comments.

{¶ 8} Duke filed timely comments on September 15, 2023. OCC submitted reply comments on September 22, 2023. Thereafter, on September 26, 2023, Staff submitted an updated review and recommendation. Also on September 26, 2023, Duke filed surreply comments and an accompanying motion for leave to file the comments.

{¶ 9} The Commission issued a Finding and Order on October 4, 2023, that approved Duke's application, subject to Staff's recommendations.

{¶ 10} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

{¶ 11} On November 3, 2023, OCC filed an application for rehearing with respect to the Commission's Finding and Order.

{¶ 12} On November 13, 2023, Duke filed a memorandum contra the application for rehearing.

III. DISCUSSION

{¶ 13} In its application for rehearing, OCC alleges two points of error. In the first assignment of error, OCC contends the Commission's order violated R.C. 4903.09 by relying on information outside of the record in the case. OCC states this further violates the Supreme Court of Ohio's holding in *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d. 87, 706 N.E.2d 1255 (*Tongren*), as the Commission relied on information that was not publicly available. As explained by OCC, Staff's original recommendation requested an approximately \$80,000 disallowance for a November 2022 storm, as that storm was not reported by Duke in its Rule 10 reporting form that documents all major storms. OCC notes that, thereafter, Staff reversed its request in its revised recommendation and approved of recovery for the November 2022 storm. OCC states the revised recommendation relied on additional information from Duke that was specifically explained. The Commission then relied on Staff's recommendation in the Finding and Order. OCC contends this situation is analogous to the fact pattern in *Tongren*, where the Commission relied on Staff's recommendation, which was the result of private discussions between Staff and the utility.

There, the Supreme Court reversed the Commission's approval, finding that the Commission's decision was not based on the record. OCC thus maintains that the Commission should reverse its approval of recovery associated with the November 2022 storm as it was not based on evidence in the record.

{¶ 14} In response, Duke asserts that OCC's first assignment of error is without merit. Initially, Duke avers that the Commission's order did not solely rely on Staff's recommendation, but also explicitly considered Duke's initial comments. Further, Duke states that the revised Staff recommendation also explicitly considers Duke's initial comments. As explained by Duke, the revised Staff recommendation says Staff "agrees with Duke" that the November 2022 storm is eligible for recovery and that Staff is not considering outside evidence but rather reconsidered its decision in light of Duke's explanatory comments. Duke also asserts it is inappropriate to compare the facts in this case to *Tongren*. In *Tongren*, Duke notes that there was no Staff report or recommendation submitted to the record, whereas, here, Staff submitted an initial recommendation and a revised recommendation.

{¶ 15} The Commission determines that OCC's first assignment of error should be denied. OCC's allegations that the revised Staff recommendation was the result of findings outside of the record is unfounded. Largely at issue in this case was the recovery of nearly \$80,000 associated with a November 2022 storm. Initially, Staff recommended that recovery be disallowed because the storm was not included in the Rule 10 Report. Duke's initial comments explained that it is possible to have a major storm event subject to recovery that would not appear in the Rule 10 report, and that the November 2022 storm was such an event. Further, Duke explained that the storm was properly recorded and included in the Rule 10 Report, albeit under the "transmission outages" section as opposed to the "major event outages" section. In response, Staff submitted a revised recommendation. In that recommendation, Staff acknowledged that it typically relies on the list of major event outages in the Rule 10 Report, but that a major storm may be eligible for recovery and not

appear on that list. Staff asserted that, upon further review, the November 2022 storm qualifies for recovery. In our decision, the Commission recognized the discussions by Staff and Duke that recoverable storms may not appear on the Rule 10 Report listing major event outages. Finding and Order at ¶ 12. Despite OCC's contentions, Staff's path to acceptance of recovery for the storm is not complicated and occurred openly. Accordingly, the Commission's approval of recovery was supported by the record and OCC's application for rehearing on this issue should be denied.

{¶ 16} OCC's second assignment of error maintains that the Commission improperly allowed Duke to file surreply comments. OCC explains that the Commission granted Duke's motion for leave to file the comments "for good cause" but did not sufficiently explain its rationale. According to OCC, this violates R.C. 4903.09. OCC submits this improperly allowed Duke to circumvent the rules.

{¶ 17} Duke asks that OCC's additional assignment of error be denied. First, Duke states good cause existed for the Commission to allow surreply comments. Duke explains that OCC only filed reply comments and Duke otherwise had no opportunity to respond to OCC's request for disallowances. Second, Duke avers that OCC has not demonstrated how it was harmed by the submission of the comments or shown that the Commission necessarily relied on the comments in its order. Finally, according to Duke, the Commission has broad authority to manage its docket as it sees fit and to obtain information necessary to assist in making its decisions. For these reasons, Duke contends OCC's application for rehearing should be denied.

{¶ 18} The Commission finds that OCC's second assignment of error should be denied as moot. As discussed, in allowing for the recovery associated with the November 2022 storm, the Commission relied on the initial comments of Duke and Staff's resulting confirmation of qualifiable recovery, found in the revised Staff recommendation. Finding and Order at ¶ 12. Thus, the submission of the surreply comments did not result in material

harm to OCC. The Commission emphasizes, however, that we, and assigned attorney examiners, have broad discretion to oversee our own dockets, as recognized by the Supreme Court of Ohio. *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 19, 734 N.E.2d 775 (2000). The Commission routinely grants motions for leave to file surreply comments, upon good cause shown, to ensure a complete discussion of the issues raised for the Commission's consideration. *See, e.g., In re Duke Energy Ohio, Inc.*, Case No. 19-622-EL-RDR, Finding and Order (Aug. 9, 2023); *In re Duke Energy Ohio, Inc.*, Case No. 22-43-GE-WVR, Finding and Order (Mar. 23, 2022). Furthermore, we confirm that good cause existed to grant Duke leave to file surreply comments. OCC's reply comments largely summarize Staff's initial review and ask that those recommendations be adopted. OCC's arguments should have been filed as initial comments, where Duke would have had an opportunity to respond. Instead, OCC submitted its comments regarding the application and Staff's review as reply comments, and then later claims that Duke is attempting to circumvent proper procedure. Accordingly, the Commission found it appropriate to allow Duke to file surreply comments.

IV. ORDER

{¶ 19} It is, therefore,

{¶ 20} ORDERED, That OCC's application for rehearing be denied. It is, further,

{¶ 21} ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

COMMISSIONERS:

Approving:

Jenifer French, Chair
Daniel R. Conway
Lawrence K. Friedeman
Dennis P. Deters
John D. Williams

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Case No(s). 23-0126-EL-RDR, 23-0281-EL-ATA

Summary: Entry on Rehearing that the Commission denies the application for rehearing filed by the Ohio Consumers' Counsel electronically filed by Ms. Donielle M. Hunter on behalf of Public Utilities Commission of Ohio.