

IN THE SUPREME COURT OF OHIO

In the Matter of the Review of Duke	)	Case No. 2025-0620
Energy Ohio, Inc.'s Distribution Capital	)	
Investment Rider.	)	On Appeal from the Public Utilities
	)	Commission of Ohio
	)	
	)	Pub. Util. Comm. Case No. 23-549-
	)	EL-RDR

MERIT BRIEF OF APPELLANT,
OFFICE OF THE OHIO CONSUMERS' COUNSEL

Maureen R. Willis
(Reg. No. 0020847)
Ohio Consumers' Counsel

David A. Yost
(Reg. No. 0056290)
Attorney General of Ohio

John Finnigan
(Reg. No. 0018689)
Counsel of Record
Assistant Consumers' Counsel

John H. Jones
(Reg. No. 0051913)
Section Chief, Public Utilities Section

Thomas E. Zuehlke
(Reg. No. 0104876)
Assistant Consumers' Counsel

Thomas G. Lindgren
(Reg. No. 0039210)

Ambrosia E. Wilson
(Reg. No. 0096598)

Office of the Ohio Consumers' Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone [Finnigan]: (614) 466-9585
Telephone [Zuehlke]: (614) 466-9569
john.finnigan@occ.ohio.gov
thomas.zuehlke@occ.ohio.gov

Assistant Attorneys General
Public Utilities Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
Telephone: (614) 466-4397
john.jones@ohioattorneygeneral.gov
thomas.lindgren@ohioago.gov
ambrosia.wilson@ohioago.gov

*Attorneys for Appellant,
Office of the Ohio Consumers' Counsel*

*Attorneys for Appellee,
Public Utilities Commission of Ohio*

August 4, 2025

Rocco O. D'Ascenzo
(Reg. No. 0077651)
Deputy General Counsel

Larisa M. Vaysman

(Reg. No. 0090290)
Associate General Counsel

Sheena McGee Leach
(Reg. No. 0103269)
Staff Attorney

Duke Energy Business Services LLC
139 East Fourth Street 1303-Main
Cincinnati, Ohio 45202
Telephone: (513) 287-4320
rocco.dascenzo@duke-energy.com
larisa.vaysman@duke-energy.com
sheena.mcgee@duke-energy.com

and

Elizabeth M. Brama
(Reg. No. 0101616)
Counsel of Record

Kodi J. Verhalen
(Reg. No. 0099831)

Taft Stettinius & Hollister LLP
2200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Phone: (612) 977-8400
ebrama@taftlaw.com
kverhalen@taftlaw.com

and

Ina Avalon
(Reg. No. 0093575)

Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, Ohio 44114
iavalon@taftlaw.com

*Attorneys for Intervening Appellee,
Duke Energy Ohio, Inc.*

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I. INTRODUCTION

This case concerns purely legal issues which demand no deference to the Public Utilities Commission of Ohio (“PUCO”). The question before this Court is whether the PUCO violated the law against retroactive ratemaking and the filed-rate doctrine set forth in R.C. 4905.32 (Appx. 68). The PUCO action being appealed concerns a ruling that allowed Duke to charge consumers, through a rider mechanism, for a \$14 million under-collection from its earlier distribution case. The \$14 million charge was caused by Duke’s error related to Accumulated Deferred Incomes Tax (“ADIT”) balances that were overstated in base distribution rates that Duke and other parties agreed to but OCC opposed.

Appellant, Office of the Ohio Consumers’ Counsel (“OCC”) asks this Court to reverse and vacate the PUCO’s Orders. The Court should also issue a remand to the PUCO with specific instructions to remove the extra \$14 million in charges to Duke’s 677,000 electric consumers.

II. STANDARD OF REVIEW

R.C. 4903.13 (Appx. 67) governs this Court’s review of PUCO orders. It provides in pertinent part, “[a] final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable * * *.” The Court has interpreted this standard as turning upon whether the issue presents a question of fact or a question of law.

As to questions of fact, the Court has held that it will not reverse the PUCO unless the PUCO’s findings are manifestly against the weight of the evidence or are so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 415 (1975), appeal after remand, 46 Ohio St.2d 105 (1976).

By contrast, this Court has complete, independent power of review on questions of law. *Office of Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110 (1979). Accordingly, legal issues are subject to a more intensive examination by this Court than are factual questions. *Id.* The Court will use a *de novo* review of legal issues and make an independent interpretation of the issues. *Id.* No deference is given to the PUCO's rulings on questions of law. *TWISM Ents., L.L.C. v. State Bd. of Registration for Prof'l Eng'rs & Surveyors*, 2022-Ohio-4677, ¶ 3.

The Court should use a *de novo* standard of review for each Proposition of Law, with no deference to the PUCO. Proposition of Law No. 1 contends that the PUCO's Orders violate the law against retroactive ratemaking. The Court must apply R.C. 4905.32 (Appx. 68) to resolve this issue. Proposition of Law No. 2 claims that the PUCO's Orders violate the filed-rate doctrine. The Court must, once again, apply R.C. 4905.32 (Appx. 68) to decide this issue.

With this standard of review in mind, Appellant asks the Court to correct the errors in the PUCO's decisions that have harmed Duke's consumers.

III. STATEMENT OF FACTS

The case below concerns the PUCO's audit of Duke's Distribution Capital Investment Rider ("Rider DCI"). (R. 45, ¶ 6) (Appx. 7). The PUCO originally approved Rider DCI in Duke's third electric security plan case in 2015. *In re Duke ESP III*, Pub. Util. Comm. No. 14-841-EL-SSO, Opinion and Order, 2015 Ohio PUC LEXIS 299 at *177 (Apr. 2, 2015). The PUCO approved the continuation of Rider DCI in 2018 when it ruled on Duke's fourth electric security plan. *In re Duke ESP IV*, Pub. Util. Comm. No. 17-1263-EL-SSO, Opinion and Order, 2018 Ohio PUC LEXIS 1268 at *65 (Dec. 19, 2018). The ESP IV version of Rider DCI was in effect for the present case.

Rider DCI charges consumers for Duke’s capital spending for distribution equipment. *In re Duke ESP IV* at *67 (Dec. 19, 2018). The PUCO has defined Rider DCI as follows: “The Rider DCI revenue requirement shall be limited to (i) a return on distribution rate base using the weighted average cost of capital approved in the most recent base electric distribution rate case, grossed up for prevailing tax rates; (ii) depreciation expense; and (iii) property taxes on the incremental rate base (*i.e.*, net plant less Accumulated Deferred Income Taxes (ADIT)) *accumulated since the date certain in the Rate Case*, grossed up for commercial activity taxes.” *Id.* (Emphasis added.)

Rider DCI is “reviewed annually for accounting accuracy, prudence, and compliance with the Commission’s Order.” (R. 2, ¶ 4). The PUCO hired Blue Ridge Consulting Services, Inc. (“Blue Ridge”) to audit Duke’s Rider DCI charges. (R. 3, ¶ 1). The audit covered July 1, 2022 through June 30, 2023. (R. 3, ¶ 6).

The Blue Ridge audit reported that Duke made a \$14 million math error in the revenue requirement that was approved by the PUCO in Duke’s most recent rate case to increase electric distribution charges. (R. 7 at 14) (Supp. Vol. I at 248). In the rate case, the PUCO approved a settlement signed by Duke, the PUCO Staff, and other parties for a \$22.6 million rate hike. *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Pub. Util. Comm. No. 21-887-EL-AIR, et al., Opinion and Order, 2022 Ohio PUC LEXIS 1248 at *24 (Dec. 14, 2022). Three parties to the rate case agreed not to oppose settlement. *Id.* at *4. OCC opposed the rate case settlement. *Id.* Except for Duke and the PUCO Staff, no party signing (or agreeing not to oppose) the rate case settlement are parties in the Rider DCI audit case at issue in this appeal.

Blue Ridge determined that the error arose from Duke's incorrect calculation of the balance of ADIT, which is a rate base account. *Id.* "The purpose of reflecting deferred income taxes as a component of rate base is to recognize the 'free loan' utilities effectively receive from the government as a result of book-tax timing differences." (R. 7 at 62) (Supp. Vol. II at 296). Blue Ridge found that Duke "inadvertently overstated the ADIT balance in [the last base rate case]." *Id.* at 14 (Supp. Vol. I at 248). "Assuming the omission had not occurred, and *all things held equal*, the impact [in the base rate case] would have been an increase to rate base by \$170,535,198 and the revenue requirement by \$14,088,731." *Id.* at 65-66 (Supp. Vol. II at 299-300). (Emphasis in original.)

More was learned about the Auditor's conclusion through a public records request made by OCC to the PUCO. Prior to finalizing the audit report, Blue Ridge shared a draft version of its report ("DRAFT Submitted to Company on December 11, 2023") with Duke and the PUCO Staff, but not with OCC. (R. Trans. Hearing Transcript at Vol. I, pp. 61:4 - 62:10; OCC Ex. 2, DEO23549ELRDR_001431) (Supp. Vol. I at 1), The draft audit report contained the following discussion and recommendation

Recommendation #8: In response to Data Request BR DR-13-005, the Company explained that it inadvertently overstated the ADIT balance in Case No. 21-887-EL-AIR by \$189 million, of which \$170.5 million was related to distribution. The Company further explained that since the quarterly Rider DCI filings do not flow through the error from the last base rate case, the date certain balance in Case No. 22-911-EL-RDR should be adjusted by the same amount. The annual revenue requirement impact would be "\$14,088,731 in each quarterly filing for the audit period.' Given the magnitude of the adjustment if the Company's proposal were adopted, *Blue Ridge found that Duke did not meet its burden of proof. Blue Ridge recommends the Company present detailed testimony and accompanying support (including arguments for why the proposed adjustment is not retroactive ratemaking) in a future filing.*

(R. EX. OCC Ex. 2 at Bates Nos. DEO23549ELRDR_001443 & 001494) (Supp. Vol. I at 15, 65). (Emphasis added.)

Duke and PUCO Staff met privately with Blue Ridge to discuss changes to the December 11, 2023 draft audit report. OCC was not invited to attend this meeting. (R. Trans. Hearing Transcript at Vol. I, p. 65:1-25) (Supp. Vol. I at 115). In this meeting, Duke discussed its concerns with the auditor's recommendation that Duke should be required to present arguments why the \$14 million adjustment is not retroactive ratemaking. *Id.*

Following the discussion, the audit was extended by a month or so. (R. 6). On January 16, 2024, Duke was given another draft of the audit report. (R. EX. OCC Ex. 2 at Bates Nos. DEO23549ELRDR_002176-002292) (Supp. Vol. I at 116-233). This version of the audit report was not shared with OCC either. Duke and the PUCO Staff met to discuss the January 16 draft audit report. (R. Trans. Hearing Transcript at Vol. I, p. 70:4-25) (Supp. Vol. I at 234). OCC was not invited to that meeting either. *Id.* That version of the draft report shared and discussed with Duke showed a different Recommendation #8, with proposed red line editing.

Recommendation #8: In response to Data Request BR DR-13-005, the Company explained that it inadvertently overstated the ADIT balance in Case No. 21-887-EL-AIR by \$189 million, of which \$170.5 million was related to distribution. The Company further explained that since the quarterly Rider DCI filings do not flow through the error from the last base rate case, the date certain balance in Case No. 22-911-EL-RDR should be adjusted by the same amount. The annual revenue requirement impact would be "\$14,088,731 in each quarterly filing for the audit period.' Given the magnitude of the adjustment if the Company's proposal were adopted and considering the fact that the issue was identified in the audit process Blue Ridge was not able to conclude the legitimacy of the requested adjustment. found that Duke did not meet its burden of proof. *Blue Ridge recommends the Company present detailed testimony and accompanying support (including arguments for why the proposed adjustment is not retroactive ratemaking) in a future filing to be adjudicated then.*

(R. EX. OCC Ex. 2 at Bates Nos. DEO23549ELRDR_002189) (Supp. Vol. I at 129). (Emphasis added.)

The Auditor's recommendation was subsequently softened and the report publicly filed. In the publicly filed version of the audit report, dated January 16, 2024, Duke was relieved of any requirement to provide testimony and support for its adjustment. Gone too was the conclusion that Duke had failed to meet its burden of proof or explain the legitimacy of the adjustment. And there was no reference to "retroactive ratemaking." Here is what was recommended by the Auditor:

Recommendation #8: In response to Data Request BR-DR-13-005, the Company explained that it inadvertently overstated the ADIT balance in Case No. 21-887-EL-AIR by \$189 million, of which \$170.5 million was related to distribution. The Company further explained that since the quarterly Rider DCI filings do not reproduce the error from the last base rate case, the date certain balance in Case No. 22-911-EL-RDR should be adjusted by the same amount. The adjustment as proposed by the Company would increase the quarterly revenue requirement by \$14,088,731 in each quarterly filing, which when annualized would result in an under-collection for the 2023 period of \$14,088,731. Due to the size of the adjustment, the Company proposed collection over a one-year period of time instead of the typical one quarter period. While Blue Ridge confirmed that an inadvertent but material omission occurred in the last base case, we do not recommend an adjustment to continue the error in the Rider DCR.

(R. 7 at 14) (Supp. Vol. I at 248).

Blue Ridge did recommend that the PUCO should reject Duke's use of Rider DCI to retroactively correct Duke's math error from the rate case. *Id.* The auditor explained that charging consumers to correct an "error" would establish bad precedent especially when the onus is on the utility to present accurate financial data:

Recommending a modification to the Rider DCI revenue requirements to include an 'error' would set a harmful precedent for the treatment of material errors and omissions in the future. In

general, the onus for preparing and presenting accurate financial schedules in a base rate case rests with the utility. It can be no other way given the asymmetric access it has to its own financial data and systems. * * * The idea that a utility could make a material error or omission in a base rate application but through an alternative rate mechanism make itself whole, without bearing any responsibility, does not seem reasonable.

(R. 7 at 66) (Supp. Vol. II at 300).

Duke and the PUCO Staff subsequently agreed to settle the case. (R. 26). OCC opposed the settlement. (R. 26). The settlement included some of Blue Ridge's recommendations to reduce the Rider DCI revenue requirement to be collected from consumers. (R. 26 at 5). The settlement did not include, however, Blue Ridge's recommendation to reject Duke's \$14 million charge. *Id.* Instead the settlement allowed the DCI rates to adjust Rider DCI for the first quarterly filing after the PUCO's approval of the settlement to collect the \$14 million under-recovery from consumers. (R. 26 at 5-6).

Devin Mackey testified in support of the settlement for PUCO Staff. (R. 33) (Supp. Vol. II at 351). He made a generalized claim that the settlement does not violate any important regulatory principle or practice. *Id.* at 5 (Supp. Vol. II at 355). He made no mention of the \$14 million charge. *Id.* His testimony is also silent as to why PUCO Staff rejected Blue Ridge's recommendation to disallow the \$14 million charge to consumers. *Id.* Jefferson "Jay" P. Brown testified in support of the settlement for Duke. (R. 30). Mr. Brown claimed that the settlement properly rejected Blue Ridge's recommendation to disallow the \$14 million charge. *Id.*

OCC presented the testimony of David Dittmore opposing the settlement. (R. 34) (Supp. Vol. II at 358). Mr. Dittmore agreed with Blue Ridge's conclusion that Duke was using Rider DCI as a backstop to charge consumers higher rates due to Duke's rate case error. *Id.* at 24 (Supp. Vol. II at 383). He testified that "[t]he independent auditor's characterization of Duke's

proposal as an attempt to ‘correct’ a base rate case filing is accurate. Duke is simply attempting to do this through its DCI rider rather than through filing a new base rate case to correct the error.” *Id.* at 25 (Supp. Vol. II at 384).

Mr. Dittmore further explained that “the Settlement [in the present case] is inconsistent with the PUCO’s Order in the base rate case because the Settlement would allow Duke to use Rider DCI to collect \$14,088,531 of revenue shortfall from the base rate case. This would be inconsistent with the terms of the settlement and the PUCO’s Order in the base rate case.” *Id.* at 26 (Supp. Vol. II at 385). He testified that Duke used Rider DCI to remedy the \$14 million under-collection “by continuing to utilize the erroneous ADIT balance” from the base rate case. *Id.* at 27 (Supp. Vol. II at 386).

An evidentiary hearing was held on July 16, 2024. Following post-hearing briefs, the PUCO issued its final order, adopting the Settlement that allowed consumers to be charged for the \$14 million mistake. (R. 45) (Appx. 6).

The PUCO opined that Duke’s behavior was “improper.” (R. 45, ¶ 39) (Appx. 22-23).

The PUCO found that:

[i]n no uncertain terms, Duke should not have raised or discussed a legal matter such as whether the ADIT Adjustment is retroactive ratemaking during that December 13, 2023 meeting or any meeting between Blue Ridge, Duke, and Staff . . . Discussion and resolution of this type of issue clearly should occur only in the context of the litigation portion of this proceeding before the Commission. Duke is a sophisticated utility that appears before us regularly and has participated in countless third-party audits of its riders and should know not to raise a legal issue such as this at a meeting of this type. (R. 45, ¶ 40) (Appx. 24).¹

¹ A similar audit issue, involving PUCO Staff’s improper action (instead of the utility’s) in asking an auditor to change her opinion in a draft audit report, occurred in *In re Review of the Power Purchase Agreement Riders of Ohio Power Co. for 2018 and 2019*, Docket No. 2024-1735 and is under review by this Court.

While recognizing that “a question of due process rights emanates in this situation” it found OCC had opportunities to rebut Duke’s arguments through comments, prefiled testimony, testimony at the hearing, documents admitted at hearing and in post-hearing briefs. (R. 45, ¶ 41) (Appx. 25). Those opportunities, according to the PUCO, cured any prejudice to OCC. *Id.* The PUCO refused to reject the Settlement on those grounds. (R. 45, ¶ 42) (Appx. 25-26). Instead, the PUCO found it would “be against the public interest to reject the Stipulation for that reason alone.” *Id.*

OCC filed an application for rehearing. (R. 46) (Appx. 42). The PUCO issued an Entry denying OCC’s rehearing application. (R. 48) (Appx. 29). OCC timely filed a notice of appeal. (R. 49) (Appx. 1). Consistent with the terms of the PUCO-approved settlement, Duke began collecting its \$14 million beginning with the next quarterly Rider DCI filing following the PUCO’s approval of the settlement. (R. 26 at 5-6).

IV. ARGUMENT

PROPOSITION OF LAW NO. 1: The PUCO violates the law against retroactive ratemaking (R.C. 4905.32) by allowing a utility to retroactively collect additional revenue to make up for the utility’s under-collection from a math error in its base distribution rate case.

There is no question that the \$14 million under-collection resulted from Duke’s math error in the last base rate case. There, Duke incorrectly calculated the ADIT account balance in setting its rate base, (R. 7 at 14) (Supp. Vol. I at 248), reducing its rate base by \$170 million and its revenue requirement by \$14 million. (R. 7 at 65-66) (Supp. Vol. II at 299-300). That Duke rate case resulted in a \$22.6 million settlement, which OCC opposed. *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Pub. Util. Comm. No. 21-887-EL-AIR, et al., Opinion and Order, 2022 Ohio PUC LEXIS 1248 at *24 (Dec. 14, 2022). Whether the settling parties in the rate case would have agreed to an additional

\$14 million rate hike, or would have negotiated different settlement terms, is unknown. As noted above, Duke and the PUCO Staff are the only parties in this case that signed the settlement in the rate case.

Ohio law precluding retroactive ratemaking applies with equal force to utility overcharges as well as utility under-collections. This Court has used this doctrine to bar consumers from obtaining refunds for past utility overcharges. *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957). This Court has also barred utilities from raising rates to compensate for past under-collections. *In re Application of Columbus S. Power Co.*, 2011-Ohio-1788. The Court has found that retroactive ratemaking precludes the balancing of one set of rates against another. *Lucas Co. Comm'rs v. PUC*, 1997-Ohio-112. And the Court has found the doctrine applies to rider charges. *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 2018-Ohio-229.

This Court should conclude, consistent with its well-established precedent, that the PUCO below allowed unlawful retroactive ratemaking when it permitted Duke to use Rider DCI to charge consumers for its \$14 million error from its last base rate case.

The prohibition against retroactive ratemaking addressed by this Court arises under R.C. 4905.32 (Appx. 68). That law provides:

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time. No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

The leading case on retroactive ratemaking dates back almost seventy years ago. That case is *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957). In *Keco*, the Court ruled that the retroactive ratemaking doctrine barred consumers from obtaining refunds for past telephone company overcharges. *Id.* The Court explained that the retroactive ratemaking doctrine arises under R.C. 4905.32, which makes it clear “that a utility has no option but to collect the rates set by the commission and is clearly forbidden to refund any part of the rates so collected.” *Id.* at 257.

This Court further explained the retroactive ratemaking doctrine in *Lucas Co. Comm’rs v. PUC*, 1997-Ohio-112. In *Lucas County*, the Court barred consumers from obtaining refunds from a gas utility’s pilot program that had been discontinued. *Id.* The Court explained that “utility ratemaking by the Public Utilities Commission is prospective only.” *Id.*, ¶ 15. The Court also stated that “were the commission to order either a refund or a credit, the commission would be ordering Columbia Gas to balance a past rate with a different future rate, and would thereby be engaging in retroactive ratemaking prohibited by *Keco*.” *Id.*, ¶ 17.

In yet another case, the Court struck down PUCO-approved rates that were aimed at recouping past losses. *In re Application of Columbus S. Power Co.*, 2011-Ohio-1788. In *Columbus S. Power*, AEP sought to implement a new electric security plan to raise rates by January 2008. *Id.* The PUCO did not issue its order until mid-March. The PUCO’s order included an additional \$63 million in revenue to compensate AEP for the PUCO’s delay in issuing the order. *Id.*, ¶ 10. This Court ruled that “[b]y approving rates that recouped losses due to past regulatory delay, the commission violated this court’s case law on retroactive ratemaking.” *Id.*, ¶ 11.

And in another holding on retroactive rates, the Court has ruled that the retroactive ratemaking doctrine applies to costs that a utility collects through its rate riders. In *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 2018-Ohio-229, this Court ruled that the retroactive ratemaking doctrine prohibits consumer refunds of rates collected by FirstEnergy's alternative energy rider. *Id.*

Duke should not be allowed to make up for its rate case error by charging more to consumers through Rider DCI. Allowing a utility to use a rider to compensate for an under-collection from the prior base rate case would violate the well-established principle that "equity will not permit to be done indirectly what cannot be done directly." *Hollister v. Dillon*, 4 Ohio St. 197, 208 (1854).

The PUCO engaged in retroactive ratemaking by allowing Duke to use Rider DCI to compensate for the \$14 million under-collection due to Duke's math error from the last base rate case. The PUCO's Orders allowed Duke to calculate Rider DCI rates on a retrospective basis, in violation of the principle that "ratemaking power is prospective only." *In re Fuel Adjustment Clauses for Columbus S. Power Co.*, 2014-Ohio-3764, ¶ 28, citing *Ohio Utilities Co. v. Public Utilities Com.*, 58 Ohio St.2d 153, 157-158 (1979). The PUCO's Orders also allowed Duke "to balance a past rate with a different future rate," which is prohibited by *Lucas Co. Comm'rs v. PUC*, 1997-Ohio-112. And the PUCO order allowed Duke to recoup a past loss caused by its error, akin to the past loss disallowed by the Court in *In re Application of Columbus S. Power Co.*, 2011-Ohio-1788.

The Court should reverse the PUCO's Orders because they violate the retroactive ratemaking doctrine and harm consumers. Consumers should not be charged retroactive rates to make up for a \$14 million utility mistake.

PROPOSITION OF LAW NO. 2: The PUCO violates the filed-rate doctrine by allowing a utility to collect charges that are contrary to the terms and conditions of the utility's PUCO-approved tariff.

Like the retroactive ratemaking doctrine, the filed-rate doctrine also arises under R.C. 4905.32. (Appx. 68). *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 2018-Ohio-229, ¶ 15. The filed-rate doctrine “provides that a utility may charge only the rates fixed by its current, commission-approved tariff.” *Id.* The filed-rate doctrine applies not only to the utility's actual charges but also to the terms and conditions of service in a tariff. *OCC v. PUC*, 61 Ohio St.3d 396 (1991) (holding that the filed-rate doctrine applies to determine whether a condominium owner was required to take service for external lighting under the utility's residential service rate or the general service rate).

The PUCO's Orders violate the filed-rate doctrine by allowing Duke to collect \$14 million in revenue in contrary to the terms of Rider DCI tariff. In Duke's ESP IV case, the PUCO defined Rider DCI as follows: “The Rider DCI revenue requirement shall be limited to (i) a return on distribution rate base using the weighted average cost of capital approved in the most recent base electric distribution rate case, grossed up for prevailing tax rates; (ii) depreciation expense; and (iii) property taxes on *the incremental rate base (i.e., net plant less Accumulated Deferred Income Taxes (ADIT)) accumulated since the date certain in the Rate Case*, grossed up for commercial activity taxes.” *In re Duke ESP IV*, Pub. Util. Comm. No. 17-1263-EL-SSO, Opinion and Order, 2018 Ohio PUC LEXIS 1268 at *67 (Dec. 19, 2018). (Emphasis added.)

The PUCO's ESP IV Order expressly limits Rider DCI to “net plant less Accumulated Deferred Income Taxes (ADIT) accumulated *since* the date certain in the Rate Case.” *Id.* The PUCO-approved Rider DCI settlement, however, improperly allows Duke to retroactively collect revenue for ADIT from *before* the date certain in the last rate case. (R. 26, 45) (Appx. 6).

Likewise, the PUCO's approval of the Rider DCI settlement directly violates the terms of the Rider DCI tariff. The PUCO-approved Rider DCI tariff expressly states that Rider DCI "recover[s] the revenue requirement associated with *incremental distribution capital costs* incurred by the Company." (R. EX. OCC Ex. 3 at 5) (Supp. Vol. II at 572).

The Rider DCI settlement allowed Duke to collect not only "incremental capital costs" but also the non-incremental capital costs from the prior rate case. But this violated the PUCO's order and the tariff, which provided that incremental cost was to be limited to costs incurred "since the date certain." *In re Duke ESP IV* at *67 (Dec. 19, 2018). The Court should reverse the PUCO's Orders because they violate the filed-rate doctrine.

V. RELIEF REQUESTED

The PUCO's Orders on appeal harm consumers by charging them for Duke's revenue shortfall from the last base rate case. For consumer protection, the Court should grant relief as described below.

This Court has the authority to reverse and vacate PUCO decisions and remand them to the PUCO with instructions. *See, e.g.*, R.C. 4903.13 (Appx. 67); *Cleveland Electric Illuminating Co. v. Public Utilities Com.*, 46 Ohio St.2d 105 (1976); *In re Application of Suburban Natural Gas Co.*, 2021-Ohio-3224, ¶¶ 35-40; 45 (reversing and remanding with instructions); *In re Determination of Significantly Excessive Earnings for 2017 Under Elec. Sec. Plan of Ohio Edison Co.*, 2002-Ohio-5450.

The Court should reverse the PUCO and vacate the PUCO's Orders. The Court should remand the case with specific instructions to the PUCO to direct Duke to revise its Rider DCI schedules and tariff pages to remove the improper \$14,088,731 charge which the PUCO-

approved settlement allowed Duke to collect beginning July 1, 2025. (R. 26 at 5-6, R. 45) (Appx. 6).

Adjusting Rider DCI on a going-forward basis is permissible under the terms of the PUCO-approved tariff making the rider “subject to reconciliation, including, but not limited to refunds or additional charges to customers.” *Id.*

OCC further requests that the Court grant such other and further relief that it deems just and reasonable.

VI. CONCLUSION

The PUCO’s Orders clearly amount to retroactive ratemaking and violate the filed-rate doctrine. The Court should protect Duke consumers by reversing the PUCO’s Orders and remanding the case to the PUCO with specific instructions as discussed above.

Respectfully submitted,

Maureen R. Willis (0020847)
Ohio Consumers’ Counsel

/s/ John Finnigan
John Finnigan (0018689)
Counsel of Record
Thomas E. Zuehlke (0104876)
Assistant Consumers’ Counsel

Office of the Ohio Consumers’ Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone [Finnigan]: (614) 466-9585
Telephone [Zuehlke]: (614) 466-9569
john.finnigan@occ.ohio.gov
thomas.zuehlke@occ.ohio.gov

*Attorneys for Appellant,
Office of the Ohio Consumers’ Counsel*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellant, Office of the Ohio Consumers' Counsel was served upon all parties of record via electronic transmission this 4th day of August 2025.

/s/ John Finnigan
John Finnigan
Assistant Consumers' Counsel

PARTIES OF RECORD

john.jones@ohioattorneygeneral.gov
thomas.lindgren@ohioAGO.gov
ambrosia.wilson@ohioAGO.gov

rocco.dascenzo@duke-energy.com
larisa.vaysman@duke-energy.com
sheena.mcgee@duke-energy.com
ebrama@taftlaw.com
kverhalen@taftlaw.com
iavalon@taftlaw.com