**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission’s Review )

of Chapter 4901:1-35 of the Ohio ) Case No. 18-1188-EL-ORD

Administrative Code. )

**APPLICATION FOR REHEARING REGARDING RULES FOR ELECTRIC SECURITY PLAN APPLICATIONS**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

Bruce Weston (0016973)

 Ohio Consumers’ Counsel

William J. Michael (0070921)

Counsel of Record

Assistant Consumers’ Counsel

**Office of the Ohio Consumers’ Counsel**

65 East State Street, 7th Floor

Columbus, Ohio 43215

Telephone: [Michael] (614) 466-1291

william.michael@occ.ohio.gov

July 6, 2020 (willing to accept service by e-mail)

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The 2008 energy law that enabled electric utilities to file electric security plans has created a regulatory environment that favors utilities over consumers. The principal “security” that such plans provide is for the electric utilities. The PUCO’s June 3, 2020 Entry did accomplish various things to protect consumers when electric utilities file electric security plans, including requiring utilities to include a cost-benefit analysis of distribution infrastructure modernization proposals and quantitative impacts of reliability improvements. But the PUCO should have done more to protect consumers who are paying charges proposed and adopted in ESP cases.

The PUCO should have adopted OCC’s recommendation to require electric utilities to give consumers the operational savings that result from distribution modernization projects consumers are required to fund. Further, the PUCO should have required electric utilities to include cost projections for all proposed “placeholder” riders. Without such a requirement, the PUCO cannot fulfill its statutory duty to protect consumers from paying more under an electric security plan than under a market offer

(the MRO v. ESP test).[[1]](#footnote-2) And the PUCO should require that electric utility charges in electric security plans be made subject to refund, to protect consumers in the event of Ohio Supreme Court reversals and other changes.

The PUCO’s Entry was unreasonable and unlawful in the following respects:

ASSIGNMENT OF ERROR NO. 1: The PUCO erred by failing to require electric utilities that propose charges to customers for distribution infrastructure modernization to also propose reducing such charges to account for operational savings attributable to the distribution infrastructure modernization.

ASSIGNMENT OF ERROR NO. 2: The PUCO erred by failing to require electric utilities to include, as part of the proposed terms and conditions of the electric security plans they file, projections (with underlying calculations and sources) of the costs to consumers for all riders that they are proposing in the case, in violation of R.C. 4928.143(C)(1).

ASSIGNMENT OF ERROR NO. 3: The PUCO erred by failing to require in tariffs that charges in electric security plans be subject to refund to consumers, in the event of Ohio Supreme Court reversals or other changes.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its Entry as proposed by OCC.

Respectfully submitted,

Bruce Weston (0016973)

 Ohio Consumers’ Counsel

*/s/ William J. Michael*

William J. Michael (0070921)

Counsel of Record

Assistant Consumers’ Counsel

**Office of the Ohio Consumers’ Counsel**

65 East State Street, 7th Floor

Columbus, Ohio 43215

Telephone: [Michael] (614) 466-1291

william.michael@occ.ohio.gov

 (willing to accept service by e-mail)

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**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission’s Review )

of Chapter 4901:1-35 of the Ohio ) Case No. 18-1188-EL-ORD

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**MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING**

**REGARDING RULES FOR ELECTRIC SECURITY PLAN APPLICATIONS**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

# INTRODUCTION

The electric security plan statute[[2]](#footnote-3) has proven a boon for electric utilities to the detriment of consumers. From a power purchase agreement rider,[[3]](#footnote-4) to a distribution modernization rider,[[4]](#footnote-5) to a stability charge, to a financial integrity rider, and others, electric utilities have charged consumers hundreds of millions of dollars for utility-favorable riders in electric security plans. Here the PUCO has an opportunity to protect consumers. It should do so.

As part of this rules review, the PUCO should adopt the consumer protections recommended by OCC. First, the PUCO should require electric utilities proposing a distribution infrastructure modernization plan as part of their electric security plan application to also include a provision for giving consumers all operational savings from the distribution investment that they fund as soon as possible (rather than waiting for a rate case). Second, the PUCO should require that electric utilities proposing to charge customers for “placeholder riders” include cost projections for the riders; otherwise the riders should not be approved. Cost projections are necessary for the PUCO to fulfill its duty under the law to approve electric security plans only if customers pay lower rates under the electric security plan than they would pay for a market plan, And the PUCO should require that utility charges in electric security plans be made subject to refund, to protect consumers in the event of Ohio Supreme Court reversals and other changes.

The PUCO’s failure to act to protect customers was unreasonable and unlawful.

# STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10, which provides that within 30 days after issuance of a PUCO order, “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.” OCC entered an appearance through its motion to intervene in this case and filed comments.

R.C. 4903.10(B) also requires that an application for rehearing be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” Further, Ohio Adm. Code 4901-1-35(A) states: “An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing.” In considering an application for rehearing, R.C. 4903.10(B) provides that “the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.” The statute also provides: “[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.”

The statutory standard for abrogating or modifying some portions of the Entry is met here. The PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing and abrogate or modify the Entry consistent with OCC’s Recommendations herein.

# MATTERS FOR RECONSIDERATION

## ASSIGNMENT OF ERROR NO. 1: The PUCO erred by failing to require electric utilities that propose charges to customers for distribution infrastructure modernization to also propose reducing such charges to account for operational savings attributable to the distribution infrastructure modernization.

OCC recommended in its comments that electric utilities proposing distribution infrastructure modernization proposals as part of their electric security plan applications should be required to reduce charges to consumers based upon the projected operational savings from the significant distribution investments that they fund. [[5]](#footnote-6) Otherwise, consumers will not realize the savings associated with the plan until (or unless) the electric utilities file applications to update base distribution rates.

The PUCO did not adopt this recommendation, saying that parties could make such a recommendation during the hearings on the electric security plan applications.[[6]](#footnote-7) The PUCO’s failure to address the issue now, in the rules review, was unreasonable for consumers. For fairness, the utilities’ compliance with this approach needs to be done leading up to and at the time they file their electric security plans. Leaving the matter open for utility resistance during the case process, such as through discovery, will not result in an efficient and fair airing of this consumer issue.

While the specific amounts of the operational savings may vary by utility, there should be no question that electric utilities are required by the PUCO rules to timely pass along operational savings to consumers. Otherwise, utilities will continue to collect costs from consumers without an offset for savings, meaning the utilities’ charges to consumers will cover their costs and also allow them to keep the related savings on top of cost recovery. That is especially so in those circumstances where the operational savings are touted by the utility as a reason for the PUCO to approve the charges for distribution investment.[[7]](#footnote-8)

The electric utilities have the burden of proof in an ESP case.[[8]](#footnote-9) The utility should have to meet its burden of proof on proposed investments of hundreds of millions of dollars (if not billions) with demonstrating customer benefits through lower charges from operational savings, Such massive capital spending should reduce utility costs associated with the maintenance and repair of equipment. That reduced expense would provide a benefit to consumers – who are being charged for the investment proposals – by requiring that all quantifiable operational savings be given to consumers in a timely manner (or advanced/accelerated for sharing with consumers based on projected savings). The PUCO should modify its ruling accordingly.

## ASSIGNMENT OF ERROR NO. 2: The PUCO erred by failing to require electric utilities to include, as part of the proposed terms and conditions of the electric security plans they file, projections (with underlying calculations and sources) of the costs to consumers for all riders that they are proposing in the case, in violation of R.C. 4928.143(C)(1).

In its comments, OCC recommended that the PUCO require electric utilities proposing placeholder riders in their electric security plans to include cost projections for such riders.[[9]](#footnote-10) The PUCO found that OCC’s recommendation was “unnecessary.”[[10]](#footnote-11) That is unreasonable and unlawful.

### A. The MRO v. ESP test in R.C. 4928.143(C)(1) is an important consumer protection that should be better implemented by the PUCO.

 An electric distribution utility is required to provide a "standard service offer" to all consumers in its certified territory. [[11]](#footnote-12) This requirement may be met through either a market rate offer or an electric security plan.[[12]](#footnote-13) Whereas a market rate offer must be determined through a competitive-bidding process, "[a] utility has considerably more flexibility to fashion a rate plan as an [electric security plan]."[[13]](#footnote-14)

Due to a utility's "considerably more flexibility'' in an electric security plan, the importance of the statutory test that must be met before the PUCO can approve, or modify and approve, an electric utility’s electric security plan cannot be overstated. Consumers should not have to pay more under an electric security plan than they would otherwise pay under a market offer. To compare what consumers would pay under an electric security plan versus a market offer, the cost of the electric security plan must be known. Otherwise, an accurate comparison cannot be made.

The statutory test, enshrined in R.C. 4928.143(C)(1), provides that the PUCO cannot approve, or modify and approve, an electric security plan unless the PUCO finds that the electric security plan "including its pricing and all other terms and conditions, including any deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code."[[14]](#footnote-15) The Supreme Court of Ohio has described the statutory test as the "only substantive requirement" that a rate plan fashioned as an electric security plan must meet.[[15]](#footnote-16) So unless the statutory test is properly conducted, there are no safeguards to ensure the availability to consumers of adequate, reliable, safe, efficient, reasonably priced, non-discriminatory electric service.

According to the Supreme Court, the statutory test does not bind the PUCO to do a strict price comparison.[[16]](#footnote-17) The Court unfortunately allowed the PUCO’s approach to consider both quantitative and qualitative benefits of an electric security plan.[[17]](#footnote-18) But the statutory test does instruct the PUCO to consider pricing and all other terms and

conditions in evaluating if an electric security plan is more favorable in the aggregate than an expected market rate offer.[[18]](#footnote-19)

Without such consideration, the PUCO does not meet its obligations under R.C. 4928.143(C)(1). And customers are left without the protection of the statute.

### B. The PUCO’s decision to not require electric utilities to include cost projections for placeholder riders is unlawful and unreasonable.

To properly perform the ESP v. MRO test, the PUCO needs to know the total cost to customers of the electric utilities’ electric security plans. Otherwise, there is no way to measure whether consumers are paying less under an electric security plan than they would otherwise pay under a market option. The PUCO cannot possibly abide by R.C. 4928.143(C)(l) that it consider whether “its pricing and all other terms and conditions” is “more favorable in the aggregate as compared to the expected results that would otherwise apply” to a market rate offer.

Placeholder riders favor the electric utilities, enabling them to “future-proof” their electric security plans without waiting until the next electric security plan to request the rider. That situation gets even worse for consumers when the placeholder rider is assigned no cost for purposes of the statutory test.

By failing to consider the pricing of electric placeholder riders that are part of a proposed electric security plan, the PUCO is acting contrary to the statute. It is depriving consumers of *the* primaryconsumer protection in the statute. That is unreasonable and unlawful.

## ASSIGNMENT OF ERROR NO. 3: The PUCO erred by failing to require in tariffs that charges in electric security plans be subject to refund to consumers, in the event of Ohio Supreme Court reversals or other changes.

An example of how electric security plans have harmed consumers is that electric utility charges (riders) have not been made subject to refund. This means that when the PUCO approves a charge and it is later declared unlawful by the Ohio Supreme Court, consumers do not receive a refund of the money they paid for the unlawful charge.

OCC (and others) have attempted to right this wrong many times. For example, OCC and OMA jointly asked the PUCO to make FirstEnergy’s so-called “distribution modernization rider” subject to refund in 2016.[[19]](#footnote-20) Unfortunately for consumers, the PUCO denied the request.[[20]](#footnote-21) After consumers spent nearly half a billion dollars for the charge, the Ohio Supreme Court later held that it was unlawful.[[21]](#footnote-22) But the Court explained that, because the PUCO did not make FirstEnergy’s charge subject to refund, FirstEnergy did not have to make refunds to its customers.[[22]](#footnote-23) So consumers were denied a refund of nearly a half-billion dollars that they paid for an unlawful charge. Since 2009, Ohio electric consumers have been denied more than a billion dollars in refunds.

Former Supreme Court Justice Pfeifer wrote about the unfairness of the denial of refunds. He stated “[a]llowing AEP to retain the $368 million that it collected based on charges that were not justified is unconscionable. Doing so because of a 50-year-old case

that is not supported by the statute on which it is based is ridiculous. The ratepayers of Ohio deserve better.”[[23]](#footnote-24)

The PUCO has an opportunity here to correct this injustice to consumers. It should adopt a rule that all charges (riders) adopted as part of an electric security plan are collected subject to refund.[[24]](#footnote-25)

# CONCLUSION

The PUCO has an opportunity to protect consumers in this electric security plan rulemaking. It should do so by adopting OCC’s recommendations. It should grant rehearing.

Respectfully submitted,

Bruce Weston (0016973)

 Ohio Consumers’ Counsel

*/s/ William J. Michael*

William J. Michael (0070921)

Counsel of Record

Assistant Consumers’ Counsel

**Office of the Ohio Consumers’ Counsel**

65 East State Street, 7th Floor

Columbus, Ohio 43215

Telephone: [Michael] (614) 466-1291

william.michael@occ.ohio.gov

 (willing to accept service by e-mail)

**CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing Application for Rehearing was served by electronic transmission upon the parties below this 6th day of July 2020.

 */s/ William J. Michael*

 William J. Michael

 Assistant Consumers’ Counsel

The PUCO’s e-filing system will electronically serve notice of the filing of this document on the following parties:

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|  |  |
| --- | --- |
| John.jones@ohioattorneygeneral.govRocco.dascenzo@duke-energy.comJeanne.kingery@duke-energy.comLarisa.vaysman@duke-energy.comAttorney Examiner:James.lynn@puco.ohio.gov | stnourse@aep.comrendris@firstenergycorp.commichael.schuler@aes.comtrhayslaw@gmail.comLeslieKovacik@toledo.oh.gov |

1. R.C. 4928.143. [↑](#footnote-ref-2)
2. R.C. 4928.143. [↑](#footnote-ref-3)
3. Through 2019, AEP has charged consumers over approximately $111 million for its power purchase agreement rider; Duke has charged consumers over approximately $21 million for so-called Price Stabilization Rider; and DP&L has charged consumers over approximately $18 million for its Reconciliation Rider. [↑](#footnote-ref-4)
4. For example, FirstEnergy collected from consumers approximately $456 million over a two and half-year period under its so-called Distribution Modernization Rider, approved as part of its electric security plan, before the rider was found unlawful by the Ohio Supreme Court and terminated by the PUCO. Similarly, DP&L collected from consumers approximately $218.75 million over 25 months under its so-called Distribution Modernization Rider before the rider was terminated by the PUCO. DP&L also collected from consumers approximately $330 million in financial stability charges that were later found to be improper by the Ohio Supreme Court and terminated by the PUCO. [↑](#footnote-ref-5)
5. *See* OCC’s Comments at 3-6. [↑](#footnote-ref-6)
6. *See* Entry at 9. [↑](#footnote-ref-7)
7. *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan,* Case No. 08-920-EL-SSO, Opinion and Order (December 17, 2009); *In the Matter of the Application of Ohio Power Company to Initiate Phase 2 of its gridSMART Project and to Establish the gridSMART Phase 2 Rider*. Case No. 13-1939-EL-RDR, (September 13, 2013). [↑](#footnote-ref-8)
8. *In re Application of the Ottoville Mut. Tel. Co.*, Case No. 73-356-T, 1973 Ohio PUC LEXIS 3, at \*4 (“the applicant must shoulder the burden of proof in every application proceeding before the Commission”). [↑](#footnote-ref-9)
9. *See* OCC’s Comments at 6-7. [↑](#footnote-ref-10)
10. *See* Entry at 10. [↑](#footnote-ref-11)
11. R.C. 4928.141(A). [↑](#footnote-ref-12)
12. *1d.* [↑](#footnote-ref-13)
13. *In re Ohio Edison Co.*,146 Ohio St. 3d 222,223 (2016). [↑](#footnote-ref-14)
14. R.C. 4928.143(C)(1). [↑](#footnote-ref-15)
15. *In re Ohio Edison Co*., 146 Ohio St. 3d at 223. [↑](#footnote-ref-16)
16. *In re Ohio Edison Co.*,146 Ohio St. 3d at 226. [↑](#footnote-ref-17)
17. *See id*. [↑](#footnote-ref-18)
18. *Id*. [↑](#footnote-ref-19)
19. *See* Motion To Reject FirstEnergy’s Distribution Modernization Rider Tariffs Or, In The Alternative, Motion To Stay FirstEnergy’s Collection Of The Rider From Customers Or Motion For FirstEnergy To Collect Distribution Modernization Rider Subject To Refund By The Office Of The Ohio Consumers’ Counsel And Ohio Manufacturers' Association Energy Group, Case No. 14-1297-EL-SSO (December 8, 2016). [↑](#footnote-ref-20)
20. *See id.* at Finding and Order (December 21, 2016). [↑](#footnote-ref-21)
21. *In re Application of Ohio Edison Co*., 157 Ohio St.3d 73 (2019). [↑](#footnote-ref-22)
22. *See id.* [↑](#footnote-ref-23)
23. *In re: Columbus Southern Power Co*., 138 Ohio St.3d 448, 2014-Ohio-462, ¶.67 (Pfeifer, dissent). [↑](#footnote-ref-24)
24. The Northwest Ohio Aggregation Coalition made this recommendation in its Reply Comments. *See* NOAC’s Reply Comments at 5-6. [↑](#footnote-ref-25)