

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio	)	
Edison Company, The Cleveland Electric	)	
Illuminating Company, and The Toledo	)	Case No. 12-2190-EL-POR
Edison Company For Approval of Their	)	Case No. 12-2191-EL-POR
Energy Efficiency and Peak Demand	)	Case No. 12-2192-EL-POR
Reduction Program Portfolio Plans for	)	
2013 through 2015.	)	

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**APPLICATION FOR REHEARING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**August 16, 2013**

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The Public Utilities Commission of Ohio (“PUCO” or “Commission”) erred in its decision<sup>1</sup> to authorize the FirstEnergy utilities<sup>2</sup> to keep certain payments that would otherwise have been credited to customers through Rider Demand Side Energy (“DSE”). To redress the errors in the July 17 Entry, the Office of the Ohio Consumers’ Counsel (“OCC”) files this Application for Rehearing on behalf of the 1.9 million residential utility consumers of FirstEnergy.

FirstEnergy initiated this case with its Application dated July 31, 2012. FirstEnergy requested approval of its Energy Efficiency and Peak Demand Reduction Program Portfolio Plans (“EE/PDR Portfolios”) for 2013 through 2015. These portfolios were proposed to provide Ohio customers with EE/PDR programs that achieve quantifiable electric savings, for purposes of meeting the standards in R.C. 4928.66(A).

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<sup>1</sup> Entry on Rehearing (July 17, 2013).

<sup>2</sup> Ohio Edison Company (“Ohio Edison”), the Cleveland Electric Illuminating Company (“CEI”), and the Toledo Edison Company (“Toledo Edison”) (collectively, “FirstEnergy” or the “Utilities”).

The PUCO issued an Opinion and Order in this case on March 20, 2013 (“March 20 Order”). On April 19, 2013, the Environmental Law and Policy Center (“ELPC”) and Ohio Environmental Council (“OEC”), FirstEnergy, Industrial Energy Users-Ohio (“IEU”), Nucor Steel Marion (“Nucor”), and OCC filed Applications for Rehearing of the March 20 Order. The PUCO ruled on the Applications for Rehearing in its Entry on Rehearing dated July 17, 2013 (“July 17 Entry”).

The PUCO’s July 17 Entry is unreasonable and unlawful because:

- A. The PUCO erred by deciding to authorize a pilot program allowing FirstEnergy to keep approximately \$1.6<sup>3</sup> million in payments from PJM for energy efficiency that should instead be used to reduce Rider DSE for customers, when no application for rehearing was filed seeking that decision. Under R.C. 4903.10, the PUCO lacks the legal authority and jurisdiction to render a decision on an issue not presented to the PUCO in an application for rehearing.
- B. The PUCO erred in deciding to authorize a pilot program which allowed FirstEnergy to keep certain payments that should have been returned to customers, in violation of R.C. 4903.09, because the PUCO’s written decision failed to set forth the reasons prompting the decisions arrived at, based upon said findings of fact from the record of this case.<sup>4</sup>

This Application for Rehearing is filed under R.C. 4903.10 and Ohio Admin. Code 4901-1-35, with reasons explained in the attached Memorandum in Support.

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<sup>3</sup> 196.6 megawatts of energy efficiency cleared the 2016/2017 PJM Base Residual Auction in the ATSI zone at a price of \$114.23. Assuming most of that capacity was bid by FirstEnergy and not accounting for the small amount of incremental monitoring and verification cost yields a revenue payment of \$8.2 million (196.6\*114.23\*365=\$8,197,031) of which 20 percent equals \$1.6 million. The \$1.6 million represents only the first year of FirstEnergy’s PJM bid shared revenue stemming from their Portfolio, and it is expected that FirstEnergy will generate additional revenue by bidding in their energy efficiency capacity in the 2017/2018 and 2018/2019 PJM Base Residual Auctions. <http://www.pjm.com/~media/markets-ops/rpm/rpm-auction-info/2016-2017-base-residual-auction-report.ashx>.

<sup>4</sup> See *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306, 312, 513 N.E.2d 337 citing *Dayton Power & Light Co. v. Pub. Util. Comm.* (1983), 4 Ohio St.3d 91, 4 OBR 241, 447 N.E. 2d 733; *Columbus v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 103, 12 O.O.3d 112, 388 N.W. 2d 1237, see also, *Tongren v. PUC* (1999), 85 Ohio St. 3d 87, 89, where the Ohio Supreme Court held that “a commission order must provide in sufficient detail, the facts upon which the order is based, and the reasoning followed by the Public Utilities Commission of Ohio in reaching its conclusion.”

Consistent with R.C. 4903.10 and the claims of error above, the PUCO should “abrogate or modify” its July 17 Entry.

Respectfully submitted,

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## TABLE OF CONTENTS

	PAGE
I. INTRODUCTION .....	1
II. STANDARD OF REVIEW .....	3
III. ARGUMENT .....	4
A. The PUCO Erred By Deciding To Authorize A Pilot Program Allowing FirstEnergy To Keep Approximately \$1.6 Million In Payments From PJM For Energy Efficiency That Should Instead Be Used To Reduce Rider DSE For Customers, When No Application For Rehearing Was Filed Seeking That Decision. Under R.C. 4903.10, The PUCO Lacks The Legal Authority And Jurisdiction To Render A Decision On An Issue Not Presented To The PUCO In An Application For Rehearing.....	4
B. The PUCO Erred In Deciding To Authorize A Pilot Program Which Allowed FirstEnergy To Keep Certain Payments That Should Have Been Returned To Customers, In Violation Of R.C. 4903.09, Because The PUCO’s Written Decision Failed To Set Forth The Reasons Prompting The Decisions Arrived At, Based Upon Said Findings Of Fact From The Record Of This Case.....	8
IV. CONCLUSION.....	14

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

This proceeding is significant because an appropriately designed portfolio for energy efficiency and peak demand reduction (“EE/PDR”) can result in lower costs for electric energy and capacity in the wholesale market leading to lower retail electric energy prices for Ohio customers. And the Utilities’ portfolio can allow customers to better control their energy use, meaning they can reduce their electric bills by reducing usage even if their rate is unchanged. In this regard, optimizing the EE/PDR capacity resources that FirstEnergy can be bid into the PJM auctions can lead to future reductions in the Demand Side Management and Energy Efficiency Rider charged to customers.

The PUCO is aware of the substantial benefit customers can experience as a result of lowering capacity auction prices that reduces Rider DSE costs billed to customers.<sup>5</sup> But instead of delivering lower utility bills to customers, the PUCO’s July 17 Entry will accomplish the opposite and will raise electric bills for FirstEnergy’s customers.

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<sup>5</sup> *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013 through 2015*, Case No. 12-2190-EL-POR, et al., Opinion and Order at 20-21 (March 20, 2013).

Specifically, the PUCO determined that FirstEnergy can implement a pilot program where it may keep for itself a portion of the payments from PJM (for customers' EE/PDF savings). But PJM's payments should all be credited to customers. Per the July 17 Entry, the Utilities will receive 20 percent of the benefit of any revenue received in the PJM auctions, while customers will receive 80 percent.<sup>6</sup> This decision is bad for consumers because it prevents customers from receiving the benefit of 100 percent of the PJM auction revenues that they earned by reducing their use of electricity.

The decision is unlawful because 1) the PUCO lacked the authority and jurisdiction to hear the issue of the pilot program on rehearing, and 2) the July 17 Entry is not supported by the record in this case. On rehearing, the PUCO may consider only those matters raised in applications for rehearing.<sup>7</sup> No party raised this issue on rehearing. In the absence of a rehearing request, the July 17 Entry exceeds the PUCO's authority and jurisdiction. In addition, the Ohio Supreme Court has held that the PUCO must provide in sufficient detail the facts in the record upon which its decisions are based,<sup>8</sup> and its decisions must be based upon the record. The PUCO failed to meet these requirements in its July 17 Entry.

The PUCO should grant rehearing.

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<sup>6</sup> *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013 through 2015*, Case No. 12-2190-EL-POR, et al., Entry on Rehearing at 5 (July 17, 2013).

<sup>7</sup> R.C. 4903.10.

<sup>8</sup> *Tongren v. PUC* (1999), 85 Ohio St. 3d 87, 89.

## II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. This statute provides that any party may apply for rehearing on matters decided by the Commission within thirty days after an order is issued.<sup>9</sup> An application for rehearing must be written and must specify how the order is unreasonable or unlawful.<sup>10</sup>

In considering an application for rehearing, the PUCO may grant rehearing requested in an application, if “sufficient reason therefore is made to appear.”<sup>11</sup> If the Commission grants a rehearing and determines that its Order is unjust or unwarranted, or should be changed, it may abrogate or modify the Order.<sup>12</sup> Otherwise the Order is affirmed. Under R.C. 4903.10(B), the PUCO is limited on rehearing to granting or denying a “matter[] specified in such application [for rehearing].”

OCC meets both the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10 and the requirements of the PUCO’s rule on applications for rehearing.<sup>13</sup> OCC is a party to the case. Additionally, OCC actively participated in this case, and thus, may apply for rehearing under R.C. 4903.10. The PUCO should determine that OCC has shown “sufficient reason” to grant rehearing on the matters specified below and should “abrogate or modify” its March 20 Order.

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<sup>9</sup> R.C. 4903.10.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> See Ohio Adm. Code 4901-1-35.



### III. ARGUMENT

**A. The PUCO Erred By Deciding To Authorize A Pilot Program Allowing FirstEnergy To Keep Approximately \$1.6 Million In Payments From PJM For Energy Efficiency That Should Instead Be Used To Reduce Rider DSE For Customers, When No Application For Rehearing Was Filed Seeking That Decision. Under R.C. 4903.10, The PUCO Lacks The Legal Authority And Jurisdiction To Render A Decision On An Issue Not Presented To The PUCO In An Application For Rehearing.**

On April 19, 2013, ELPC and OEC,<sup>14</sup> FirstEnergy, IEU,<sup>15</sup> Nucor,<sup>16</sup> and OCC filed applications for rehearing. With respect to bidding megawatts into the PJM Base Residual Auction (“Auction” or “PJM Auction”), FirstEnergy alleged that the PUCO’s mandate that the Utilities bid planned energy efficiency resources into the 2016/2-17 PJM auction was unjust and unreasonable, especially in light of Senate Bill 58. FirstEnergy also argued that the PUCO does not have statutory authority to require the Utilities to bid into the PJM Auction.<sup>17</sup>

OCC argued on rehearing that the PUCO erred in only requiring FirstEnergy to bid in 75 percent of its planned energy efficiency resources into the May 2013 PJM Auction. OCC explained that the PUCO’s decision did not maximize the benefits for customers.<sup>18</sup> In response to OCC’s argument, the PUCO held:

**[T]he Commission thoroughly considered these arguments in the Opinion and Order where the Commission established a reasonable balance to mitigate risks to both the Companies**

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<sup>14</sup> ELPC and OEC did not raise the PJM bidding issue in their Application for Rehearing.

<sup>15</sup> IEU discusses PJM bidding within the context of the PUCO’s lack of statutory authority to require a mercantile customer to cede PJM bidding rights to FirstEnergy.

<sup>16</sup> Nucor argued that the March 20 Order was unclear as to whether FirstEnergy should be required to bid Rider ELR interruptible load into the annual PJM auctions.

<sup>17</sup> Case No. 12-2190-EL-POR, FirstEnergy Application for Rehearing (April 19, 2013).

<sup>18</sup> Case No. 12-2190-EL-POR, OCC Application for Rehearing (April 19, 2013).

**and ratepayers while lowering the net costs of the energy efficiency and peak demand reduction programs.<sup>19</sup>**

But in its July 17 Entry, the PUCO determined that FirstEnergy may implement a pilot program through which the Utilities may share in any revenue received in the PJM auctions.<sup>20</sup> The PUCO found that an “80/20 percent share of revenue between ratepayers and a company, respectively, is appropriate.”<sup>21</sup> Specifically, the PUCO stated that it granted rehearing “to better align the interests of the electric distribution utility and the interests of its customers in support of the implementation of energy efficiency and peak demand reduction programs.”<sup>22</sup> The PUCO made these findings despite the fact that no party argued on rehearing asked the Commission to alter the alignment interests or sought implementation of a pilot program whereby customers and the Utilities share in the revenues generated from bidding energy efficiency resources into the PJM Auction. Consequently, the PUCO exceeded its authority and jurisdiction by granting rehearing on an issue that was not raised on rehearing.

The Commission is a creature of statute and lacks authority to deviate from the statutory requirements related to ratemaking.<sup>23</sup> As such, the PUCO lacked jurisdiction to establish a revenue sharing pilot program in its July 17, 2013 Entry on Rehearing.<sup>24</sup> R.C. 4903.10 governs applications for rehearing filed before the PUCO, and states: “[s]uch

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<sup>19</sup> Id. referencing March 20, 2013, Opinion and Order at 17-21. (Emphasis added).

<sup>20</sup> *In the Matter of the Application of The Cleveland Electric illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015*, Case No. 12-2190-EL-POR, et al., Entry on Rehearing at 4 (July 17, 2013).

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1.

<sup>24</sup> Id.

application shall be in writing and shall **set forth specifically the ground or grounds** on which the applicant considers the order to be unreasonable or unlawful.” (Emphasis added). The language of R.C. 4903.10 is plain on its face, and under R.C. 1.42, the plain language of a statute must control. Thus, the PUCO may only grant rehearing on those matters specified on rehearing.

Through R.C. 4903.10, the General Assembly established the procedure and requirements regarding applications for rehearing. The General Assembly provided the PUCO authority to grant and hold rehearing on specific matters raised in an application for rehearing.<sup>25</sup> If the General Assembly intended to confer upon the PUCO broad authority to grant rehearing on *any* matter (and not just those raised on rehearing), then the legislature would have included language in the statute to that affect. But the General Assembly only authorized the PUCO to grant rehearing on matters specified in an application.

R.C. 4903.10 emphasizes the requirement of specificity with respect to applications for rehearing. The Supreme Court of Ohio has held that general phrases are not sufficient to preserve a claim, either in an application for rehearing or on appeal to the Supreme Court from the Commission.<sup>26</sup> Parties must specifically explain the error, and

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<sup>25</sup> R.C. 4903.10 (“Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear.”).

<sup>26</sup> See e.g. *OCC v. PUC* (2010), 127 Ohio St. 3d 524,528 (“The more general phrase “unlawfully approving” does not equate to the more specific claim of lack of subject-matter jurisdiction and therefore does not state a claim of subject-matter jurisdiction in the notice of appeal.”).

cannot merely draw conclusions that an order was unjust and unreasonable.<sup>27</sup> An application for rehearing is properly filed when it specifically explains the error. The Ohio Supreme Court has strictly construed the specificity test set forth in RC 4903.10.<sup>28</sup> “[T]he General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the appellant’s application for rehearing used a shotgun instead of a rifle to hit that question.”<sup>29</sup>

Under the PUCO’s March 20, 2013 Order, in which the Commission admitted that it had established a reasonable balance to mitigate risks to both the Utilities and ratepayers while lowering the net costs of the energy efficiency and peak demand reduction programs, all PJM payments would have been returned to customers. Given the requirements of R.C. 4903.10, the issue as to the appropriateness of a revenue sharing pilot program would need to have been specifically raised in an application for rehearing in order for the issue to be properly before the PUCO. The issue was not raised in an application for rehearing. The issue therefore should not have been addressed in the July 17 Entry.

While the PUCO may modify an order after justifying the change,<sup>30</sup> the Ohio Supreme Court has held that the PUCO may only modify an order after *granting* an

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<sup>27</sup> See e.g. *Marion v. PUC* (1954), 161 Ohio St. 276, 278 (“The first assignment of error in this court and the first ground for rehearing before the commission are broad and general and state no more than a conclusion; they completely fail to allege in what respect the commission lacked jurisdiction to hear and determine the applications for increased telephone rates.”).

<sup>28</sup> *Disc Cellular* at 374 (citing *OCC v. PUC* (1994), 70 Ohio St. 3d 244, 248).

<sup>29</sup> *Disc Cellular* at 374-75 (quotation omitted).

<sup>30</sup> *OCC v. PUC* (2006), 111 Ohio St. 3d 300, 304 (“The commission cannot justify the modifications made on rehearing merely by stating that those changes benefit consumers and the utility and promote competitive markets. The commission’s reasoning and the factual basis supporting the modifications on rehearing must be discernible from its orders.”).

application for rehearing.<sup>31</sup> Moreover, the PUCO must grant rehearing on a matter specified in the application for rehearing.<sup>32</sup> An interpretation of the statute that allows the PUCO to address on rehearing matters that were not raised in an application for rehearing negates the specificity requirement of R.C. 4903.10.

Essentially, through the July 17 Entry, the PUCO modified its original order to include the sharing pilot program. The PUCO justifies the change by claiming it “better align[s] the interests of the electric distribution utility and the interests of its customers.” But no party raised the matter of sharing revenues generated from bidding resources into the PJM Auction. The PUCO exceeded its statutory authority when it addressed a matter on rehearing that was not specified in an application for rehearing pending before it. Therefore, OCC’s Rehearing request should be granted.

**B. The PUCO Erred In Deciding To Authorize A Pilot Program Which Allowed FirstEnergy To Keep Certain Payments That Should Have Been Returned To Customers, In Violation Of R.C. 4903.09, Because The PUCO’s Written Decision Failed To Set Forth The Reasons Prompting The Decisions Arrived At, Based Upon Said Findings Of Fact From The Record Of This Case.<sup>33</sup>**

The March 20 Order requires FirstEnergy to bid 75 percent of its planned energy efficiency resources for the 2016/2017 planning year under its program portfolio into the May 2013 PJM Auction.<sup>34</sup> The rationale for the PUCO’s decision was that bidding 75

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<sup>31</sup> *Disc Cellular* at 375.

<sup>32</sup> R.C. 4903.10.

<sup>33</sup> See *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306, 312, 513 N.E.2d 337 citing *Dayton Power & Light Co. v. Pub. Util. Comm.* (1983), 4 Ohio St.3d 91, 4 OBR 241, 447 N.E. 2d 733; *Columbus v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 103, 12 O.O.3d 112, 388 N.W. 2d 1237, see also, *Tongren v. PUC* (1999), 85 Ohio St. 3d 87, 89, where the Ohio Supreme Court held that “a commission order must provide in sufficient detail, the facts upon which the order is based, and the reasoning followed by the Public Utilities Commission of Ohio in reaching its conclusion.”

<sup>34</sup> Case No. 12-2190-EL-POR, Opinion and Order at 20 (March 20, 2013).

percent into the Auction (rather than 100 percent as argued by OCC and others) would create “a reasonable balance between the uncertainty and potentially substantial benefits [of bidding planned energy efficiency savings into the PJM auction].”<sup>35</sup>

While the PUCO intended to protect FirstEnergy from the alleged “risks” of bidding in energy efficiency resources that are planned but not yet installed, the Commission also acknowledged that requiring the Utilities to bid in all planned energy efficiency savings into future PJM Auctions “could substantially benefit ratepayers by lowering capacity auction prices and reducing Rider DSE costs.”<sup>36</sup> But the July 17 Entry provided FirstEnergy with an additional (and unrequested) benefit, the sharing of PJM auction revenue, that is not supported by the record.

R.C. 4903.09 requires that the PUCO’s decisions be based upon findings of fact in the record. But the record for this proceeding provides no support for the PUCO’s approval of an 80/20 revenue sharing pilot program. The Ohio Supreme Court has held that “the purpose of R.C. 4903.09 is to provide [the] court with sufficient details to enable [it] to determine, upon appeal, how the commission reached its decision.”<sup>37</sup> And only where “there was enough evidence and discussion in order to enable the PUCO’s reasoning to be readily discerned” has the Ohio Supreme Court found substantial compliance with R.C. 4903.09.<sup>38</sup> But instead of citing to the record as support for its decision as is required, the PUCO cites to *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Rates*, et al. Case No. 07-589-GA-AIR and *In the*

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<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> See *Cleveland Elec. Illuminating Co. v. PUC*, 4 Ohio St. 3d 107, 110 (Ohio 1983), citing to, *General Tel. Co. v. Pub. Util. Comm.* (1972), 30 Ohio St. 2d 271.

<sup>38</sup> *MCI Telecommunications Corp. v. Public Utilities Com.*, 32 Ohio St. 3d 306, 312 (Ohio 1987).

*Matter of the Long-Term Forecast Report of Vectren Energy Delivery of Ohio and Related Matters*, et al. Case No. 00-120-GA-FOR. But neither of the cases cited by the PUCO are energy efficiency portfolio proceedings (and thus, neither of the cases cited by the PUCO deal with sharing of PJM auction revenues). In fact, both cases cited by the PUCO in support of its decision are natural gas proceedings.

PUCO Case No. 07-589-GA-AIR is a natural gas case whereby Duke Energy Ohio was permitted to revise its Gas Cost Recovery tariff to implement a sharing mechanism for sharing of net revenues from off-system transactions.<sup>39</sup> But the revenue sharing mechanism and approved percentages in 07-589-GA-AIR were derived from a Stipulation (which by its terms does not allow for use in other cases).<sup>40</sup> In addition, the PUCO included language in its Opinion and Order that expressly limited the applicability of the revenue sharing mechanism to gas-related sales transactions.<sup>41</sup>

In this regard, the PUCO stated: **“the revenue sharing percentage proposed by implementation of the sharing mechanism in this Stipulation is expressly limited to gas-related sales transactions**, and shall not have precedential value in establishing sharing percentages for similar electric sales transactions by Duke.”<sup>42</sup> If the PUCO ruled that the sharing mechanism it approved in 07-589-GA-AIR could not be used as precedent in “similar electric cases,” it simply cannot be precedent for this electric utility energy efficiency portfolio case.

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<sup>39</sup> Case No. 07-589-GA-AIR, et al. Opinion and Order at 11 (May 28, 2008).

<sup>40</sup> Id. The Stipulation prohibits its use as precedent in other cases, see page 2.

<sup>41</sup> Case No. 07-589-GA-AIR, et al. Opinion and Order at 11 (May 28, 2008).

<sup>42</sup> Id. Stipulation and Recommendation at 21-22 (February 28, 2008) (emphasis added).

Similarly, PUCO Case No. 00-120-GA-FOR is also not applicable to the present proceeding. This case also involved a sharing mechanism that was a result of a Stipulation.<sup>43</sup> In that proceeding, Dayton Power & Light, OCC and the PUCO Staff agreed that DP&L would retain 20 percent of the exchange of fee revenues received from Columbia Energy Services.<sup>44</sup> Although the PUCO approved this Stipulation, it also found that “DP&L improperly concluded, without prior Commission approval or even notice to Commission staff, what DP&L believed to be the appropriate proportion of exchange fees received from CES.”<sup>45</sup>

The PUCO emphasized that the benefit of all future pipeline capacity/asset management arrangements must be credited to (benefit) GCR customers, unless otherwise approved by the PUCO.<sup>46</sup> The PUCO ultimately adopted the 20 percent sharing mechanism in 00-120-GA-FOR because it determined that the difficulty and delays that reopening case would be contrary to the public interest.<sup>47</sup> Thus, the PUCO did not approve the sharing mechanism because it found the percentages to be appropriate. It did so because of the possible harm that delay in approval could cause the public. The purpose for which the PUCO cites to the July 17 entry to 00-120-GA-FOR (to show that the PUCO has found an 80/20 revenue sharing to be appropriate in the past) is not supported by the actual facts of 00-120-GA-FOR. This case certainly does not

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<sup>43</sup> Case No. 00-120-GA-FOR Opinion and Order at 11 (September 25, 2001).

<sup>44</sup> Id.

<sup>45</sup> Id. at 12.

<sup>46</sup> Id.

<sup>47</sup> Id.



support the PUCO's decision that an 80/20 sharing is appropriate for the current proceeding.

The PUCO also cites to testimony by Staff Witness Scheck in support of its finding.<sup>48</sup> But examination of Witness Scheck's prefiled testimony in this proceeding confirms that Mr. Scheck did not make a specific recommendation as to PJM auction revenue sharing. Instead, he offered "revenue sharing" as one potential option to mitigate risk. Witness Scheck also testified that requiring the Utilities to bid 75% of planned resources was another way to mitigate risk.<sup>49</sup> He stated that "it is possible that [FirstEnergy] could share in any revenues from the PJM auctions so long as the amount cleared and delivered into PJM exceeded the annual peak demand reduction benchmark for an FE Operating Company."<sup>50</sup>

But Staff Witness Scheck did not expound on this recommendation or explain in what context such sharing would actually be appropriate. He did not specify whether sharing would even be necessary if the Utilities were only required to bid 75 percent of planned resources rather than 100 percent, as is the case here. He also did not recommend an 80/20 sharing mechanism. Notably, the PUCO Staff did not explain and/or make this recommendation in its Initial or Reply briefs in this case. Staff Witness Scheck's direct testimony does not support the PUCO's finding that a revenue sharing pilot program is appropriate.

PUCO Staff witness Scheck was examined on this issue during the evidentiary hearing by an attorney examiner. The Examiner asked him to acknowledge that the result

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<sup>48</sup> Case No. 12-2190-EL-POR, Entry at 4 (July 17, 2013).

<sup>49</sup> Case No. 12-2190-EL-POR, Scheck Direct Testimony at 12 (October 9, 2012).

<sup>50</sup> Id.

of a 90/10 revenue sharing could likely be “substantially more” than the maximum shared savings the Utilities could earn.<sup>51</sup> And the Examiner asked Witness Scheck to “suggest a way to mitigate [FirstEnergy’s] performance risk.” Mr. Scheck responded by saying “I think I already put it down, 75 percent of whatever you can qualify and that you can claim would be a way to mitigate the risk.”<sup>52</sup> The Examiner then asked Mr. Scheck about revenue sharing and Mr. Scheck acknowledged that he did not have a “prescribed amount” that would be appropriate.<sup>53</sup> Then the PUCO used these responses from Mr. Scheck (to the Attorney Examiner’s questions) in its July 17 Entry to support its finding that customers should pay more for Rider DSE. This is wrong. The record does not support the PUCO’s finding.

A legion of cases establishes that the PUCO abuses its discretion if it renders an opinion on an issue without a record in support.<sup>54</sup> The need for record support is mandated under R.C. 4903.09. Under R.C. 4903.09 in all contested cases heard, the PUCO “shall file, with records of such cases, finding of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.” Some factual support for PUCO determinations must exist in the record, an obligation which the PUCO itself has recognized in its orders.<sup>55</sup>

Without adequate facts and reasons to support the PUCO’s decision, the Court would not be able to determine if the Rehearing Entry is reasonable and lawful under

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<sup>51</sup> Case No. 12-2190-EL-POR, Tr. Vol IV at 811.

<sup>52</sup> Tr. V. IV at 810.

<sup>53</sup> Id. at 811.

<sup>54</sup> *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 163, 166.

<sup>55</sup> See, e.g., In re Petition of Studer & Numerous Other Subscribers of Neapolis Exchange of ALLTEL Ohio, Case No. 88-481-TP-PEX. Entry on Rehearing (Sept. 6 1990).

R.C. 4903.10. Additionally, lack of a record stymies a complaining party's effort in demonstrating prejudice,<sup>56</sup> a necessary element to obtain reversal of a Commission order by the Ohio Supreme Court.<sup>57</sup> The PUCO's decision in its July 17 Entry is not supported by the record and rehearing should be granted.

#### **IV. CONCLUSION**

For the reasons stated herein, the PUCO should grant OCC's application for rehearing and abrogate or modify its July 17 Entry. The pilot program that the PUCO approved in the July 17 Entry gave FirstEnergy some of PJM's payments for energy efficiency instead of giving consumers the full benefit of the payments in the form of lower rates. But that decision to deny benefits to customers was not sought by any party in applications for rehearing. Thus, the PUCO exceeded its jurisdictional authority under R.C. 4903.10 by addressing the issue in the July 17 Entry.

In addition, the PUCO's finding that an 80/20 revenue sharing pilot program is appropriate is inadequately supported by the record and does not comply with the mandates of R.C. 4903.09. The PUCO's decision takes benefits away from customers and provides them to the Utilities. The Entry should be abrogated or modified.

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<sup>56</sup> See *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 92-93.

<sup>57</sup> *Id.*, citing *Holliday Corp. v. Pub. Util. Comm.*, (1980, 61 Ohio St.2d 335, syllabus.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic service this 16th day of August 2013.

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Summary: Application Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Kern, Kyle Mrs.