

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission’s Review of)
Chapter 4901:1-10, Ohio Administrative) Case No. 12-2050-EL-ORD
Code, Regarding Electric Companies.)

**MEMORANDUM CONTRA APPLICATIONS FOR REHEARING
OF FIRSTENERGY AND
DUKE ENERGY OHIO
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

In this proceeding the Public Utilities Commission of Ohio (“PUCO” or “the Commission”) conducted its five-year review of its rules (that specify the minimum service quality, safety, and reliability requirements concerning the supply of electric service in the state)¹ and adopted amendments that allow residential customers to opt-out of having their electricity usage measured with a new advanced (“smart”) meter instead of a traditional meter.² Those amendments include a requirement that, prior to the installation of an advanced meter, the utility must give a residential customer at least one business-day notice in advance of the pending installation.³ These amendments will provide valuable consumer protections.

OCC supports the PUCO’s decision to provide residential customers with the option to opt-out of having an advanced meter. As stated in OCC’s comments, there has been some controversy surrounding smart meter deployments in other states where some customers preferred using a traditional meter. The opt-out and notice provisions adopted

¹ Ohio Adm. Code 4901:1-10.

² October 16, 2013 Finding and Order, Attachment B at pages 4-5.

³ October 16, 2013 Finding and Order, Attachment B at page 4 (Ohio Adm. Code 4901:1-10-05(J)(2).

by the PUCO will help reduce or eliminate any ill-will that could develop between some customers wanting a traditional meter and utilities installing advanced meters.

FirstEnergy⁴ and Duke Energy Ohio (“Duke”) are seeking rehearing on these amendments. The Office of the Ohio Consumers’ Counsel (“OCC”), in accordance with Ohio Adm. Code 4901-1-35(B), files this Memorandum Contra Applications for Rehearing of FirstEnergy and Duke. As further explained in this Memorandum Contra, the reasons alleged in the Applications for Rehearing by FirstEnergy and Duke provide no basis to conclude that the PUCO’s October 16, 2013 Opinion and Order is unlawful or unreasonable in regard to residential consumers being permitted to opt-out of advanced meter service and being provided adequate notice prior to installation. Accordingly, the OCC urges the PUCO to deny the Applications for Rehearing by FirstEnergy and Duke as discussed in this Memorandum Contra.

II. ARGUMENT

The PUCO acted lawfully and reasonably when it adopted rules that do not require a residential customer to have an advanced meter if they do not want one. And, contrary to the arguments of FirstEnergy,⁵ the PUCO has the statutory authority, including under R.C. 4905.06, to adopt rules that provide for customers to opt-out of advanced meter service.

⁴ “FirstEnergy,” means the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

⁵ FirstEnergy Application for Rehearing at 5-6.

Customer concerns about advanced meters can range from privacy and cybersecurity to health and safety.⁶ R.C. 4905.06 grants the PUCO general supervision over all public utilities within its jurisdiction. Contained in that supervision is the power to inspect which “includes the power to prescribe any rule or order that the commission finds necessary for the protection of the public safety.”⁷ The Ohio Supreme Court has interpreted this provision of the statute and concluded that it gives the Commission the power to promulgate rules so long as the Commission finds it necessary for the protection of public safety.⁸ The Court stated that the term “public safety” to mean “safeguard the interests of the public, particularly with respect to health safety and welfare.”⁹ The Court held that as long as the order was related to the “protection of public safety” it was within the Commission’s powers.¹⁰ The PUCO has authority under R.C. 4905.06 to adopt rules that provide residential customers a right to opt out of advanced meter service.

Additionally, FirstEnergy argues that R.C. 4928.06 does not provide the PUCO with the statutory authority to adopt the opt-out provision because “By allowing a customer the opportunity to ‘opt out’ of the installation of advanced metering, the Commission is *discouraging* innovation and market access to advanced metering—something that is contrary to the policy of the State.”¹¹ But FirstEnergy has it wrong. The opt-out provision does not discourage innovation and market access to advanced

⁶ www.nasuca.org/archive/res/index.resolutions.php: Smart Grid Principles of the National Association of State Utility Consumer Advocates Resolution 2009-03, June 30, 2009.

⁷ R.C. 4905.06.

⁸ *Utility Service Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St. 3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶13.

⁹ *Id.* (Citing *Akron v. Pub. Util. Co.*, (1948), 149 Ohio St.347, 349, 37 O.O. 39, 78 N.E.2d 890.).

¹⁰ *Id.*

¹¹ FirstEnergy Application for Rehearing at 6.

meters. To the contrary, the opt-out provision should encourage innovation and market access to advanced meters. Specifically, the-opt out provision provides utilities a way to install advanced meters while still allowing customers the continued use of traditional meters if they choose.

FirstEnergy's Application fails to cite any precedent that suggests that the PUCO does not have the statutory authority to adopt rules that enable residential customers to opt-out of advanced meter service. FirstEnergy merely applies its own *incorrect* interpretation to Ohio law and PUCO rules. Accordingly, the PUCO should deny rehearing on this issue.

Additionally, the PUCO should deny rehearing on Duke's request that the PUCO address a utility's "right to deny opt out to a customer who has a meter inside the premises."¹² Residential customers should not be denied opt-out service just because the meter is located inside the house. Duke states that accessing inside meters is a significant safety risk and that there is an increase in cost.¹³ But the PUCO has already identified the circumstances under which the utility has the right to refuse to provide advanced meter opt-out service.¹⁴ The PUCO has already decided that if opt-out service creates a safety hazard to a utility's personnel, then the utility can refuse to provide the opt-out service.¹⁵ Additionally, the PUCO's rules provide for the collection of costs for opt-service from customers.¹⁶ The PUCO has already adequately addressed Duke's concerns in regard to this matter. Duke's request for rehearing on this issue should be denied.

¹² Duke Application for Rehearing at 6.

¹³ *Id.*

¹⁴ October 16, 2013 Finding and Order, Attachment B at page 5 (Ohio Adm. Code 4901:1-10-05(J)(4).

¹⁵ *Id.*

¹⁶ October 16, 2013 Finding and Order, Attachment B at page 5 (Ohio Adm. Code 4901:1-10-05(J)(5).

III. CONCLUSION

For all the reasons discussed above, the OCC urges the PUCO to deny the Applications for Rehearing by FirstEnergy and Duke because they provide no basis to conclude that the PUCO's October 16, 2013 Opinion and Order is unlawful or unreasonable in regard to residential consumers being permitted to opt-out of advanced meter service and being provided adequate notice prior to installation.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Melissa R. Yost

Melissa R. Yost

Deputy Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-1291 – Telephone
yost@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing Memorandum Contra upon the following via electric transmission, this 25th day of November 2013.

/s/ Melissa R. Yost

Melissa R. Yost

Deputy Consumers' Counsel

SERVICE LIST

William Wright
Chief, Public Utilities Section
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215
William.wright@puc.state.oh.us
Bryce.mckenney@puc.state.oh.us

Christopher J. Allwein
Advanced Energy Economy - Ohio
Williams Allwein & Moser, LLC
1373 Grandview Ave., Suite 212
Columbus, Ohio 43212
callwein@wamenergylaw.com

Nolan Moser
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
Nolan@theoec.org

Kimberly W. Bojko
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
bojko@carpenterlipps.com

Thadeus B. Culley
Keyes, Fox & Wiedman LLP
436 14th Street, Suite 1305
Oakland, California 94612
510-314-8203
510-314-8205
jkeyes@kfvlaw.com
tculley@kfvlaw.com

Nicholas McDaniel
Environmental Law & Policy Center
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212
NMcDaniel@elpc.org

Annie C. Lappé
Solar Policy Director
The Vote Solar Initiative
1120 Pearl Street, Suite 200
Boulder, Colorado 80302
annie@votesolar.org

Elizabeth Watts
Jeanne W. Kingery
Duke Energy Retail Sales, LLC
155 East Broad Street, 21 Fl
Columbus, Ohio 43215
Jeanne.kingery@duke-energy.com
Elizabeth.watts@duke-energy.com

Amy B. Spiller
Elizabeth H. Watts
Duke Energy Business Services, LLC
139 East Fourth Street, 1303 Main
Cincinnati, Ohio 45202
Elizabeth.watts@duke-energy.com
Amy.spiller@duke-energy.com

Nathan G. Johnson
Staff Attorney
Buckeye Forest Council
1200 W. Fifth Ave., STE 103
Columbus, Ohio 43212
nathan@buckeyeforestcouncil.org

Scotte Elliott, MSEE, CEM
NABCEP Certified Solar PV
InstallerTM
Metro CD Engineering, LLC
7003 Post Road, Suite 204
Dublin, Ohio 43016
selliott@metrocdengineering.com

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P. O. Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com
smhoward@vorys.com

Matthew S. White
In House Counsel
Vincent A. Parisi
General Counsel
Interstate Gas Supply, Inc.
6100 Emerald Parkway
Dublin, Ohio 43026
mwhite@igsenergy.com
vparisi@igsenergy.com

Judi L. Sobecki
Dayton Power and Light Company
1065 Woodman Drive
Dayton, Ohio 45432
Judi.sobecki@dplinc.com

Trent A. Dougherty, Esq.
Director of Legal Affairs
Ohio Environmental Council
1207 Grandview Ave. Suite 201
Columbus, Ohio 43212
trent@theoec.org

Mark A. Hayden
Scott J. Casto
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
haydenm@firstenergycorp.com
scasto@firstenergycorp.com

James W. Burk
Counsel of Record
Carrie M. Dunn
FirstEnergy Corporation
76 South Main Street
Akron, Ohio 44308
burkj@firstenergycorp.com
cdunn@firstenergycorp.com

Colleen L. Mooney
Cathryn N. Loucas
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45840
cmooney@ohiopartners.org
cloucas@ohiopartners.org

Matthew J. Satterwhite
Steven T. Nourse
American Electric Power Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
mjstatterwhite@aep.com
stnourse@aep.com

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
tobrien@bricker.com

Steven Giles
Vice President – Alternative Energy
Hull & Associate, Inc.
6397 Emerald Parkway
Dublin, Ohio 43016
sgiles@hullinc.com

Emma Berndt
Opower, Inc.
1515 North Courthouse Road
Arlington, Virginia 22201
Emma.berndt@opower.com

Mallory M. Mohler
Carpenter Lipps & Leland LLP
280 North High St., Ste. 1300
Columbus, Ohio 43215
mohler@carpenterlipps.com

Richard L. Sites
General Counsel and Senior Director of
Health Policy
155 East Broad Street, 15th Floor
Columbus, Ohio 43215-3620
ricks@OHANET.org

Matthew White
In-House Counsel
Interstate Gas Supply, Inc.
6100 Emerald Parkway
Dublin, Ohio 43016
mswhite@igsenergy.com

Joseph M. Clark
Jennifer L. Lause
Direct Energy
Fifth Third Building
21 East State Street, 19th Floor
Columbus, Ohio 43215
joseph.clark@directenergy.com
jennifer.lause@directenergy.com

James Nice
230 W. Huron, Ste. 85-53
Cleveland, Ohio 44113
jnice@energy-avenue.com

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Summary: Memorandum Memorandum Contra Applications for Rehearing of FirstEnergy and Duke Energy Ohio by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Yost, Melissa R. Ms.