

In the Matter of the Commission's)
Investigation of Ohio's Retail Electric) Case No. 12-3151-EL-COI
Service Market.)

**APPLICATION FOR REHEARING
BY
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Rehearing is sought of the March 26, 2014 Finding and Order based on the following Assignments of Error:

- (A) The PUCO erred when it ruled that certain marketer-supplied information filed at the PUCO be kept confidential when that information could assist customers in evaluating offers from marketers. Specifically, the PUCO ruled that marketer-supplied information, including the number of customers served, the amount of sales, and data related to aggregation should be held confidential (without a motion for protective order), until a request for disclosure is filed. The PUCO's ruling conflicts with R.C. 4905.07, which requires that all information in its possession shall be public. Additionally, the PUCO's ruling unreasonably relieves marketers from demonstrating the need for confidential treatment of such

data, conflicting with the requirements of Ohio Admin. Code 4901-1-24.

- (B) The PUCO's Order unreasonably adopted as a price to compare a historic rate rather than the current standard service rate that the consumer will pay during the next twelve months. Using the current standard service rate as the price to compare will ensure timely information essential to allow consumers to best evaluate the reasonableness of a marketer's offer.
- (C) The PUCO erred in unreasonably ruling that costs associated with formatting customers' bills, including marketer logo set-up fees, should be charged to customers. Because such costs are caused by marketers, and are a cost of doing business, the marketers, rather than customers, should pay these costs.

The basis of this Application for Rehearing is set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC's claims of error, the PUCO should modify or abrogate its Finding and Order.

Respectfully submitted,

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Unfortunately, the PUCO also adopted other recommendations that will make it more difficult for customers to understand marketers' offers and will cause customers to bear unnecessary costs that should be borne by marketers. Specifically the PUCO ruled that certain marketer-supplied information be kept confidential when that information could be helpful to customers when evaluating a marketer's offer. Additionally, the PUCO established a price to compare that is not based on the latest known standard service rate that customers pay, but based on outdated standard service rates. Also, the PUCO ruled that customers, and not marketers, must pay the cost of including the marketers' name or logo on their electric bill. OCC discusses these issues in detail below.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty days after issuance of an order from the PUCO, “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.”¹ Furthermore, the application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”²

In considering an application for rehearing, Ohio law provides that the PUCO “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.”³ Furthermore, if the PUCO grants a rehearing and determines 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 * * *.”⁴

OCC meets both the statutory conditions applicable to an applicant for rehearing under R.C. 4903.10 and the requirements of the PUCO’s rule on applications for rehearing.⁵ Accordingly, OCC respectfully requests that the PUCO grant rehearing on the matters specified below.

¹ R.C. 4903.10.

² R.C. 4903.10(B).

³ Id.

⁴ Id.

⁵ See Ohio Admin. Code 4901-1-35.

III. LAW AND ARGUMENT

ASSIGNMENT OF ERRORS:

- A. The PUCO Erred When It Ruled That Certain Marketer-Supplied Information Filed At The PUCO Be Kept Confidential When That Information Could Assist Customers In Evaluating Offers From Marketers. Specifically, The PUCO Ruled That Marketer-Supplied Information, Including The Number Of Customers Served, The Amount Of Sales, And Data Related To Aggregation Should Be Held Confidential (Without A Motion For Protective Order), Until A Request For Disclosure Is Filed. The PUCO’s Ruling Conflicts With R.C. 4905.07, Which Requires That All Information In Its Possession Shall Be Public. Additionally, The PUCO’s Ruling Unreasonably Relieves Marketers From Demonstrating The Need For Confidential Treatment Of Such Data, Conflicting With The Requirements Of Ohio Admin. Code 4901-1-24.**

The PUCO’s Opinion and Order in this case was unlawful and unreasonable, violating the Public Records Act by allowing automatic protection of marketing monitoring data as confidential trade secret information without requiring parties to file a motion for protective order. The Public Records Act, as set forth in R.C. 149.43, “allows public access to public records with certain exceptions and is based on the ‘fundamental policy of promoting open government, not restricting it.’”⁶ Therefore, it has long been held that “‘R.C. 149.43 [the Public Records Act] is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records.’”⁷ The Public Records Act has been directly applied to the PUCO whereby “[e]xcept as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX

⁶ *Gilbert v. Summit County*, 2004-Ohio-7108, 104 Ohio St.3d 660, 821 N.E.2d 564, ¶7 (quoting *State ex rel. The Miami Student v. Miami Univ.*, 79 Ohio St. 3d 168, 171, 680 N.E.2d 956 (1997)).

⁷ *Gilbert*, 2004-Ohio-7108, at ¶7, (quoting *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St. 3d 374, 376, 1996 Ohio 214, 662 N.E.2d 334; (1996); see also, *In the Matter of the Application of NOPEC, Inc. for Authority to Operate as a Certified Retail Electric Supplier in the State of Ohio*, Case No. 07-891-EL-CRS, Entry at 1 (citing *State ex rel. Williams v. Cleveland*, 64 Ohio St.3d 544, 549, 597 N.E.2d 147 (1992)).

[49] of the Revised Code, all proceedings of the public utilities commission and all documents and records in its possession are public records,”⁸ and “all facts and information in the possession of the public utilities commission shall be public.”⁹

To advance the important public principles behind the Public Records Act, a government entity “has the burden of proving that the records are excepted from disclosure by R.C. 149.43.”¹⁰ Accordingly, Ohio Adm. Code 4901-1-24 requires a party to file a motion for protective order and “[t]he party requesting such protection shall have the burden of establishing that such protection is required.”¹¹ Thus, it comes as no surprise that this Commission has held that confidential treatment, based on the trade secret,¹² should only be given in “extraordinary circumstances.”¹³ Moreover, a party seeking such protection must file a motion for protective order either concurrently or prior to filing the information for which it seeks protection.¹⁴

In the Finding and Order that was issued on March 26, 2014, the PUCO recognized the burden associated with the confidentiality exception to the Public Records Act, acknowledging that it would only be granted upon a motion filed in accordance with Ohio Adm. Code 4901-1-24.¹⁵ But then, the PUCO’s Finding and Order in this case

⁸ R.C. 4901.12.

⁹ R.C. 4905.07.

¹⁰ *Gilbert*, 2004-Ohio-7108 at ¶ 6, quoting *State ex. rel. Natl. Broadcasting Co., Inc. v. Cleveland* (1988), 38 Ohio St.3d 79, 526 N.E.2d 786, paragraph two of the syllabus.

¹¹ Ohio Adm. Code 4901-1-27-(B)(7)(e).

¹² See, R.C. 1331.61; *State ex rel. Plain Dealer v. Department of Ins.*, 80 Ohio St.3d 513, 687 N.E.2d 661 (1998).

¹³ *In the Matter of the Application of the Cleveland Electric Illuminating Company for Approval of an electric Service Agreement with American Steel Wire Corporation*, Case No. 95-77-EL-AEC, Entry at 2-3 (September 6, 1995).

¹⁴ Ohio Adm. Code 4901-1-02(E).

¹⁵ Finding and Order at 11.

inexplicably does an about-face and turns that burden on its head “hold[ing] information filed pursuant to Ohio Adm. Code 4901:1-25-02(A)(2)(d), (A)(3), and (A)(4) as confidential, without a motion for protective order.”¹⁶ Instead, the PUCO now requires that any interested party file a request for disclosure before the Commission will consider public release of marketing information that contains such things as the number of customers served, the amount of sales, and data related to aggregation.¹⁷

Requiring a request for disclosure for such information that also includes the number of customers in each class and total amount of load that a CRES or aggregator serves¹⁸ will impede customer choice in the marketplace. Customers may base their shopping decisions upon the size and reliability of the company, or a marketer’s ability to specifically serve the residential class. Allowing public access to this useful information is precisely the purpose behind the Public Records Act, but the PUCO’s Finding and Order in this case unlawfully and unreasonably flies in the face of R.C. 4901.12, R.C. and R.C. 4905.07, and R.C. 149.43.

The PUCO rationalizes this decision by citing to the administrative burden associated with “numerous motions for protective orders.”¹⁹ Administrative burden, however, is not a legitimate excuse for bypassing the requirements of the Public Records Act. However, requiring parties that seek such information to file a request for disclosure would arguably be even more administratively burdensome.

¹⁶ Finding and Order at 11.

¹⁷ Finding and Order at 11.

¹⁸ Ohio Adm. Code 4901-25-02(A)(3); 4901-25-02(A)(4).

¹⁹ Opinion and Order at 11.

Under the PUCO’s Opinion and Order in this case, parties seeking the information would have to file a request by “identify[ing] the information being sought and the report from which it is being sought.”²⁰ The respective party seeking confidentiality would then have to file a motion for protective order within 3 days.²¹ This needlessly creates an extra step to acquire market-monitoring data – information that is of particular importance to the public because it includes information that customers may utilize to make more informed decisions when choosing a marketer. Such a process, therefore, undermines the state policy of affording customers “cost-effective and efficient access to information . . . in order to promote both effective customer choice of retail electric service . . .”²²

For these reasons, the PUCO should grant OCC’s Application for Rehearing by requiring that marketers and aggregators carry their appropriately high burden of establishing that the information is confidential trade secret before it is withheld from public disclosure.

B. The PUCO’s Order Unreasonably Adopted As A Price To Compare A Historic Rate Rather Than The Current Standard Service Rate That The Consumer Will Pay During The Next Twelve Months. Using The Current Standard Service Rate As The Price To Compare Will Ensure Timely Information Essential To Allow Consumers To Best Evaluate The Reasonableness Of A Marketer’s Offer.

The PUCO adopted a methodology for calculating the price-to-compare that will harm consumers by providing them with an outdated price comparison based on the

²⁰ Opinion and Order at 11.

²¹ Opinion and Order at 12.

²² R.C. 4928.02(E).

historic SSO price rather than a price based on the SSO price that is in effect for the upcoming period.

The PUCO ordered standardization of the price-to-compare across the state of Ohio, finding that this would “bring transparency to the market and clarity to customers.”²³ The PUCO found that the EDUs “should use a rolling annual average price-to compare” calculated “by using the SSO rate for the previous 12 months and divide it by the customer’s usage.”²⁴ The PUCO directed EDUs to “include this bill format change in their application to revise their bill format to bring it into conformity with R.C. 4928.07 and this Order.”²⁵ The PUCO also directed that any explanation of the price-to-compare provided to residential consumers pursuant to Ohio Adm. Code 4901:1-10-22, 4901:1-10-33, or 4901:1-21-18 “should include an explanation of the standardized price-to-compare, consistent with this Order.”²⁶

While OCC agrees with the PUCO’s recommendation to establish a standardized methodology for calculating the price-to-compare across the state of Ohio, OCC disagrees with the PUCO’s use of a rolling annual average of the SSO rate over the previous 12 months. This policy is counter to advancing transparency and clouds informed consumer decisions and choice. Using an historic average will provide consumers with outdated information that is not relevant to the current supply market. It will harm consumers by leading them to compare current supplier offers with an historic SSO price, when that historic SSO price is not likely to be the price they will pay for SSO

²³ Finding and Order of March 26, 2014 at 28-29.

²⁴ *Id.*

²⁵ *Id.* at 29.

²⁶ *Id.*

service during the period for which they are evaluating CRES supplier offers. This could cause substantial harm to consumers by causing them to believe that the SSO rate is lower than CRES offers, keeping them from selecting the CRES offer. Or, on the other hand, it may lead them to believe that the SSO rate is higher than CRES offers, causing them to select a CRES supplier's offer. Use of an historic average price-to-compare will mislead consumers to make ill-advised choices regarding their decision to switch between the EDU's SSO rate and CRES supplier offers. It will be counter-productive to the objectives of providing consumers with a "price-to-compare."

The PUCO should reevaluate the determination of the price-to-compare. Because the SSO rates for Duke and FirstEnergy are set in advance for a specific period of time, those rates are more relevant to consumers in evaluating CRES supplier offers. The time frame of Duke's and FirstEnergy's rates is simply more comparable to the period over which consumers will be shopping for electric supply than the PUCO's historic period. The currently-effective SSO rates for Duke's customers have been in effect since June 1, 2013. Duke's residential rates established at that time were 5.6709¢/kWh for the first 1,000 kWh, 6.7472¢/kWh for additional kWh in the summer, and 3.1523¢/kWh for additional consumption in the winter.²⁷ And Duke's SSO rates will be reset effective June 1, 2014 for the following year, June 1, 2014 through May 31, 2015.

Similarly, FirstEnergy's currently-effective rates have been in use since June 2013. The currently-effective rate for Ohio Edison residential customers is

²⁷ Duke Tariff, P.U.C.O. Electric No. 19, Sheet No. 112.3 (Effective May 31, 2013). Duke's 100% weighted average auction-determined price of electricity, which underlies SSO prices, for the period from June 2014 through May 2015, is \$53.59/MWH, as reflected in the Auction Manager's Reports at Case No. 11-6000-EL-UNC. Reports of 12/15/2011, 5/23/2012, 11/16, 2012, 5/22/2013, and 11/13/2013. Duke's auction-determined price and customer rates will change June 1, 2014 with the new auction prices being incorporated into new SSO rates.

6.7424¢/kWh in the summer and 5.721¢/kWh in the winter.²⁸ And the currently effective rate for Toledo Edison residential customers is 6.7878¢/kWh in the summer and 5.8788¢/kWh in the winter.²⁹ Like Duke's rates, FirstEnergy's rates will also change effective June 1, 2014 and will be in effect for an entire year, thus providing a timely price-to-compare for customers shopping during that time frame. As new auctions are held for both Duke and FirstEnergy, SSO rates will change and be set for periods beyond May 2015. But, most importantly, the established SSO rate for such period of time, will serve as a meaningful and relevant price-to-compare for the upcoming period. Consequently, at least for both Duke and FirstEnergy, the auction-based price-to-compare that has been predetermined for a specific period of time should be utilized rather than an historic price to compare.

OCC notes that the use of block rates and seasonal pricing results in the need to compute an average SSO price-to-compare for a consumer over a full year rather than to simply use the currently-effective rate. OCC also notes that SSO auction prices include a seasonal factor and, thus, seasonal pricing is currently consistent with the manner in which bids are issued and selected. Consequently, calculation of the consumer's average rate for their usage over a 12-month time frame is necessary. Thus, the PUCO appropriately indicates its determination that the price-to-compare should be the average rate for their usage over a 12 month period of time.³⁰ But the price-to-compare for Duke

²⁸ Ohio Edison Tariff, Sheet 114, P.U.C.O. No. 11 6th Revised Page 1 of 2 (Effective June 1, 2013). This is derived from the 100% auction-determined price for the period from June 2014 through May 2015, of \$59.2996/MWh, established at Case No. 12-2742-EL-UNC. Reports of CBP Auction Results of 10/24/2012, 1/23/2013, 10/23/2013, and 1/29/2014. This will change June 1, 2014 with the new auction prices being incorporated into new SSO rates.

²⁹ Toledo Edison Tariff, Sheet 114, P.U.C.O. No. 11 6th Revised Page 1 of 2. This will change June 1, 2014 with the new auction prices being incorporated into new SSO rates.

³⁰ Finding and Order of March 26, 2014 at 28.

and FirstEnergy should be appropriately set based upon the known SSO cost of power for June 2014 through May 2015, and reset annually, rather than set based upon an historic period.

For AEP and DP&L, both of which have held initial auctions for a portion of their load (10%), the price-to-compare should be set based on the relevant ratio of auction pricing and base generation rates. By January 1, 2015, AEP's energy price will be set entirely through competitive bid auction procedures, and by June 1, 2015, AEP's SSO rate will be based entirely on competitive bid auctions (including both energy and capacity).³¹ Consequently, at least by January 1, 2015, the effective SSO rates for AEP are more relevant for consumers in evaluating whether to choose a CRES supplier offer than historic SSO rates and should be utilized as the price-to-compare. Until then, even though subject to quarterly adjustments for fuel costs, the currently-effective rate will still be better than an historic rate that is unrelated to current pricing and market conditions.

Likewise, for DP&L, by January 1, 2016, DP&L's price will be based entirely upon a competitive bid auction and the rate implemented at that time will be effective through May 2017.³² Until then, even though subject to quarterly adjustments for fuel costs, the currently-effective rate will still be better than an historic rate that is unrelated to current pricing and market conditions. Using historical SSO rates to set the price-to-compare is unreasonable and the PUCO should, in its place, use the effective SSO rate applied to the customer's estimated usage over the next 12 months to establish the price-

³¹ *In the Matter of the Application of Ohio Power Company to Establish a Competitive Bidding Process for Procurement of Energy to Support Its Standard Service Offer*, Case No. 12-3254-EL-UNC, Opinion and Order of November 13, 2013 at 5.

³² *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Second Entry on Rehearing at 18-19 (March 19, 2014)

to-compare for all EDUs. Finally, the PUCO should carefully assess the costs and benefits of continuing seasonal and blocked rates and their consistency with SSO prices in a competitive market.

C. The PUCO Erred In Unreasonably Ruling That Costs Associated With Formatting Customers' Bills, Including Marketer Logo Set-Up Fees, Should Be Charged To Customers. Because Such Costs Are Caused By Marketers, And Are A Cost Of Doing Business, The Marketers, Rather Than Customers, Should Pay These Costs.

The PUCO's determination to charge distribution rate customers for bill format changes designed to meet CRES supplier objectives, despite its Staff's recommendation otherwise, is unreasonable and inconsistent with allocating costs to the cost causer, as the PUCO itself recognized.

In its market development work plan, the PUCO Staff recommended that "the Commission authorize the utility to charge all active CRES in their territory a one-time initial setup charge" "for the IT changes needed to allow CRES logos on the bills."³³ In its Order, the PUCO rejected its Staff's recommendation for a one-time set-up fee to implement the IT changes.³⁴ The PUCO stated that "[a]lthough the cost causer is normally assessed, the Commission believes that the bill format changes proposed by Staff and addressed in this Order are appropriate for recovery by an EDU in a distribution rate case" and indicated that the "EDUs may file applications for recovery of those costs in their next distribution rate case."³⁵

The PUCO's determination contravenes the longstanding principle of cost causation which the PUCO itself acknowledged is the primary rationale for charging

³³ PUCO Staff Market Development Work Plan at 21.

³⁴ Finding and Order of March 26, 2014 at 26.

³⁵ *Id.*

costs to particular customers, or in this case, electric suppliers. To the extent that these charges are intended primarily to meet CRES supplier objectives, including marketing objectives, they should be charged directly to CRES suppliers and not made the responsibility of customers. Distribution customers should not be charged to subsidize CRES supplier marketing objectives, just like EDUs typically are not permitted to charge customers for advertising costs.³⁶

Additionally, charging distribution customers for costs that support the competitive efforts of marketers creates a subsidy that runs afoul of R.C. 4928.02(H). Under that provision of law, the PUCO is to ensure effective competition by avoiding anti-competitive subsidies flowing from regulated service (distribution) to competitive service. Specifically, R.C. 4928.02(H) prohibits the recovery of any generation-related costs through distribution or transition rates.³⁷ Yet, under the PUCO's proposal costs of competitive generation service (marketing generation service) would be paid for by distribution customers.

IV. CONCLUSION

The PUCO should assure that information that can assist customers in engaging in and being informed regarding choice for retail competition is made available to them.

To make informed decisions, consumers should have access to marketer-supplied information about aggregation, number of customers served, and the load served. Such information should not be presumed to be confidential and shielded from the light of day.

³⁶ See, for example, *Cleveland v. Pub. Util. Comm.*, 63 Ohio St.2d 62, 1980 Ohio Lexis 773 (1980) where the Supreme Court of Ohio disallowed an EDU's claim for promotional and advertising expenses, in the absence of the utility demonstrating "a direct, primary benefit to its customers from such ads."

³⁷ See e.g. *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164 (PUCO violated R.C. 4928.02(G) when it allowed the utility to collect deferred fuel costs through future distribution rate cases). Subsection (G) was renumbered as (H) as part of the 2012 amendments to the statute.

Additionally, the price to compare should be a useful tool for consumers to evaluate various marketer offerings. That price to compare should be based on the latest known standard service rate. Finally, distribution customers should not have to pay increased rates so that marketers' logos can appear on their electric service bills.

For these reasons, rehearing should be granted.

Respectfully submitted,

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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 transmission to the persons listed below, this 25th day of April, 2014.

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Summary: App for Rehearing Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.