

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

As part of advocating for residential customers in the State of Ohio to receive adequate, reliable, and reasonably priced retail electric service, the Office of the Ohio Consumers' Counsel ("OCC") files this Memorandum Contra Applications for Rehearing filed by the electric distribution utilities ("EDUs"). Those Applications seek to push potentially "substantial"<sup>1</sup> costs of the regulatory mandates ordered in this proceeding on to customers, instead of onto the primary cost causers -- marketers.<sup>2</sup>

Dayton Power & Light Company (“DP&L”), Ohio Power Company (“AEP Ohio”), Duke Energy Ohio, Inc. (“Duke”), and The Cleveland Electric Illuminating Company, Ohio Edison Company and The Toledo Edison Company (collectively “First Energy”) seek rehearing of the PUCO’s March 26, 2014 Finding and Order because the PUCO did not directly authorize them to collect all of the costs associated with the new regulatory mandates.<sup>3</sup> Instead, for some of the mandates,<sup>4</sup> the PUCO authorized the

<sup>4</sup> The PUCO authorized the EDUs to seek to collect the cost of including CRES logos on customers' bills and corporate separation audits in the next distribution case. See Order at ¶¶13, 26.

EDUs to seek to collect the costs in a distribution rate case.<sup>5</sup> Additionally, as pointed out by some of the EDUs, there were a number of costs associated with new mandates for which the PUCO did not identify any cost recovery mechanism.<sup>6</sup> AEP Ohio describes these multiple “unfunded mandates” as including:

- Pursuing various enhancements to electronic data interface systems;<sup>7</sup>
- Obligations to develop either a statewide seamless move, contract portability, instant connect, or warm transfer process; and
- Issues “punted” into new working groups or other cases to be implemented.<sup>8</sup>

AEP Ohio characterizes these requirements as “significant” and alleges that “together they could involve substantial costs upon full implementation.”<sup>9</sup>

The EDUs allege that the PUCO’s order is unreasonable in several respects. First, AEP Ohio complains that the PUCO created “unfunded mandates.”<sup>10</sup> Second, AEP Ohio alleges that the mechanism for collecting the “funded” mandates is inadequate.<sup>11</sup>

According to the AEP Ohio, the PUCO’s Order is unreasonable because it limits potential

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<sup>5</sup> Opinion and Order at ¶26.

<sup>6</sup> See First Energy Application for Rehearing at 4-5; AEP Ohio Application for Rehearing at 3.

<sup>7</sup> IGS Energy appears to seek rehearing on this issue asking the PUCO to order that EDUs shall not charge customers or CRES providers for access to customer energy usage data. IGS Application for Rehearing at 6. OCC agrees with IGS to the extent that customers should not be charged for access to their own data.

<sup>8</sup> AEP Ohio Application for Rehearing at 3-4. AEP Ohio refers to corporate separation audit costs and bill format enhancements as unfunded mandates as well. These are more accurately characterized as “inadequately” funded mandates (in the utility’s view) based on the utility’s dissatisfaction with the funding mechanism the PUCO ordered.

<sup>9</sup> Id. at 3.

<sup>10</sup> AEP Ohio Application for Rehearing at 3, see also Duke Application for Rehearing at 7.

<sup>11</sup> AEP Ohio Application for Rehearing at 3, see also Duke Application for Rehearing at 7.

collection of the “funded mandates” to those incurred during the test period in a distribution rate case.<sup>12</sup>

Most of the EDUs urge the PUCO to permit them to defer these costs (with carrying charges) so that they can seek to collect all costs (plus carrying costs) from customers at a future time. FirstEnergy supports a more direct approach whereby EDUs would be permitted to collect such costs through an existing or newly filed tariff or rider.<sup>13</sup> FirstEnergy, however, fails to specify what existing riders or tariffs would permit it to collect such costs, and does not identify the legal authority necessary to do so.

There are a number of reasons that the PUCO should deny the EDUs’ Applications for Rehearing. First and foremost, distribution customers should not fund the competitive generation efforts of marketers. Doing so violates the law. Specifically, R.C. 4928.02(H) prohibits the recovery of any generation-related costs through distribution or transition rates.<sup>14</sup> Under the EDUs’ requests, the costs of competitive generation service (marketing) would be paid for by distribution customers.

Second, the PUCO should recognize that collecting the costs of the new mandates from customers contravenes the longstanding principle of cost causation. Because these charges are intended primarily to meet CRES supplier objectives, they should be charged directly to CRES suppliers and not made the responsibility of customers. Customers

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<sup>12</sup> AEP Ohio Application for Rehearing at 2.

<sup>13</sup> First Energy Application for Rehearing at 6.

<sup>14</sup> 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.

should not be charged to subsidize CRES supplier marketing objectives, just like EDUs typically are not permitted to charge customers for advertising costs.<sup>15</sup>

Third, EDUs should not be permitted to defer these costs with carrying charges so that they can later request dollar for dollar collection from customers. Accounting standards do not control ratemaking outcomes by the PUCO. But, under Statement of Financial Accounting Standard No. 71, before utilities may book a cost for deferral (deferred asset treatment), it must be “probable that future revenue in an amount at least equal to the capitalized cost will result from inclusion of that cost in allowable costs for rate-making purposes.”<sup>16</sup> And as the PUCO has established in past cases, deferral authorization should be limited to “exigent circumstances” and for “good reason” because such authorization is a departure from standard accounting procedures as provided by R.C. 4905.13.<sup>17</sup> The EDU’s have failed to present any exigent circumstances or good reason to justify the PUCO granting deferral authority for those costs.

Moreover, inasmuch as none of the EDUs have provided any quantification or estimate of these potential future costs, it would be inappropriate to grant deferral authority for what would be a blank check at customers’ risk and expense.

Finally, there is no basis to allow these costs to be collected through existing riders or tariffs, as FirstEnergy suggests. The fact that FirstEnergy did not identify any

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<sup>15</sup> 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.”

<sup>16</sup> Statement of Financial Accounting Standards No. 71.

<sup>17</sup> See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Generation Charge Adjustment Rider*, 05-704-EL-ATA, 05-1125-EL-ATA, 05-1126-EL-AAM, and 05-1127-EL-UNC, Opinion and Order (Jan. 4, 2006), *aff’d in part and rev’d in part, and remanded (aff’d in relevant part, ) Elyria Foundry Co. v. Public Util. Comm’n of Ohio*, 114 Ohio St.3d 305; 2007-Ohio-4164; 871 N.E.2d 1176.

existing riders or tariffs that the utilities could use to collect the costs speaks volumes. There are none. And the PUCO should not create a mechanism to collect CRES marketing costs from customers when such a mechanism is not authorized under Ohio law.

The costs associated with the PUCO's new mandates are not appropriate for collection from customers because collection could only be accomplished through an unlawful subsidy. Furthermore, even if it was lawful to collect such costs from customers, there are no exigent circumstances or good reason to authorize the deferral. For these reasons, the EDUs' Applications for Rehearing should be denied.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this *Memorandum Contra Applications for Rehearing* was served on the persons stated below via electronic transmission to the persons listed below, this 5th day of May, 2014.

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