

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

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

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The Office of the Ohio Consumers' Counsel (“OCC”) files this Application to make suggestions regarding further improvements to the net metering rules to protect consumers. OCC appreciates the work of the Public Utilities Commission of Ohio (“PUCO”) in this important area. Additional consumer safeguards are necessary, and are detailed below. The November 8, 2017 Finding and Order (“Finding and Order”) is unreasonable and unlawful in the following respects:

Assignment of Error 2: The Finding and Order is unreasonable and unlawful because the PUCO failed to provide a legal explanation for reversing its previous position supporting a net metering customer capacity credit.

Assignment of Error 4: The Finding and Order is unreasonable because the PUCO should clarify whether a utility that net meters can charge its customers for the distributed generation investment and for excess generation payments made to itself.

Assignment of Error 5: The Finding and Order is unreasonable because the PUCO should protect consumers from unfair contract terms and conditions that could be offered by marketers.

Assignment of Error 6: The Finding and Order is unreasonable because the PUCO should clarify that utilities are required to file updates to their supplier tariffs to reflect the cost that will be charged to CRES providers for billing net-meter customers.

Assignment of Error 7: The Finding and Order is unlawful because it assumes that the PUCO has the required authority to decide applications for utility-provided, captive customer-funded, behind-the-meter services.

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regulatory policies in the net-metering rules are reasonably adapted for the future. The PUCO should ensure that parties have the opportunity to provide comments regarding net-metering in Case No. 17-1842-EL-ORD.

In the instant matter, though, the Finding and Order contains several errors that the PUCO should revisit. Net metering rules must contain reasonable consumer safeguards and protections. Further, the rules must facilitate fair, reasonable results for consumers consistent with Ohio policy.<sup>2</sup> The amendments to Ohio Adm. Code 4901:1-10-28 adopted in the Finding and Order do not go far enough on these scores. Net metering customers should be fairly compensated for their excess generation. Further, the PUCO should explain its reversal of its previous position supporting a net metering customer capacity credit. Any potential customer charges resulting from paying excess generation should be limited to utility payments made net of revenue received from SSO customers who consumed the excess energy. And in the interest of clarity, the PUCO should explain whether a utility that net meters can charge its customers for the distributed generation investment and for excess generation payments made to itself. As further consumer protection, the PUCO should prohibit unfair contract terms and conditions that could be offered by marketers. The PUCO should also require utilities to file updates to their supplier tariffs to reflect the cost that will be charged to CRES providers for billing net-meter customers.

## **II. STANDARD OF REVIEW**

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, “any party who has entered an

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<sup>2</sup> R.C. 4928.02.

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 in this proceeding.

R.C. 4903.10 requires that an 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.” Additionally, 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 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 some portions of the Finding and Order and modifying other portions are met here. The PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Finding and Order.

### III. RECOMMENDATIONS

**Assignment of Error 1: The Finding and Order is unreasonable because net metering customers should be compensated with a capacity credit for their excess generation.**

In paragraph 45 of the Finding and Order, the PUCO finds that “the credit for excess generation for customer-generators on the utility’s standard net metering tariff shall be a monetary credit calculated at the energy-only component of the electric utility’s standard service offer (“SSO”) and applied to a customer-generator’s total bill.”<sup>3</sup> Currently, Ohio’s investor owned utility net metering customers receive a generation credit consisting of energy and capacity<sup>4</sup> for excess generation supplied to the grid.<sup>5</sup> The status quo, where net metering customers receive a credit consisting of energy and capacity, should remain pending the detailed, state-wide policy review based on a more current record as discussed above.

**Assignment of Error 2: The Finding and Order is unreasonable and unlawful because the PUCO failed to provide a legal explanation for reversing its previous position supporting a net metering customer capacity credit.**

The PUCO’s position regarding a net metering customer capacity credit marks a total reversal of its previous ruling in this case. In the Third Entry on Rehearing, the

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<sup>3</sup> Finding and Order at 17.

<sup>4</sup> Capacity costs are usually developed based on the results from annual PJM capacity auctions (including incremental auctions) and allocated to each Company and tariff schedule based on the average of coincident peaks, including distribution losses, for the months of June through September of the year before the applicable PJM delivery year. The calculated wholesale capacity costs are used to develop capacity charges. These calculated wholesale capacity costs will be converted to an energy basis and will then be subtracted from the SSO competitive bid process (“CBP”) results to develop the non-capacity related energy charges. See, e.g., Ohio Edison Tariff Sheet 14, RIDER GEN.

<sup>5</sup> For example, the Ohio Edison Company Net Energy Metering Rider (Tariff Sheet No. 94) only credits the energy charges of its Generation Service Rider, whereas Duke Energy of Ohio net metering customers currently receive an excess generation credit based on Rider RC, Retail Capacity and Rider RE, Retail Energy (Tariff Sheet No. 48.5). The current Rider NM was last revised on May 11, 2015, where Rider RC was added as payment for customer generators’ excess kWh during a monthly billing period. Duke has filed to remove the existing capacity credit in Case No. 17-1263-EL-SSO.



PUCO rejected FirstEnergy's distribution utilities' rehearing request (supported by other electric distribution utilities) related to net metering credit for excess generation, stating: "We find no merit to the argument proposed by FirstEnergy that the only way the rules can comply with the Ohio Supreme Court's holding is to provide an energy-only credit for excess generation."<sup>6</sup> The PUCO also stated that "the electricity generated by the customer-generator should also be recognized to include the components of capacity, demand, and energy."<sup>7</sup>

On pages 3 to 7 of the Third Entry of Rehearing, the PUCO refutes the legal arguments of FirstEnergy on the capacity crediting issue for a customer generator's excess generation.<sup>8</sup>

Reversing a previous order without establishing a legal foundation for that reversal is inappropriate.<sup>9</sup> For the reasons stated above, and pending the detailed, state-wide policy review based on a more current record discussed earlier, OCC recommends that the PUCO insert the capacity component of the SSO and the peak load contribution of customer generators into 4901:1-10-28(B)(9)(c). OCC's proposed language with insertion highlighted reads as follows:

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<sup>6</sup> Third Entry on Rehearing, 7/23/2014, page 8. Subsequent to that Entry, the PUCO sent the rules to Joint Committee on Agency Rule Review ("JCARR"). AEP Ohio filed an appeal with the Ohio Supreme Court on 7/28/2014 (Supreme Court Case No. 14-1290) and FirstEnergy filed an appeal on 9/22/2014 (Supreme Court Case No. 14-1633). The appeals did not proceed at the Ohio Supreme Court because after issuing its Order and filing the rules with the JCARR, Ohio Admin. Code 4901:1-10-28 (the net metering rule), was withdrawn from JCARR for further consideration of the matter.

<sup>7</sup> Id at 4.

<sup>8</sup> Id. at 3-7.

<sup>9</sup> See, e.g., *OCC v. PUC*, 10 Ohio St. 3d 49 (1984).

“(c) For customer-generators on the electric utility’s standard net metering tariff, when the electric utility receives more electricity from the customer-generator than it supplied to the customer-generator over a monthly billing cycle, the excess electricity shall be converted to a monetary credit at the energy *and capacity components* of the electric utility’s standard service offer and shall continuously carry forward as a monetary credit on the customer-generator’s future bills, and the monetary credit may be lost if a customer-generator does not use the credit or stops taking service under the electric utility’s standard service offer. *Customer-generators with interval meters will receive a bill lowering benefit to account for their peak load contribution.*”

**Assignment of Error 3: The Finding and Order is unreasonable because the PUCO should limit any potential electric utility customer charges resulting from paying excess generation to the net of revenue received from SSO customers who consumed the excess energy.**

In its Finding and Order, the PUCO finds that “electric utilities should be provided the opportunity to file an application with the Commission for the deferral of costs of providing customer credits from net metering.”<sup>10</sup> Pending the detailed, state-wide policy review based on a more current record discussed earlier, the PUCO should limit the deferrals to utility excess generation payments made minus any payments received from SSO customers who consumed the excess generation.

For a net metering customer generator (receiving a utility credit), any utility payment for excess generation is recovered by the utility from the non-net metering customers who consume the excess generation and pay the SSO rate (that includes an energy and capacity component). Therefore, cost recovery for the excess generation payments to net metering customers may constitute a case of utility double recovery. If the excess energy from the customer generator instead is consumed by a Marketer

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<sup>10</sup> See Finding and Order at 19.

customer, then the electric utility may not be paid for the excess generation payment and may be entitled to payment.<sup>11</sup>

Further, based on the current Finding and Order, electric utilities will not have to pay for the excess generation of CRES customer generators after one year from the date of rule adoption. This rule should reduce the amount of excess generation payments by electric utilities and charges to customers, everything else being equal.

**Assignment of Error 4: The Finding and Order is unreasonable because the PUCO should clarify whether a utility that net meters can charge its customers for the distributed generation investment and for excess generation payments made to itself.**

The PUCO does not make a finding on whether an electric utility can be considered a customer generator. But an electric utility may be a customer generator if it meets the requirements.<sup>12</sup> An electric utility can also file an application if it intends to offer net metering to a customer not contemplated by the Revised Code or the Administrative Code.<sup>13</sup> Accordingly, pending the detailed, state-wide policy review based on a more current record discussed earlier, the PUCO should clarify whether a utility that net meters can charge its customers for the distributed generation investment or whether it is considered a generation asset and not recoverable from SSO or shopping customers. The PUCO should also clarify whether the net metering utility can charge its customers for the excess generation payments made to them.

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<sup>11</sup> Although it is not clear that Ohio's electric utilities can identify net metering customers that are on CRES contracts based on their existing databases, or whether if they were identified, they were awarded any excess generation credits.

<sup>12</sup> Finding and Order at 5.

<sup>13</sup> Id. at 5-6.

**Assignment of Error 5: The Finding and Order is unreasonable because the PUCO should protect consumers from unfair contract terms and conditions that could be offered by marketers.**

The PUCO Finding and Order determined that CRES providers and customers should define within the terms of the net metering contract the price, rate, credit, or refund for any excess production by a customer-generator consistent within the Ohio Adm. Code 4901:1-21.<sup>14</sup> But the consumer protections inherent in Ohio Adm. Code 4901:1-21 are generally structured to address requirements for contracts between marketers and customers for supplying retail electric service. These consumer protections may be insufficient to adequately protect net-metering customers from unfair sales practices that could occur through net-meter contracts.

There is an opportunity for the PUCO to adopt consumer protection rules specific to net-metered customers in Case No. 17-1843-EL-ORD. The PUCO should protect net-meter consumers from potential unfair sales practices by holding the requirements in Ohio Adm. Code 4901:1-10-28(B)(1)(c) in abeyance until the CRES rules are amended to address marketing, solicitation, and disclosure requirements for customers in Case No. 17-1843-EL-ORD.

**Assignment of Error 6: The Finding and Order is unreasonable because the PUCO should clarify that utilities are required to file updates to their supplier tariffs to reflect the cost that will be charged to CRES providers for billing net-meter customers.**

The PUCO Finding and Order requires an electric distribution utility to bill net meter customers who are served by a CRES provider using bill-ready billing unless the CRES provider and customer have agreed to dual billing.<sup>15</sup> But the PUCO did not

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<sup>14</sup> Finding and Order, Attachment A, Page 2 of 10.

<sup>15</sup> Finding and Order, Attachment A, page 7 of 10.

require the electric distribution utilities to file updates to their supplier tariff to reflect the costs for providing this service. The responsibility for paying all electric distribution utility costs associated with billing net metered customers on behalf of a CRES provider should be the responsibility of the CRES provider. Otherwise, other customers could be subsidizing these costs in violation of O.R.C. 4928.02(H).

**Assignment of Error 7: The Finding and Order is unlawful because it assumes that the PUCO has the required authority to decide applications for utility-provided, captive customer-funded, behind-the-meter services.**

The PUCO's Finding and Order observes that Duke has asked "that the Commission clarify that an electric utility that owns and operates distributed generation on a customer's premise may be considered a customer generator."<sup>16</sup> In response, the PUCO's Finding and Order stated that "[t]he Commission makes no finding on whether an electric utility can be considered a customer generator. We simply find that a customer-generator is a user of a net metering system."<sup>17</sup> The PUCO's Finding and Order notes, however, that "if an electric utility intends to offer net metering in a manner not contemplated by R.C. Chapter 4928 or Ohio Adm. Code 4901:1-10-28, then the electric utility may file an application with the Commission for its consideration."<sup>18</sup> The PUCO's decision on this matter is unlawful.

The PUCO is a creature of statute, and as such does not have the authority to act beyond the authority provided under Ohio statutes.<sup>19</sup> The PUCO does not possess the requisite authority to approve an application that would ultimately allow for utility

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<sup>16</sup> Finding and Order at page 5.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., *Canton Storage and Transfer Co. v. Public Util. Comm.* 72 Ohio St. 3d 1 (1995).

provided, captive customer funded competitive services on the customers' side of the meter. R.C. 4928 neither contemplates nor allows for the PUCO's consideration or approval of such a service configuration, and for good reason.<sup>20</sup> Captive customer funded utility services on the customers' side of the meter would be both harmful to competitive markets for distributed energy resource ("DER") service providers and unfair to those captive customers who would be required to fund these services, which are located on the unregulated side of the local distribution grid. Additional legislative authority would first need to be gained by the PUCO prior to considering any such utility application. Alternatively, utility shareholders could be instructed by the PUCO to fund a structurally separate DER services company to compete freely in the open market against other similarly situated companies, which do not have the benefit of captive customer funded subsidy payments for their competitive offerings. For these reasons, the PUCO should amend its order to reflect that the necessary legislative authority must be obtained prior to the PUCO considering any such utility application for utility-provided, behind-the-meter services.

On a related matter, the PUCO's decision reflects that "[i]f an electric utility intends to be a customer-generator itself, such as by constructing a net metering system on its own premise to serve its own requirements, then this may result in the electric utility being a customer generator."<sup>21</sup> First, to protect captive customers from unwarranted charges from the utility, the PUCO's decision needs to clearly identify under what circumstances the utility itself would be behind the meter and what DER services would be used and how. Second, to protect both consumers and competitive wholesale

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<sup>20</sup> Further, the PUCO does not have jurisdiction behind the meter. See R.C. 4905.01-.06.

<sup>21</sup> *Id.*

markets, the PUCO should include a requirement that captive customer-funded utility provided DER services must demonstrate that they are cost-effective and beneficial from the customer perspective. Otherwise, an Ohio utility could install net metering generation installations that are not economical at the consumers' expense. Another important requirement should be that captive customer-funded utility provided DER services cannot participate in wholesale organized markets for generation services.<sup>22</sup> Customer-funded subsidies for generation services should not be permitted to participate in wholesale generation markets. Subsidized generation is bad for markets and unfair to captive customers required to fund the subsidy. The PUCO's decision should be amended accordingly.

#### **IV. CONCLUSION**

Net-metering is an important issue to Ohio and consumers. Properly constructed rules are necessary. They cannot be adopted based on the stale record in this case, particularly given the rapid technological advances which is causing net-metering advances. Accordingly, the PUCO should conduct a comprehensive, state-wide investigation of net-metering so it can make rules based on an up-to-date record in a way that protects consumers.

Pending that investigation, as described herein, the PUCO has an opportunity to revisit its Finding and Order to implement important consumer safeguards. It should take the opportunity and do so.

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<sup>22</sup> In the future, such a restriction may be necessary for competitive distribution services (such as voltage support) that may develop if utilities evolve as integrators of distributive energy services and therefore start acting as a market facilitator of such services.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Application for Rehearing  
was served via electronic transmission upon the parties this 8th day of December 2017.

/s/ William Michael  
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Summary: App for Rehearing Application for Rehearing by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Michael, William Mr.