

**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)	
Edison Company for Approval of their)	Case No. 16-743-EL-POR
Energy Efficiency and Peak Demand)	
Reduction Program Portfolio Plans for)	
2017 through 2019.)	

**MEMORANDUM CONTRA
APPLICATIONS FOR REHEARING FILED BY FIRSTENERGY
AND ENVIRONMENTAL PARTIES
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

FirstEnergy's¹ and the Environmental Parties'² applications for rehearing³ have failed to establish any grounds on which the Order⁴ in this case is unreasonable or unlawful. Though these applications include several assignments of error, they really only make one argument: that the Public Utilities Commission of Ohio (the "PUCO") should not have imposed a 4.0% cost cap (\$107 million per year) on the amount that FirstEnergy can charge its customers for energy efficiency program costs and utility profits (shared savings). FirstEnergy and the Environmental Parties are wrong. The 4.0% cost cap benefits customers and the public interest and is neither unreasonable nor

¹ FirstEnergy is, collectively, the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company.

² The Environmental Parties are the Environmental Law & Policy Center, Natural Resources Defense Council, Ohio Environmental Council, and Environmental Defense Fund.

³ Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Application for Rehearing (Dec. 21, 2017) (the "FirstEnergy AFR"); Application for Rehearing by The Environmental Law & Policy Center, Natural Resources Defense Council, Ohio Environmental Council, and Environmental Defense Fund (Dec. 21, 2017) (the "Environmental AFR").

⁴ Opinion & Order (Nov. 21, 2017) (the "Order").

unlawful. The PUCO should reaffirm its commitment to protect customers from high charges for energy efficiency by denying FirstEnergy's and the Environmental Parties' applications for rehearing.

II. RECOMMENDATIONS

A. FirstEnergy's Application for Rehearing

FirstEnergy identifies three purported assignments of error in its application for rehearing. First, it argues that the PUCO lacks legal authority to limit the amount that consumers are charged for energy efficiency program costs and utility profits.⁵ Second, it argues that the Order is unlawful because the cost cap was not subjected to Ohio's rulemaking procedures.⁶ Third, it argues that the record does not support the cost cap and the cost cap is unfair to FirstEnergy because it does not treat FirstEnergy the same as other Ohio utilities.⁷ Each of these arguments fails.

1. The PUCO has the authority to limit the amount that customers pay for energy efficiency programs and utility profits.

FirstEnergy argues that the PUCO does not have the legal authority to approve an annual limit on the amount that FirstEnergy can charge customers for energy efficiency program costs and utility profits.⁸ According to FirstEnergy, the authority to cap energy efficiency spending would need to be explicit in R.C. 4928.66.⁹ FirstEnergy is wrong.

The PUCO has broad authority over the rates that Ohio electric distribution utilities charge their customers. R.C. 4905.22 requires all utility charges to customers to

⁵ FirstEnergy AFR at 2-4.

⁶ *Id.* at 5-10.

⁷ *Id.* at 10-14.

⁸ *Id.* at 2-5.

⁹ *Id.* at 3.

be just and reasonable. R.C. 4928.02 establishes as a state policy that customers are entitled to retail electric service that is reasonably priced. In determining that FirstEnergy cannot charge customers more than \$107 million per year in energy efficiency program costs and utility profits, the PUCO was exercising its statutory authority over customers' utility rates. Indeed, FirstEnergy itself admits that the statutory requirements for just and reasonable rates and reasonably priced electric service apply to its energy efficiency charges.¹⁰ The mere fact that R.C. 4928.66 does not contain an explicit cost cap does not strip the PUCO of its more general authority to regulate customers' utility rates under R.C. 4905.22 and 4928.02.

Indeed, the PUCO routinely exercises this authority in the form of caps on rider charges to customers. For example, in FirstEnergy's 2010 and 2012 electric security plan ("ESP") cases, the PUCO approved a cap for FirstEnergy's Delivery Capital Recovery Rider, despite there being no explicit mention of a "cost cap" in the ESP statute, R.C. 4928.143.¹¹ In FirstEnergy's most recent ESP case, the PUCO ordered a \$10 million after-tax cap on FirstEnergy's shared savings.¹² In AEP Ohio's 2013 ESP case, the PUCO approved an annual cap on AEP Ohio's Distribution Investment Rider.¹³ And in Duke Energy Ohio's 2014 ESP case, the PUCO, at the recommendation of its Staff, OCC, and

¹⁰ *Id.* ("the Commission is certainly vested with the statutory authority to review an EDU's costs of compliance with its EE/PDR obligations to ensure such costs are 'just and reasonable'").

¹¹ See *In re Application of [FirstEnergy] for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan*, Case No. 10-388-EL-SSO, Opinion & Order (Aug. 25, 2010); *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan*, Case No. 12-1230-EL-SSO, Opinion & Order (July 18, 2012).

¹² *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Security Plan*, Case No. 14-1297-EL-SSO, Opinion & Order (Oct. 12, 2016).

¹³ *In re Application of Ohio Power Co. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Elec. Security Plan*, Case No. 13-2385-EL-SSO, Opinion & Order (Feb. 25, 2015).

the Ohio Manufacturers' Association, ordered a cap on Duke's Distribution Capital Investment Rider.¹⁴

The PUCO has the authority under the law to ensure that rates are just and reasonable.¹⁵ One way that it exercises that authority is by placing annual caps on rider charges to customers. This case is no different. The cost cap is legal.

2. The Order does not constitute rulemaking under Ohio law.

In an attempt to prevent the PUCO from imposing a limit on the amount that FirstEnergy can charge its customers for energy efficiency program costs and utility profits, FirstEnergy argues that any cap on costs must be imposed in a formal PUCO rulemaking proceeding. The PUCO should reject FirstEnergy's strained interpretation of Ohio rulemaking laws.

a. FirstEnergy's reliance on cases interpreting R.C. 119.01 is erroneous because that statute does not apply to the PUCO and is materially different than the relevant statute, R.C. 111.15.

As FirstEnergy notes in its application for rehearing, R.C. 111.15 requires Ohio agencies to follow certain procedures when adopting rules.¹⁶ The \$107 million cost cap is not a "rule," so R.C. 111.15 does not apply.

In support of its argument that the proposed cost cap is a "rule," FirstEnergy cites two cases that are distinguishable from the cost cap proposal in this case. First, FirstEnergy cites *Fairfield County Board of Commissioners v. Nally*.¹⁷ In *Fairfield*

¹⁴ *In re Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Security Plan*, Case No. 14-841-EL-SSO, Opinion & Order (Apr. 2, 2015).

¹⁵ R.C. 4905.22.

¹⁶ FirstEnergy AFR at 5.

¹⁷ 143 Ohio St. 3d 93 (2015).

County, the Supreme Court of Ohio found that the Ohio Environmental Protection Agency failed to follow the rulemaking procedures found in R.C. 119.01 when it imposed a guideline that "prescribe[d] a legal standard that did not previously exist."¹⁸ From this, FirstEnergy concludes that any agency proposal that "prescribes a legal standard that did not previously exist" is a "rule" under Ohio law that must be subject to formal rulemaking procedures.¹⁹

FirstEnergy's interpretation of *Fairfield County* is erroneous. In *Fairfield County*, the Supreme Court interpreted certain rulemaking provisions found in R.C. 119.01, not R.C. 111.15. But R.C. 119.01 does not apply to the PUCO. The statute itself plainly states: "Section 119.01 to 119.13 of the Revised Code do not apply to the public utilities commission."²⁰ *Fairfield County* does not cite or otherwise rely on R.C. 111.15, the relevant rulemaking statute for the PUCO.²¹ Thus, *Fairfield County* has no bearing on this energy efficiency portfolio proceeding.

Second, FirstEnergy cites *Ohio Nurses Association v. State Board of Nursing Education*.²² Like *Fairfield County*, the Supreme Court in *Ohio Nurses Association* did not interpret or apply R.C. 111.15. And like *Fairfield County*, the *Ohio Nurses Association* decision pertains to R.C. 119.01, which does not apply to the PUCO.

¹⁸ Id. at 100.

¹⁹ FirstEnergy AFR at 5.

²⁰ R.C. 119.01(A)(1).

²¹ See generally *Fairfield County*, 143 Ohio St. 3d 93 (2015).

²² 44 Ohio St. 3d 73 (1989).

FirstEnergy tries to get around this critical error by arguing that R.C. 119.01 and R.C. 111.15 "define 'rule' in nearly identical terms."²³ But this simply is not true. R.C.

119.01(C) states:

"Rule" means any rule regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, and includes any appendix to a rule. "Rule" does not include any internal management rule of an agency unless the internal management rule affects private rights and does not include any guideline adopted pursuant to section 3301.0714 of the Revised Code.

Whereas R.C. 111.15(A)(1) provides:

"Rule" includes any rule, regulation, bylaw, or standard having a general and uniform operation adopted by an agency under the authority of the laws governing the agency; any appendix to a rule; and any internal management rule. "Rule" does not include any guideline adopted pursuant to section 3301.0714 of the Revised Code, any order respecting the duties of employees, any finding, any determination of a question of law or fact in a matter presented to an agency, or any rule promulgated pursuant to Chapter 119 or division (C)(1) or (2) of section 5117.02 of the Revised Code. "Rule" includes any amendment or rescission of a rule.

While the first part of these two rules may be similar, there is a critical difference between the two. R.C. 111.15(A)(1)—which applies to the PUCO—provides that "any determination of a question of law or fact in a matter presented to an agency" is **not** a rule. This qualification is not found in R.C. 119.01(C), which FirstEnergy relies on. Thus, it is not true, as FirstEnergy claims, that R.C. 119.01(C) and R.C. 111.15(A)(1) "define 'rule' in nearly identical terms."

And indeed, this distinction between the two statutes matters in this case. Here, the PUCO is making a determination, as a matter of law and fact, that an annual limit on

²³ FirstEnergy AFR at 5 n.17.

charges to consumers for energy efficiency program costs and utility profits will result in just and reasonable rates under R.C. 4905.22. The PUCO's decision, therefore, does not constitute a "rule" under R.C. 111.15(A)(1). FirstEnergy's attempt to extend the rulings of cases involving a materially different statute must fail.

b. The Order does not constitute rulemaking because it does not have "a general and uniform operation" as required by R.C. 111.15(A)(1).

For something to be a "rule" under R.C. 111.15(A)(1), it must have "a general and uniform operation." The Order falls outside this definition because it is neither "general" nor "uniform" across Ohio utilities.

First, this case pertains only to FirstEnergy. The Order limits FirstEnergy's annual charges to customers for energy efficiency program costs and utility profits to \$107 million. This has no impact on AEP Ohio, Duke Energy, Dayton Power & Light, or any other utility in Ohio. This contrasts with, for example, the cases that FirstEnergy relies on where the agency in question made a decision that simultaneously applied equally to all of its constituents.²⁴ There is simply no way to interpret the Order as having a general operation in Ohio because the Order only impacts FirstEnergy.

Second, as FirstEnergy discusses in its application for rehearing, the 4.0% cost cap for FirstEnergy affects it differently than the 4.0% cost caps that the PUCO has applied to other utilities in separate proceedings: (i) each of the major electric distribution utilities can spend a different amount per kWh on energy efficiency under their respective

²⁴ See *Fairfield Cnty. Bd. of Commissioners v. Nally*, 143 Ohio St. 3d 93, 94-101 (Mar. 24, 2015) (Ohio EPA imposed limits on water pollution that applied to all potentially polluting entities, which the court found to be rulemaking under R.C. Chapter 119); *Ohio Nurses Assoc. v. State Bd. of Nursing Educ.*, 44 Ohio St. 3d 73, 75-76 (1989) (State Board of Nursing issued a position paper substantially enlarging the scope of practice for licensed professional nurses, which applied identically to every licensed practical nurse in Ohio, which the court found to be rulemaking under R.C. Chapter 119).

cost caps, (ii) each utility has a different percentage of customers that shop for their electric generation service, which impacts the amount of each utility's cost cap, and (iii) FirstEnergy's revenue per kWh is not the same as other utilities, which also impacts the amount of FirstEnergy's cost cap.²⁵ Thus, FirstEnergy's own admission that a 4.0% cost cap has a different impact on each electric distribution utility in Ohio is fatal to its claim that the Order has "a general and uniform operation" as required for R.C. 111.15(A)(1) to apply.²⁶

- c. By ordering a 4.0% cost cap, the PUCO followed the precedent it set in a recent case involving Duke Energy, as the Supreme Court of Ohio has instructed it to do.**

The Supreme Court of Ohio has instructed the PUCO to "respect its own precedents in its decisions to assure the predictability which is essential in all areas of law, including administrative law."²⁷ In September 2017, in a case involving Duke Energy, the PUCO implemented a 4.0% cost cap over the objection of the utility.²⁸ Now, just two months later, the PUCO cited its *Duke Energy* decision as precedent, and ruled that FirstEnergy should also be subjected to a 4.0% cost cap. The PUCO was therefore following the Ohio Supreme Court's directive to respect its precedents.

²⁵ See FirstEnergy AFR at 13-14.

²⁶ This case is also distinguishable from the PUCO's decision in *In re the Commission's Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI. There, the PUCO entered an order as a result of a general submetering investigation, not an order that was specific to any particular entity engaged in submetering. See Case No. 15-1594-AU-COI, Second Entry on Rehearing (June 21, 2017). Thus, there would be merit to an approach of the PUCO following the rulemaking procedures under R.C. 111.15(A)(1) with respect to submetering, but the same would not apply to the present case that involves only FirstEnergy.

²⁷ *In re Duke Energy Ohio, Inc.*, 150 Ohio St. 3d 437, 443 (2017) (quoting *Cleveland Elec. Illuminating Co. v. PUCO*, 42 Ohio St. 2d 403, 431 (1975)). See also *Ohio Consumers' Counsel v. PUCO*, 125 Ohio St. 3d 57, 59 (2010) ("the commission should respect its own precedents in its orders to assure predictability in the law").

²⁸ *In re Application of Duke Energy Ohio, Inc. for Approval of its 2017-2019 Energy Efficiency & Peak Demand Reduction Program Portfolio Plan*, Case No. 16-576-EL-POR, Opinion & Order ¶ 67 (Sept. 27, 2017).

According to FirstEnergy, however, by following past precedent, the PUCO was creating a "rule" for Ohio that must be subjected to the rulemaking procedures under R.C. 111.15. If FirstEnergy's interpretation of R.C. 111.15 were adopted, then every time the PUCO felt it appropriate to follow the precedent set in one of its previous cases, it would be prohibited from ruling on the case before it and would have to open a new rulemaking proceeding instead. This cannot be what the General Assembly intended in enacting R.C. 111.15, nor what the Supreme Court of Ohio intended when it instructed the PUCO to respect its precedents.

3. The record adequately supports the PUCO's decision to limit the amount that customers pay for energy efficiency program costs and utility profits.

In its third assignment of error, FirstEnergy argues that (i) the record does not support a cost cap, and (ii) the \$107 million cost cap is unfair to FirstEnergy because it "leads to significant inequities among Ohio's major EDUs."²⁹ These positions lack merit.

a. There is ample record evidence supporting the need for an annual limit on charges to consumers for energy efficiency program costs and utility profits.

With respect to its first argument, FirstEnergy is simply seeking to substitute its own judgment for that of the PUCO when it comes to weighing the evidence in the case. Indeed, there is abundant evidence supporting a cost cap:

- PUCO Staff witness Donlon testified that the PUCO Staff's proposed cost cap methodology made sense because it was based on a number that was public and readily available, was expressed in total dollars, and allowed for flexibility in managing FirstEnergy's programs.³⁰

²⁹ FirstEnergy AFR at 10-14.

³⁰ Amended Testimony of Patrick Donlon at 4-5 (Jan. 10, 2017).

- Mr. Donlon testified that FirstEnergy can meet its statutory energy efficiency benchmarks under the cost cap.³¹
- Mr. Donlon testified that the costs of energy efficiency "have been escalating to the point that the rider in which energy efficiency costs are collected has become one of the highest riders on residential customers' bills."³²
- Mr. Donlon testified that a cost cap would provide price assurances to customers.³³
- OCC witness Spellman testified that a cost cap would "encourage FirstEnergy to spend customer funds as wisely as possible."³⁴
- Mr. Spellman testified that a cost cap would "allow substantial financial support for energy efficiency measures and programs" but would still "provide an upper limit to rate impacts on consumers."³⁵
- Mr. Spellman testified that there was "concise and clear direction on how the cost cap can be audited, items that would offset the cost cap, how demand response revenues from PJM should be treated, and which programs count towards the Companies' shared savings calculation."³⁶
- Mr. Spellman testified that other states have implemented cost caps for energy efficiency.³⁷
- Mr. Spellman testified that an \$80.1 million cost cap would be reasonable.³⁸ If anything, therefore, the \$107 million cost cap that the PUCO ordered is generous.

³¹ *Id.* at 5.

³² *Id.*

³³ *Id.*

³⁴ Supplemental Direct Testimony of Richard F. Spellman on Behalf of the Office of the Ohio Consumers' Counsel at 15 (Jan. 10, 2017).

³⁵ *Id.*

³⁶ *Id.* at 16.

³⁷ *Id.* at 17-23.

³⁸ *Id.* at 16-17.

The fact that FirstEnergy may disagree with this evidence does not strip the PUCO of the right to rely on it in making its decisions. There is ample record evidence supporting the imposition of a cost cap. FirstEnergy has not demonstrated otherwise.

b. The \$107 million cost cap is fair to FirstEnergy.

FirstEnergy argues that the \$107 million cost cap is unfair because it "leads to significant inequities among Ohio's major EDUs."³⁹ The PUCO should reject this argument.

First, FirstEnergy wrongly presumes that all Ohio electric utilities must be treated identically before the PUCO. This has never been true, nor could it be. Each utility files its own cases before the PUCO, and the PUCO addresses each case on the merits. Nothing in the Ohio Revised Code or the PUCO's rules requires the PUCO, in adjudicating its proceedings, to provide the exact same treatment to all utilities.⁴⁰

Second, FirstEnergy claims that AEP Ohio and DP&L will be permitted to spend more per kWh than FirstEnergy, which FirstEnergy deems inequitable.⁴¹ But both AEP Ohio and DP&L agreed to a 4.0% cost cap through settlements that were supported by the PUCO Staff (and for which OCC did not oppose the provisions providing for a cost cap).⁴² FirstEnergy, in contrast, did not agree to include any cost cap at all in its filed settlement, which is why the PUCO Staff and OCC opposed it. The PUCO should not

³⁹ FirstEnergy AFR at 13.

⁴⁰ See, e.g., *In re Investigation into the Dev. of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Elec. Utils.*, Case No. 09-786-EL-UNC, Entry on Rehearing ¶ 23 (Aug. 25, 2010) (noting that the PUCO will "consider all the relevant factors surrounding each utility and its unique circumstances").

⁴¹ FirstEnergy AFR at 13.

⁴² *In re Application of Ohio Power Co. for Approval of its Energy Efficiency & Peak Demand Reduction Program Portfolio Plan for 2017 through 2020*, Case No. 16-574-EL-POR, Opinion & Order (Jan. 18, 2017); *In re Application of the Dayton Power & Light Co. for Approval of its Energy Efficiency & Peak Demand Reduction Program Portfolio Plan for 2017 through 2019*, Case No. 16-649-EL-Opinion & Order (Sept. 27, 2017).

permit FirstEnergy to litigate a case and then, when it loses, complain that it is not being treated the same as utilities that agreed to a cost cap as part of a give and take with the PUCO Staff and OCC.

B. The Environmental Parties' Application for Rehearing.

The Environmental Parties argue that the Order is unlawful and unreasonable because it limits the amount that FirstEnergy can charge customers for energy efficiency program costs and utility profits to \$107 million.⁴³ The Environmental Parties are mistaken: the \$107 million cost cap is lawful and reasonable.

The Environmental Parties' position is unsupported by the record in this case. The Environmental Parties claim that "[w]hen utilities spend more on efficiency, customers spend less on generation and overall costs go down."⁴⁴ But this claim is unfounded for several reasons. First, not all of FirstEnergy's programs are projected to be cost-effective. Its low-income program, for example, costs significantly more than it saves.⁴⁵ Thus, while the low-income program serves the important purpose of assisting customers most in need, it also increases the overall cost to customers in the aggregate. FirstEnergy's market potential study also suggests that some of its sub-programs⁴⁶ are not cost-effective.⁴⁷ Second, the PUCO has the authority to approve programs that are not cost-

⁴³ Environmental AFR at 2.

⁴⁴ Environmental AFR at 4-5.

⁴⁵ See Stipulation & Recommendation, Ex. B at Appendix C-4 (showing TRC scores significantly below 1.0 for the Low Income Energy Efficiency Program).

⁴⁶ In addition to "programs" and "measures," which are defined in the Ohio Administrative Code, FirstEnergy, unlike other Ohio utilities, also includes "sub-programs" in its energy efficiency portfolio, which are simply smaller programs within a program.

⁴⁷ See Supplemental Direct Testimony of Richard F. Spellman on Behalf of the Office of the Ohio Consumers' Counsel at 65-67 (Jan. 10, 2017) (explaining that FirstEnergy's proposed Direct Load Control, Behavioral, Audits & Education, HVAC, and Smart Thermostats sub-programs were not projected to be cost-effective).

effective if such programs "provide substantial nonenergy benefits."⁴⁸ Any such program would increase overall costs for customers. Third, the PUCO's rules provide that "each measure within a program need not be cost-effective."⁴⁹ Thus, to the extent a utility spends more on energy efficiency for measures that are not cost effective, then overall costs to customers would increase, not decrease. Fourth, the Environmental Parties fail to take into account the cost increase imposed on those customers who do not participate in the utility's energy efficiency programs. Even if the *aggregate* cost to consumers goes down as a result of spending more on energy efficiency, the PUCO is rightfully concerned with reducing charges to the many customers who pay for the programs but receive no direct benefits.⁵⁰

The Environmental Parties' application for rehearing relies on the assumption that more energy efficiency spending necessarily means lower charges for customers. As demonstrated, this assumption is unfounded. The Environmental Parties, therefore, have failed to demonstrate that the \$107 million cost cap is unlawful or unreasonable.

III. CONCLUSION

The PUCO should deny FirstEnergy's and the Environmental Parties' applications for rehearing because the PUCO's decision to implement a 4.0% cost cap is reasonable and lawful.

⁴⁸ Ohio Adm. Code 4901:1-39-04(B).

⁴⁹ Ohio Adm. Code 4901:1-39-04(B).

⁵⁰ The Environmental Parties cite a PUCO letter regarding the purported impact of energy efficiency on wholesale electricity prices. *See* Environmental AFR at 6. But there is no evidence that this price suppression effect, if it exists at all, comes close to offsetting the rider charges that customers pay for energy efficiency programs and utility profits.

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I hereby certify that a copy of the foregoing Memorandum Contra was served on the persons stated below via electronic transmission, this 2nd day of January 2018.

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