

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission’s Review of Its)	
Rules for Energy Efficiency Programs Contained in)	Case No. 12-2156-EL-ORD
Chapter 4901:1-39 of the Ohio Administrative)	
Code.)	

In the Matter of the Commission’s Review of Its)	
Rules for the Alternative Energy Portfolio Standard)	Case No. 13-0651-EL-ORD
Contained in Chapter 4901:1-40 of the Ohio)	
Administrative Code.)	

In the Matter of the Amendment of Ohio)	
Administrative Code Chapter 4901:1-40, Regarding)	Case No. 13-0652-EL-ORD
the Alternative Energy Portfolio Standard, to)	
Implement Am. Sub. S.B. 315.)	

**MEMORANDUM CONTRA ELECTRIC DISTRIBUTION UTILITIES’
APPLICATIONS FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

The Public Utilities Commission of Ohio (“PUCO”) should deny the Electric Distribution Utilities’ (“EDU”)¹ applications for rehearing as described below because their proposed changes would harm customers and result in higher charges to customers for energy efficiency programs and renewable energy mandates.

In particular, the PUCO should (i) reject the EDUs’ proposal that they be allowed to charge customers for shared savings based on banked energy savings, (ii) affirm the new rules’ requirements regarding the 3% limit on charges to customers for EDUs’

¹ The EDUs are Ohio Power Company (“AEP”), the Dayton Power and Light Company (“DP&L”), Duke Energy Ohio, Inc. (“Duke”), and Ohio Edison Company, the Toledo Edison Company, and the Cleveland Electric Illuminating Company (collectively, “FirstEnergy”).

compliance with renewable mandates, and (iii) confirm that EDUs bear the burden of proving that their proposed charges to customers are just and reasonable.²

II. RECOMMENDATIONS

- A. The PUCO should reject the EDUs' proposals that they be allowed to charge customers higher utility profits (shared savings) based on "banked" energy savings (savings that occurred in prior years).**

Each of the EDUs recommends that the PUCO's rules be modified to allow EDUs to use banked energy savings to charge higher shared savings (utility profits) to customers. The PUCO has already rejected this in the past, and the new rules are therefore consistent with PUCO precedent.

When an EDU's energy efficiency programs save more energy than is required to meet its statutory mandates in one year, it may "bank" the extra savings and apply them to comply with mandates in a future year. For example, if an EDU's benchmark in year 1 is 100 kWh and that EDU's programs saved 125 kWh in year 1, then the EDU could apply the additional 25 kWh in year 2 to meet its mandate in that year. But now, the EDUs want the PUCO to amend its rules to allow the utility to use that 25 kWh in year 2 to charge customers higher shared savings.³ This violates PUCO precedent.

In re Application of The Cleveland Electric Illuminating Co., Ohio Edison Co., and The Toledo Edison Co. for Approval of their Energy Efficiency & Peak Demand

² The Office of the Ohio Consumers' Counsel ("OCC") does not address all the arguments raised by the EDUs in their applications for rehearing. This should not be construed as OCC's acquiescence to those arguments.

³ See Application for Rehearing of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company at 2-3 (Jan. 18, 2019) (the "FirstEnergy AFR"); Application for Rehearing of Duke Energy Ohio, Inc. at 6 (Jan. 18, 2019) (the "Duke AFR"); Application for Rehearing of Ohio Power Company and the Dayton Power and Light Company at 9-11 (Jan. 18, 2019) (the "AEP/DP&L AFR").

Reduction Program Plans for 2013 through 2015,⁴ the PUCO addressed this very issue.

It succinctly concluded: “the Commission finds that banked savings shall only be counted toward shared savings in the year it is banked.”⁵ The PUCO, therefore, has already decided this issue; the new rules prohibiting a utility from using banked savings to increase shared savings is merely rule codification of existing PUCO precedent.

“Although the Commission should be willing to change its position when the need therefor is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.”⁶ No showing has been made in this case to justify departing from the PUCO’s precedent.

In addition, the use of banked savings to trigger shared savings is not “enabled” by legislation, as FirstEnergy states.⁷ The only mention of banked savings regarding energy efficiency programs in Ohio law concerns applying banked savings to meet energy efficiency and peak demand requirements.⁸ The law makes no connection between banked savings and shared savings (and additional unwarranted utility profits).

Allowing a utility to use banked energy savings to increase shared savings would also be bad public policy. Suppose a utility banks energy savings for several years such that it has enough banked energy savings to meet its entire energy efficiency mandate. A utility could then completely cancel all of its energy efficiency programs, apply the

⁴ Case No. 12-2190-EL-POR, Opinion & Order (Mar. 20, 2013).

⁵ *Id.* at 16.

⁶ *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 431, 71 O.O.2d 393, 409, 330 N.E.2d 1, 19-20.

⁷ FirstEnergy AFR at 3.

⁸ R.C. 4928.662(G).

banked savings to meet its mandates, and then still charge customers tens of millions of dollars per year in “shared savings.” Customers should not pay profits to a utility if a utility cancels all of its energy efficiency programs, but that is exactly what could occur if the PUCO allows utilities to use banked energy savings to increase shared savings.

The PUCO should therefore reject the EDUs’ proposals that they be allowed to charge customers higher shared savings (utility profits) based on energy savings that occurred in prior years.

B. The PUCO should affirm the Order’s requirements regarding the 3% cost limitation on charges to consumers for compliance with renewable mandates.

R.C. 4928.64(C)(3) provides that an electric distribution utility need not comply with the statutory renewable mandates “to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three per cent or more.” The PUCO’s new rules require electric distribution utilities to (i) calculate the 3% limitation and (ii) restrict charges to customers consistent with that 3% limitation. AEP/DP&L contend that the cost cap rules adopted by the PUCO are inconsistent with this statute.⁹

Contrary to AEP/DP&L’s assertion, the new cost cap rules are consistent with the statute. Notably, the statute provides that a utility “need not comply” with the renewable energy mandates if the cost would exceed this 3% limitation. The statute, however, does not state who makes the decision regarding whether the utility “need not comply.” In particular, the statute does *not* state that the utility has the exclusive right to determine whether it will exceed the 3% limitation and therefore need not comply with the

⁹ AEP/DP&L AFR at 14-16.

mandates. Instead, the statute allows the PUCO to determine when a utility exceeds the 3% cost limitation, and to make a finding that the utility need not comply with the statutory renewable under those circumstances. The PUCO's rules regarding the 3% cost limitation are consistent with the statute and should be affirmed on rehearing.

C. The PUCO should require utilities to bear the burden of proving that their proposed charges to customers are just and reasonable.

Rule 4901:1-39-06(A) attempts to clarify that an EDU demonstrate "how it proposes recovery and why" in each cost collection mechanism, specifically charges that are beyond direct program and implementation costs. This addresses, among other things, FirstEnergy's past practice of filing rider updates with only a tariff sheet, as opposed to an application, testimony, workpapers, exhibits, or documentation showing how the revenue requirement was calculated or how the rates to customers were derived.

FirstEnergy appears to ask that it not be required to demonstrate the justness and reasonableness of its proposed charges to consumers for energy efficiency. In particular, FirstEnergy states that the PUCO "has already determined how energy efficiency recovery should occur and approved energy efficiency recovery mechanisms that are in effect today."¹⁰ It appears as though FirstEnergy is asking the PUCO to include rules providing that if a cost-collection mechanism is approved once, it is automatically approved for all future periods. The PUCO should reject this proposal. There should be no presumption that a past collection mechanism is reasonable for future plan periods.

¹⁰ FirstEnergy AFR at 5.

III. CONCLUSION

The PUCO should deny the EDUs' applications for rehearing, consistent with OCC's recommendations herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served on the persons stated below via electronic transmission, this 28th day of January 2019.

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Summary: Memorandum Memorandum Contra Electric Distribution Utilities' Applications for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.