

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review of Its Rules for Energy Efficiency Programs Contained in Chapter 4901:1-39 of the Ohio Administrative Code.)))))	Case No. 13-651-EL-ORD
In the Matter of the Commission's Review of Its Rules for the Alternative Energy Portfolio Standard Contained in Chapter 4901:1-40 of the Ohio Administrative Code.)))))	Case No. 13-652-EL-ORD
In the Matter of the Amendment of Ohio Administrative Code Chapter 4901:1-40 regarding the Alternative Energy Portfolio Standard, to Implement Am. Sub. S.B. 315.)))))	Case No. 12-2156-EL-ORD

**COMMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

The Public Utilities Commission of Ohio (“PUCO”) has put out for comment the PUCO Staff’s proposed changes to important rules that should provide Ohioans with the benefit of energy efficiency. The proposed rules should, but do not, constrain what Ohioans will pay their electric utilities for energy efficiency. Instead, the proposed rules transfer decision-making from the PUCO to the electric utilities for outcomes on electric bills, with predictable bad results for Ohioans who already are paying more on average for electricity than residential consumers in 32 other states.¹

¹ See U.S. Energy Information Administration, EIA Electric Power Monthly with Data for August 2013 (October 2013) at 119, Table 5.6B (http://www.eia.gov/electricity/monthly/current_year/october2013.pdf).

The energy efficiency rules address electric utilities' compliance with the energy efficiency standards of R.C. 4928.66, which include programs (such as peak demand response and smart grid) directed toward customers. The alternative energy portfolio rules implement the requirements of R.C. 4928.67 that electric distribution utilities provide a percentage of their generation load through alternative energy sources. The PUCO Staff's proposed changes include any revisions to rules resulting from the enactment of Am. Sub. S.B. 315 ("S.B. 315").²

In response to the Entry, the Office of the Ohio Consumers' Counsel ("OCC") files Comments on the proposed rule revisions.³ The most significant change proposed by the PUCO Staff is "to move from a pre-approval process for portfolio plans to a post-approval scenario that would allow utilities the flexibility to make changes in accordance with technologies and market conditions."⁴ This proposal is a sea change from the current process for energy efficiency cases, where the PUCO maintains discretion over energy efficiency portfolios and the costs for Ohioans. The PUCO Staff's proposal would diminish the role of interested stakeholders in the planning stages of energy efficiency programs, and render the collaborative process less effective or ineffective for stakeholders (other than the utilities).

² Entry (January 29, 2014) at 2. The governor of the state of Ohio signed S.B. 315 into law on June 11, 2012, and the law became effective on September 10, 2012. Id.

³ The Entry set February 28, 2014 as the deadline for comments on the proposed rule revisions, and March 14, 2014 as the deadline for reply comments. Id. at 6. But the PUCO's offices were closed on February 28, 2014 due to a power outage. Per Ohio Adm. Code 4901-1-7(D), "[i]f the commission office is closed to the public for the entire day that constitutes the last day for doing an act or closes before its usual closing time on that day, the act may be performed on the next succeeding day that is not a Saturday, Sunday, or legal holiday." The PUCO extended the deadline for filings due on February 28, 2014 until March 3, 2014. See *In the Matter of the Extension of Filing Dates for Pleadings and Other Papers Due to a Building Emergency*, Case No. 14-38-AU-UNC, Entry (March 3, 2014).

⁴ Id. at 3.

In addition, the PUCO Staff proposes that concurrent with the filing of [a utility's] program portfolio plan, an electric utility must propose a rate adjustment mechanism for collection of costs from customers.⁵ The rate mechanism may include lost distribution revenues and shared savings.⁶ The PUCO Staff proposes that inclusion of lost distribution revenue and shared savings in the proposed rate adjustment must be “consistent with prior Commission directives.”⁷

This caveat – that the mechanism for utility charges to customers must be “consistent with prior Commission directives” – is too vague and ambiguous for a PUCO rule. The electric utilities will likely use the rule to select any directive by the PUCO related to lost revenues and shared savings that the utilities favor. This utility-discretion rule will have predictable results for millions of Ohioans who pay the electric utilities’ bills, meaning customers will likely pay even more under the proposed rule.

The PUCO should be reducing over time what utilities can charge Ohioans for shared savings and lost revenues. But the PUCO Staff’s proposed rule would allow utilities to cherry-pick the most favorable PUCO rulings from the past for increasing customers’ bills, and thereby thwart the exercise of sound regulatory judgment on issues over time.

In these Comments, OCC addresses many of the PUCO Staff’s proposed changes to the portfolio plan process. OCC also comments on other changes to Chapter 39 proposed by the PUCO Staff.⁸ Where OCC recommends particular changes, deletions of

⁵ Id., Attachment A, page 25 of 30.

⁶ Id.

⁷ Id.

⁸ OCC has no proposed changes to Chapter 40. OCC reserves the right to respond, in its reply comments, to other parties’ proposed changes to Chapter 39 and/or Chapter 40.

language in a proposed rule will be shown with strikethroughs and additions to a proposed rule will be shown as all caps.

II. COMMENTS

A. **Proposed Ohio Adm. Code 4901-39-04: Program Portfolio Plan and Filing Requirements.**

1. **The PUCO Staff's proposal would adversely affect or negate the rights of customer parties and others to be heard on significant matters affecting their electric bills.**

The PUCO Staff has proposed to change this rule so that the electric utility – not the PUCO – makes the final determination regarding the energy efficiency programs that will comprise the utility's program portfolio. The PUCO Staff's proposal is detrimental to customers and will effectively reduce or negate stakeholders' ability to participate in energy efficiency portfolio proceedings for purposes including protecting Ohioans' electric bills. The PUCO should not adopt the proposed rule.

Under the current rule, an electric utility must file its energy efficiency program portfolio plan by April 15 of each year.⁹ The electric utility must show that the portfolio as a whole is cost-effective, and that each program within the portfolio is cost-effective or provides substantial non-energy benefits.¹⁰ The current rule provides that any person may file objections to the plan within 60 days after the plan is filed.¹¹ The objections must be specific, and must include any proposed additional or alternative programs or proposed modifications to the plan.¹² The PUCO then sets the plan for hearing, at which

⁹ Ohio Adm. Code 4901-39-04(A). In these Comments, OCC will cite to the current rule as "Ohio Adm. Code" and will cite to proposed rules as "proposed rule."

¹⁰ Ohio Adm. Code 4901-39-04(B).

¹¹ Ohio Adm. Code 4901-39-04(D).

¹² Id.

the electric utility has the burden to prove that its proposed plan is consistent with the State policy as set forth in R.C. 4928.02 and meets the requirements of R.C. 4928.66.¹³

Under the PUCO Staff's proposed rule 39-04(A), electric utilities must file their portfolio plan by September 15 of each year, with implementation to occur during the following year.¹⁴ After the plan is filed, interested persons then would have a mere 30 days to file comments on the plan.¹⁵ The comments must "specify the basis for all recommendations made, including any proposed additional or alternative programs or measures, or modifications that are suggested to be made to the electric utility's proposed program portfolio plan."¹⁶

Under the PUCO Staff's proposed rule 39-04(E), "[w]ithin thirty days after the deadline for filing comments pursuant to paragraph (D) of this rule, **the electric utility shall file its response, in which it shall indicate which recommendations it has accepted for inclusion into its program portfolio plan.**"¹⁷ This proposed rule would make the electric utility, rather than the PUCO, the ultimate judge of which energy efficiency programs the utility would implement. The proposed rule is thus an abrogation of the PUCO's responsibility to oversee energy efficiency programs and to render its own decisions under R.C. 4903.09. The proposed rule substitutes the judgment of the electric utilities' that is based on profit in the place of the PUCO's judgment that should be based on best outcomes for people (Ohioans). The proposal is patently unfair to persons who

¹³ Ohio Adm. Code 4901-39-04(E).

¹⁴ Entry, Attachment A, pages 13 of 30 and 14 of 30.

¹⁵ Id, page 15 of 30 (proposed rule 39-04(D)).

¹⁶ Id.

¹⁷ Id. (emphasis added).

have an interest in the effectiveness of electric utilities' energy efficiency programs for Ohio, its people and its businesses.

This unwelcome turn of events under the proposed rule – where monopoly utilities are given control of regulatory outcomes – is similar to the control that Senate Bill 221¹⁸ yields to utilities for rejecting even a unanimous decision of the PUCO in an electric standard offer case. On that latter issue, Commissioner Roberto wrote in 2009 that “parties certainly do not possess equal bargaining power”¹⁹ with the utilities. The Commissioner described the statute’s empowerment of the electric utilities as “one party has the singular authority to reject not only any and all modifications proffered by the other parties but the Commission’s independent judgment as to what is just and reasonable.”²⁰ Commissioner Roberto’s concerns for parties on the short end of a codified imbalance of power are applicable here, and should be heeded by rejecting the PUCO Staff’s proposed rules that empower monopoly utilities over their customers.

Also, the PUCO Staff’s proposed rules would eliminate stakeholders’ and the public’s ability to have effective input regarding the programs in an electric utility’s portfolio plan. The proposed rule cuts in half the time available to review a utility’s energy efficiency plan, analyze the plan and comment on it. Interested persons currently have 60 days in which to file objections to a utility’s portfolio filing.²¹ But under the PUCO Staff’s proposed changes, stakeholders and the public will only have 30 days to file comments on a utility’s portfolio plan. Thirty days is inadequate to provide

¹⁸ R.C. 4928.143(C)(2)(a).

¹⁹ *In the Matter of the Application of the FirstEnergy Utilities*, Case No. 08-935-EL-SSO, Opinion and Order (March 25, 2009), Concurring and Dissenting Opinion of Commissioner Roberto at 2.

²⁰ *Id.*

²¹ Ohio Adm. Code 4901-39-04(D).

meaningful input regarding portfolio plans, especially considering the large sums of money that the utilities seek from customers.²²

In addition, the PUCO Staff's revision would require all electric utilities' portfolio plans to be due on the same day of each year (making comments on all four electric utilities' plans due on the same day). Interested persons would be tasked with analyzing the energy efficiency portfolios of AEP, DP&L, Duke and FirstEnergy at the same time on the same constrained schedule. And interested persons would also be tasked with drafting comments responding to plan at the same time. This process of the proposed rule is unfair to stakeholders, who have their own "peak demand" challenges for resources to deploy in utility cases. And the process is thereby unhelpful for the PUCO, which depends upon the input of stakeholders and the public input for sound decision-making under R.C. 4903.09.

Proposed rule 39-04(E) also would undermine the comment process by allowing the electric utility to have the final word on which programs should be included in its portfolio plan. Obviously, the electric utility likely will prefer its proposals to any recommendations made in comments filed by interested persons, and thus filing comments would likely become a less useful or non-useful exercise. And although proposed rule 39-04(C)(2) requires stakeholder participation in the development of the plan, the PUCO Staff's proposed rules do not require the electric utility to include any stakeholder suggestions in the portfolio plan.

Further, the proposed rule is unfair toward persons who file comments. Proposed rule 39-04(D) would require that comments be specific regarding all recommendations

²² Although the energy efficiency portfolio should be discussed in the collaborative, the rule does not require that all elements of the plan be vetted through the collaborative.

made. But no such specificity is required in the electric utility's response.²³ The utility could unilaterally reject any or all suggestions without explanation. The proposed rule contains no standard by which the utility must make a decision. And it effectively transfers the PUCO's discretion in energy efficiency proceedings to the utilities.

In addition, the proposed rule makes no exception for energy efficiency programs that include decoupling mechanisms. R.C. 4928.66(D) mandates a PUCO order in cases where energy efficiency programs contain decoupling mechanisms:

(D) The commission may establish rules regarding the content of an application by an electric distribution utility for commission approval of a revenue decoupling mechanism under this division. Such an application shall not be considered an application to increase rates and may be included as part of a proposal to establish, continue, or expand energy efficiency or conservation programs. The commission **by order** may approve an application under this division if it determines both that the revenue decoupling mechanism provides for the recovery of revenue that otherwise may be forgone by the utility as a result of or in connection with the implementation by the electric distribution utility of any energy efficiency or energy conservation programs and reasonably aligns the interests of the utility and of its customers in favor of those programs.

(Emphasis added.) The proposed rule thus violates R.C. 4928.66(D).

The proposed rule is unlawful, abrogates the PUCO's responsibility to oversee electric utilities' energy efficiency programs and is manifestly unfair to persons interested in such programs. Electric utilities should not be allowed to dictate which programs will be included in their portfolio plans. Under R.C. 4903.09, it is the PUCO, not the utility industry, that is to hear cases and arrive at "decisions." The PUCO should reject the PUCO Staff's proposed rule 39-04(E), and should retain (not abdicate) the decision-making power over electric utilities' energy efficiency programs.

²³ Entry, Attachment A, page 15 of 30.

2. Other issues with proposed rule 39-04.

Another flaw in proposed rule 39-04 is the absence of a cost-effectiveness analysis. Proposed rule 39-04(B) states that the portfolio as a whole must be cost-effective, and that each program within the portfolio must be cost-effective or must provide substantial non-energy benefits.²⁴ Although cost-effectiveness is one of the 12 factors still to be considered in designing the plan,²⁵ there is no requirement that the electric utility demonstrate, in its docketed plan, the cost-effectiveness of the programs within the plan. Proposed rule 39-04(C)(4) requires that the plan include an analysis of each program and the electric utility's rationale retaining, modifying or eliminating a program,²⁶ but does not require a cost-effectiveness analysis. The PUCO should require that portfolio plans include a cost-effectiveness analysis.

OCC also suggests one change in proposed rule 39-04(A) to clarify that each electric utility must file a portfolio plan annually. The following change should be made to the rule: "No later than September 15 in the last year of an existing commission approved portfolio plan, and no later than September 15 each year thereafter, EACH electric utility shall file an updated program portfolio plan to be implemented in the following calendar year, unless otherwise directed by the commission."

B. Proposed Ohio Adm. Code 4901:1-39-06: Recovery Mechanism.

Proposed rule 39-06 has a flaw similar to the PUCO Staff's proposed rule 39-04. Under proposed rule 39-06, electric utilities could dictate the mechanism that would be used to charge customers for the costs associated with energy efficiency programs. The

²⁴ Id. page 14 of 30.

²⁵ See id., page 10 of 30 (proposed rule 39-03(B)(1)).

²⁶ Id.

current rule does not require electric utilities to include a collection mechanism as part of their portfolio plans; it provides that utilities “*may* submit a request for recovery of an approved rate adjustment mechanism....”²⁷ The rule also allows for the filing of objections to the mechanism within 30 days after the plan is filed, and for a hearing on the mechanism “[i]f the application appears unjust or unreasonable....”²⁸

In proposed rule 39-06, however, the PUCO Staff would make a collection mechanism a *mandatory* part of an electric utility’s portfolio plan: “Concurrent with the filing of its program portfolio plan, the electric utility *shall* propose a rate adjustment mechanism for recovery of costs incurred in implementing its energy efficiency, peak-demand reduction, and demand response programs.”²⁹ But the proposed rule specifies no process to address the collection mechanism.

Thus, either the collection mechanism proposed by the electric utility would not be scrutinized, or the process for examining the collection mechanism would be the same as the process for the portfolio plan in proposed rule 39-04. Either way, the utility would make the final decision regarding the collection mechanism. This is wrong and to the detriment of customers.

The collection mechanism (for charging customers) would only be scrutinized after the fact. Under the proposed rule, the collection mechanism would be subject to “reconciliation based on the commission’s opinion and order issued in the performance

²⁷ Ohio Adm. Code 4901-39-07(A) (emphasis added). The current rule addressing collection mechanisms is Ohio Adm. Code 4901-39-07. The PUCO Staff proposes to eliminate current Ohio Adm. Code 4901-39-06 and renumber the collection mechanism rule as Ohio Adm. Code 4901-39-06.

²⁸ Ohio Adm. Code 4901-39-07(B).

²⁹ Entry, Attachment A, page 25 of 30 (emphasis added).

verification process.”³⁰ The performance verification process takes place in the year *after* the portfolio plan occurs.³¹

As with the portfolio plan itself, the electric utility – not the PUCO – would have the final word regarding the collection mechanism. This would be an abrogation of the PUCO’s statutory duty to ensure that rates are just and reasonable³² and to render decisions.³³

Under the proposed rule, the only restriction on the mechanism for charging customers included in a utility’s portfolio plan is that it “shall be consistent with prior Commission directives.”³⁴ This proposed restriction is inherently flawed and fatally flawed for protecting customers from utility charges.

The language “consistent with prior Commission directives” is vague, ambiguous and gives the utility unfettered discretion as to determining which PUCO “directive(s)” justify its recovery mechanism. The proposed rule does not define “directives”; a utility’s view of the rule could theoretically include choosing from PUCO decisions involving circumstances that have no relationship to the utility’s situation. For instance, a utility may assert that it could cite to a PUCO order involving another utility, even though the order addressed markedly different circumstances. Utilities can be expected to claim they have been given the opportunity to pick and choose (cherry-pick) the PUCO

³⁰ Id. Under the current rules, collection mechanisms are already subject to reconciliation as part of the verification process. See Ohio Adm. Code 4901-39-07(A).

³¹ See Entry, Attachment A, page 20 of 30.

³² See R.C. 4905.22; R.C. 4928.02(A).

³³ R.C. 4903.09.

³⁴ Entry, Attachment A, page 25 of 30.

directive(s) most advantageous to the utilities. Giving utilities this level of discretion is wrong.

Electric utilities should not be able to dictate the mechanism to collect costs from customers. The PUCO should retain its decision-making power over electric utilities' energy efficiency programs. The PUCO should modify the PUCO Staff's proposed rule 39-06 and retain the process already found in Ohio Adm. Code 4901-39-07(B).

- 1. The PUCO Staff's proposal (rule 39-06) to allow utilities to charge customers for "lost revenue recovery" is contrary to previous PUCO statements and contrary to the interests of Ohioans who will find the lost revenues on their electric bills.**

The PUCO Staff's proposed rule 39-06 would allow utilities to propose a rate adjustment mechanism that includes a request to collect lost distribution revenues from customers. A mechanism to recover lost distribution revenues would allow the utility to collect distribution revenues that are otherwise not collected from customers because of the electricity savings resulting from the utility's energy efficiency programs. This proposed rule is concerning because it embraces a utility model where customers *paying* utilities for energy efficiency, when instead customers should be *benefiting* from the savings of energy efficiency.

In addition, allowing utilities to collect lost distribution revenues is contradictory to PUCO statements. For example, PUCO Chairman Snitchler has stated that there would be reluctance "to approve any future proposals which include the collection of lost distribution revenues resulting from the statutory mandates for energy efficiency savings

and peak demand reduction.”³⁵ Similarly, former Commissioner Roberto said that lost revenue recovery has out-lived its value to customers.³⁶

OCC agrees. The PUCO should modify the PUCO Staff’s proposed rule 39-06 to eliminate the charging of customers for so-called lost distribution revenues.

2. Charges for shared savings in the portfolio plans of AEP, DP&L, Duke and FirstEnergy, if allowed at all by the PUCO, should be strictly limited to charging customers for shared savings on the efficiencies that exceed the statutory benchmark.

Ohio is an energy efficiency compliance state, where electric utilities must meet an annual savings benchmark or be subject to penalties. In this regard, OCC recommends that incentives only be made available for actual utility performance that is demonstrated to have exceeded the statutory benchmarks. The regulatory principle is that allowing charges to customers is an incentive for the utility to provide the “good” of more energy efficiency that saves customers more money. But there is no regulatory principle or science in allowing the utility to charge customers for merely meeting the expectation of compliance with the law. And if utilities exceed the statutory benchmark for energy efficiency, the incentive (shared savings) they charge customers for exceeding the benchmark should not include any charges for the efficiency achieved below the benchmarks.

³⁵ *In the Matter of the Application of the Cleveland Electric Illuminating Company, Ohio Edison Company, and the Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2010 through 2012 and Associated Cost Recovery*, Case Nos. 09-1947-EL-POR, et. al., Opinion and Order (March 23, 2011), Concurring Opinion of Chairman Todd A. Snitchler at 2.

³⁶ *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012) (“FirstEnergy ESP III Order”), Dissenting Opinion of Commissioner Cheryl L. Roberto at 6.

A shared savings incentive mechanism is a tool used by regulators to reward exemplary utility performance in delivering energy efficiency and peak demand reduction programs to its customers. A utility should not be provided an incentive to comply with the law. Thus, any shared savings mechanism should only be made available for actual utility performance that is demonstrated to have exceeded the statutory benchmarks. Additionally, an electric utility should not be allowed to collect a shared savings incentive if it is receiving lost distribution revenues.

Further, an electric utility should not be allowed to collect a shared savings incentive if it bids less than 75% of its eligible energy efficiency (MW) into the PJM base residual auction. Bidding into the PJM auction is also discussed in Section F of these comments. The objective of energy efficiency is to save money for Ohio customers and businesses, and not to become a utility profit center at customer expense.

Based on the above discussion, OCC proposes the following changes to the PUCO Staff's proposed rule 39-06:

Concurrent with the filing of its program portfolio plan, the electric utility ~~shall~~ MAY propose a rate adjustment mechanism for recovery FROM CUSTOMERS of costs incurred in implementing its energy efficiency, peak-demand reduction, and demand response programs. Inclusion of any ~~lost distribution revenue and~~ shared savings in the proposed rate adjustment mechanism FOR CHARGING CUSTOMERS shall ~~be consistent with prior Commission directives~~ REFLECT ONLY THE ELECTRIC UTILITY'S PERFORMANCE EXCEEDING THE STATUTORY BENCHMARKS. THE LEVEL OF ANY SHARED SAVINGS THAT THE ELECTRIC UTILITY IS PERMITTED TO COLLECT FROM CUSTOMERS THROUGH THE RATE ADJUSTMENT MECHANISM SHALL BE SET BETWEEN ZERO AND THIRTEEN PERCENT OF THE AMOUNT (KWH) BY WHICH THE UTILITY EXCEEDS THE ANNUAL BENCHMARK UP TO 125% OF THE KWH REQUIRED FOR THE UTILITY'S COMPLIANCE WITH THE BENCHMARK FOR THE YEAR. THE ELECTRIC UTILITY SHALL NOT BE

PERMITTED TO COLLECT SHARED SAVINGS FROM CUSTOMERS DURING ANY YEAR WHEN THE ELECTRIC UTILITY COLLECTS LOST REVENUES FROM CUSTOMERS OR WHEN THE UTILITY BIDS LESS THAN 75 PERCENT OF ITS ELIGIBLE ENERGY EFFICIENCY (MW) INTO THE PJM BASE RESIDUAL AUCTION. THE ELECTRIC UTILITY'S RATE ADJUSTMENT MECHANISM WILL NOT BE EFFECTIVE UNLESS APPROVED BY THE COMMISSION. Any cost recovery that occurs under the electric utility's rate adjustment mechanism shall be subject to reconciliation based on the commission's opinion and order issued in the performance verification process.

C. Proposed Ohio Adm. Code 4901-39-01: Definitions.

OCC recommends changes to two definitions in proposed Ohio Adm. Code 4901:1-39-01. The first change is to the definition of "shared savings" that the PUCO Staff proposes to add to the rule as 4901:1-39-01(X). The PUCO Staff proposes the following definition for "shared savings":

the percentage of the net savings that a distribution electric utility may earn in any year in which it exceeds a statutory energy efficiency and/or peak demand reduction benchmark. The net savings is the difference in the present value of the EDU's portfolio of avoided generation, transmission and distribution costs minus the total costs of the energy efficiency programs inclusive of each program's measurement and verification costs.³⁷

The PUCO Staff's definition of "shared savings" is inadequate because it does not reflect PUCO precedent regarding shared savings in energy efficiency portfolios. For example, the PUCO has consistently ruled that mercantile program savings and transmission project savings can be counted toward compliance, but shall not be included

³⁷ Entry, Attachment A, page 7 of 30.

in any shared savings calculations (that result in payments by customers).³⁸ The definition of “shared savings” should recognize these exclusions, to protect customers from excessive utility charges.

The PUCO also has approved settlements in the past between parties and utilities that incorporate a three-year measure life for all measures that are included in a shared savings calculation.³⁹ This is an adequate interval and should be added to the rule. And it is important for the “shared savings” definition to clearly state that because banked savings have been counted in the year the savings were created, their inclusion would result in double counting of the savings.

OCC thus recommends the following change to the PUCO Staff’s definition of “shared savings”:

(X) “Shared savings” means the percentage of the net savings that a distribution electric utility may earn in any year in which it exceeds a statutory energy efficiency and/or peak demand reduction benchmark. The net savings is the difference in the present value of the EDU’s portfolio of avoided generation, transmission and distribution costs OF THE EDU’S PORTFOLIO OF ENERGY EFFICIENCY PROGRAM MEASURES minus the total costs of the energy efficiency program MEASUREs inclusive of each program’s measurement and verification costs. THE NET SAVINGS DO NOT INCLUDE ANY SAVINGS RELATED TO MERCANTILE PROGRAMS, TRANSMISSION AND DISTRIBUTION INFRASTRUCTURE PROJECTS, AND BANKED SAVINGS. THE ENERGY AND/OR PEAK

³⁸ See *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015*, Case No. 12-2190-EL-POR, et al., Opinion and Order (March 20, 2013) (“FirstEnergy Portfolio Order”) at 16; *In the Matter of the Application of Duke Energy Ohio, Inc. for an Energy Efficiency Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in Its Existing Portfolio*, Case No. 11-4393-EL-RDR, Opinion and Order (August 15, 2012) at 9; *In the Matter of the Application of Columbus Southern Power Company for Approval of Its Program Portfolio Plan and Request for Expedited Consideration*, Case No. 11-5568-EL-POR, et al., Opinion and Order (March 21, 2012) at 12.

³⁹ See *Duke Energy Ohio Portfolio*, Case No. 11-4393-EL-RDR, Opinion and Order (August 15, 2012) at 4.

DEMAND SAVINGS FROM EACH MEASURE WILL BE
CALCULATED USING THE METHODOLOGY FOUND IN
THE OHIO TECHNICAL REFERENCE MANUAL AND WITH
A THREE-YEAR MEASURE LIFE.

The second change OCC proposes is to the definition of “verified savings” in proposed paragraph (BB). Verified savings matter to Ohioans because the savings become the basis for utility charges that show up on their electric bills. The PUCO Staff has proposed no changes to the current rule in paragraph (Z), which provides:

“Verified savings” means an annual reduction of energy usage or peak demand from an energy efficiency or peak-demand reduction program directly measured or calculated using reasonable statistical and/or engineering methods consistent with approved measurement and verification guidelines.

This definition does not account for the Ohio Technical Resource Manual (“TRM”). In its Entry on Rehearing in Case No. 09-512-GE-UNC in 2013, the PUCO stated that the TRM “should be adopted and approved for use by the electric utilities and gas utilities to determine their energy savings and demand reductions.”⁴⁰ The PUCO then went on to rule that the TRM should be a set of guidelines rather than a mandate.⁴¹

It is time for the PUCO to update the TRM and adopt it as the standard for determining verified savings. Doing so will protect Ohio electric customers by ensuring consistency for determining energy savings among electric utilities in Ohio. Thus, OCC proposes the following change to the definition of “verified savings”:

“Verified savings” means an annual reduction of energy usage or peak demand from an energy efficiency or peak-demand reduction program directly measured or calculated using ~~reasonable~~ statistical and/or engineering methods ~~consistent with approved~~

⁴⁰ *In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures*, Case No. 09-512-GE-UNC, Entry on Rehearing (July 31, 2013) at 11.

⁴¹ *Id.*

~~measurement and verification guidelines~~ AS FOUND IN THE
OHIO TECHNICAL RESOURCE MANUAL.

D. Proposed Ohio Adm. Code 4901-39-02(B) [Waivers].

The current rule states: “The commission may, upon an application or a motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown.” The PUCO Staff, however, has proposed to include language that would allow waiver of non-statutory requirements for energy efficiency programs on the PUCO’s own motion. The PUCO Staff proposes the following change to the rule: “The commission may, sua sponte, or upon an application or a motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown.”⁴² The PUCO should not adopt the Staff’s proposed change.

The current rule allows the PUCO to hear opinions from varied, interested stakeholders regarding any waiver of the energy efficiency rules requested by an electric utility. The utility must file a waiver request, and stakeholders have the opportunity to present their views on the waiver request. This helps the PUCO reach an informed decision.

The PUCO Staff’s proposed rule, however, could remove interested stakeholders (and transparency) from the waiver process. The PUCO could waive a rule based only on information provided by the utility or, depending on the circumstances, based on no information that is public.

⁴² Entry, Attachment A, page 9 of 30.

The PUCO should preserve the opportunity for interested stakeholders to be heard regarding all waivers of the PUCO's rules. The PUCO should not adopt the PUCO Staff's proposed change to this rule.

E. Proposed Ohio Adm. Code 4901-39-03(A): Program Planning Requirements

Ohio Adm. Code 4901-39-03(A) currently requires each electric utility to assess “the potential energy savings and peak-demand reduction from adoption of energy efficiency and demand-response measures within their certified territories....” Under the rule, this assessment must take place prior to the utility filing its portfolio plan each year, and thus must be done annually.

The PUCO Staff proposes to change the rule thusly:

Assessment of potential. Prior to implementing an proposing its comprehensive energy efficiency and peak-demand reduction program portfolio plan, and at least every five years thereafter, an electric utility shall conduct an assessment of potential energy savings and peak-demand reduction from adoption of energy efficiency and demand-response measures within its certified territory, ~~which will be included in the electric utility's program portfolio filing pursuant to rule 4901:1-39-01 of the Administrative Code.~~ Such assessment may be updated by the electric utility from time to time, at less than five year intervals, as market conditions warrant.⁴³

The proposed rule is confusing. Under the PUCO Staff's proposed changes, an assessment of potential energy savings and peak-demand reduction must be performed prior to implementing a program portfolio plan. Through proposed rule 39-04, portfolio plans are implemented every year.⁴⁴ But if the assessment is done every year, this

⁴³ Id.

⁴⁴ Id., page 13 of 30 and page 14 of 30.

obviates the need for doing the assessment every five years, as the PUCO Staff proposes. The PUCO Staff's proposal should be clarified.

In addition, five years is too long a period between assessments for potential energy savings and peak demand reduction. Customers pay for the electric utilities' energy efficiency programs, so the potential effectiveness of the programs should be assessed frequently. OCC favors annual assessments. But if the PUCO decides to lengthen the assessment interval, OCC recommends that the interval between assessments be no more than three years.

If the PUCO decides to lengthen the assessment interval, the wording of proposed rule 39-03(A) should be changed. The phrase "at least every five years thereafter" could be read to mean that the assessment interval should be *no less than* five years. If the PUCO adopts a longer assessment interval than one year, the language should be changed to "no more than" whatever interval the PUCO decides.

F. The PUCO Should Adopt a Rule Requiring Electric Utilities to Bid at Least 75 Percent of Their Eligible Energy Efficiency Resources into the PJM Base Residual Auction for the Benefit of Customers.

The PUCO should implement a rule requiring electric utilities to bid 75 percent of their eligible efficiency resources into the PJM Base Residual Auction ("BRA"). The BRA determines what customers pay for capacity in any given year. Bidding eligible energy efficiency resources into the BRA benefits customers because it can potentially lower the final capacity cost for customers, and can decrease the amount customers ultimately pay for energy efficiency programs on their electric bills.

Requiring electric utilities to bid in at least 75 percent of eligible resources into the PJM BRA will assure that customers realize the substantial benefits from bidding in

additional capacity into the BRA. The requirement will also help protect electric utilities from any alleged risk of bidding eligible/planned resources into the auction (rather than just existing resources).

The PJM Rules allow for bidding “planned resources” into the PJM BRA. Specifically, the demand savings from utility energy efficiency and load management programs can be bid into the base residual auctions as long as the savings from the programs have a PJM approved Measurement & Verification plan. The programs must comply with the Measurement & Verification protocols in PJM Manual 18b for energy efficiency resources, and PJM Manual 18 Section 4.3, Load Management Products (and all PJM manuals referred therein) for load management resources).

There are two major dollar benefit streams for customers from bidding additional capacity into the PJM BRA: 1) the impact of the energy efficiency bid of potentially reducing customers’ capacity costs; and 2) the revenue payments received by the utilities from PJM for the eligible energy efficiency and load management capacity bid into the BRA are used to reduce the energy efficiency program costs. The PUCO has recognized that there are “substantial benefits” for customers that result from utilities bidding energy efficiency into the PJM BRA.⁴⁵ But these benefits for customers will potentially not be fully realized if PJM BRA bidding strategies are left to the utilities to decide.

Implementing a rule requiring electric utilities to bid 75 percent of eligible resources into the PJM BRA is consistent with the PUCO’s FirstEnergy Portfolio Order. In that case, the PUCO required FirstEnergy to bid 75 percent of its planned energy efficiency resources for the 2016/2017 Planning Year under its EE/PDR Portfolio into the

⁴⁵ FirstEnergy Portfolio Order at 21.

May 2013 PJM BRA.⁴⁶ The PUCO's Order aimed to alleviate FirstEnergy's alleged risk (while maintaining the benefits to customers) by only requiring FirstEnergy to bid in 75 percent of its eligible energy efficiency resources, rather than 100 percent for 2013.⁴⁷

The FirstEnergy Portfolio Order is consistent with PUCO precedent on bidding into the PJM BRA. For example, the PUCO previously instructed that FirstEnergy has “an obligation to take all reasonable and cost-effective steps to avoid unnecessary [Reliability Pricing Model] price increases for their customers.”⁴⁸ And, in its Opinion and Order in the FirstEnergy Electric Security Plan III case, the PUCO reiterated its support for FirstEnergy bidding into the PJM BRA:

However, the Commission notes that additional steps may be taken to mitigate the impact of the transmission constraint in the ATSI zone for future base residual auctions. **Specifically, the Companies should take steps to amend their energy efficiency programs to ensure that customers, knowingly and as a condition of participation in the programs, tender ownership of the energy efficiency resources to the Companies. Further, the Companies should continue to take the necessary steps to verify the energy savings to qualify for participation in the base residual auctions, and the Companies should bid qualifying energy resources into the auction.** The record demonstrates that there has been tremendous growth in the use of energy efficiency resources in the capacity auctions, and the Companies are well positioned to substantially increase the amount of energy efficiency resources they can bid into the auction, which will assist in mitigating the impact of the transmission constraint in the ATSI zone. Further, the Commission will continue to review the Companies' participation in future base residual auctions until

⁴⁶ Id. at 20. PJM BRA for a Delivery Year is held during the month of May, three years prior to the actual Delivery Year. See <http://www.pjm.com/~media/markets-ops/rpm/rpm-auction-info/rpm-base-residual-auction-faqs.ashx>.

⁴⁷ FirstEnergy Portfolio Order at 20-21.

⁴⁸ See *In the Matter of the Commission's Review of the Participation of The Cleveland Electric Illuminating Company, the Ohio Edison Company, and The Toledo Edison Company in the May 2012 PJM Reliability Pricing Model Auction*, Case No. 12-814-EL-UNC, Entry at 2 (February 2, 2012).

such time as the transmission constraint in the ATSI zone is resolved.⁴⁹

The revenues and capacity savings for customers that can be generated from bidding energy efficiency resources into the PJM BRA should not be left on the table. The PUCO should assure that Ohioans realize the substantial benefits that can be gained from bidding energy efficiency resources into the PJM BRA. OCC recommends that the PUCO adopt a rule requiring utilities to bid 75 percent of their eligible energy efficiency resources into the PJM BRA.⁵⁰

III. CONCLUSION

The PUCO has been presented with proposed rules that are a sea change in implementing energy efficiency under Senate Bill 221. The proposed rules would transform the regulatory process from one of valuing the diverse interests of stakeholders for PUCO decision-making to one of deference to one particular interest – the electric utility monopolies – that are supposed to be regulated for the protection of the public. And the proposed rules would place Ohioans’ electric bills in harm’s way, where utilities would be empowered by rule (proposed rule 39-04(A)) to make choices that result in higher charges to consumers (and more profits to utilities) when lowering charges is a desired option.

This unwelcome turn of events under the proposed rule, where monopoly utilities are given control of regulatory outcomes, is similar to the control that Senate Bill 221⁵¹ yields to utilities for rejecting even a unanimous decision of the PUCO in an electric

⁴⁹ FirstEnergy ESP III Order at 38 (emphasis added).

⁵⁰ See FirstEnergy Portfolio Case, Direct Testimony of Wilson Gonzalez (October 5, 2012) at 18-25, discussing the benefits of bidding into the PJM BRA for customers.

⁵¹ R.C. 4928.143(C)(2)(a).

standard offer case. On that latter issue, Commissioner Roberto wrote in 2009 that “parties certainly do not possess equal bargaining power”⁵² with the utilities. The Commissioner described the statute’s empowerment of the electric utilities as “one party has the singular authority to reject not only any and all modifications proffered by the other parties but the Commission’s independent judgment as to what is just and reasonable.”⁵³ Commissioner Roberto’s concerns for parties on the short end of a codified imbalance of power are applicable here, and should be heeded by rejecting the PUCO Staff’s proposed rules that empower monopoly utilities over their customers.

OCC’s other recommended changes to the PUCO Staff’s proposed rules will improve the final rules for Ohioans whose electric bills are affected by these issues. The PUCO should adopt OCC’s recommendations.

Respectfully submitted,

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⁵² Case No. 08-935-EL-SSO, Opinion and Order (March 25, 2009), Concurring and Dissenting Opinion of Commissioner Roberto at 2.

⁵³ Id.

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Comments were served upon the persons listed below via electronic service this 3rd day of March, 2014.

/s/ Terry L. Etter

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