

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF THE
OHIO EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY, AND
THE TOLEDO EDISON COMPANY FOR
APPROVAL OF THEIR ENERGY EFFICIENCY
AND PEAK DEMAND REDUCTION PROGRAM
PORTFOLIO PLANS FOR 2017 THROUGH 2019.

CASE NO. 16-743-EL-POR

ENTRY ON REHEARING

Entered in the Journal on January 10, 2018

I. SUMMARY

{¶ 1} The Commission denies the applications for rehearing of the November 21, 2017 Opinion and Order, as the matters raised therein have been fully considered.

II. PROCEDURAL HISTORY

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02, and as such, are subject to the energy efficiency and peak demand reduction (EE/PDR) requirements under R.C. 4928.64 and 4928.66. In this proceeding, the Commission reviewed FirstEnergy's EE/PDR Program Portfolio Plan for 2017 through 2019 (2017-2019 Portfolio Plan), pursuant to Ohio Adm.Code Chapter 4901:1-39, to ensure that the Companies' 2017-2019 Portfolio Plan consists of cost-effective EE/PDR programs that achieve the statutory benchmarks for peak-demand reduction, and meet or exceed the statutory benchmarks for energy efficiency.

{¶ 3} On November 21, 2017, the Commission issued its Opinion and Order approving FirstEnergy's 2017-2019 Portfolio Plan, as modified by the Stipulation filed December 9, 2016, but also imposing an annual cap of approximately \$107 million on the Company's recovery of EE/PDR program costs and shared savings from customers, a limit of four percent of the Companies' 2015 operating revenues (4% Cap). *In re Ohio Edison Co.*,

et al., for Approval of Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019, Case No. 16-743-EL-POR, Opinion and Order (Nov. 21, 2017) (Opinion and Order) at ¶¶1, 57, 74-75.

{¶ 4} On December 21, 2017, applications for rehearing of the Opinion and Order were filed jointly by the Environmental Law & Policy Center, the Natural Resources Defense Council, the Ohio Environmental Council, and the Environmental Defense Fund (Environmental Advocates, collectively), and by FirstEnergy.

{¶ 5} On January 2, 2018, the Ohio Consumers' Counsel (OCC) filed memoranda contra both applications for rehearing.

III. APPLICATIONS FOR REHEARING

{¶ 6} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

A. *Environmental Advocates' Application for Rehearing*

{¶ 7} As their only ground for rehearing, the Environmental Advocates contend that the Opinion and Order is unlawful and unreasonable because the likely result will be less spending on cost-effective energy efficiency and higher overall bills for FirstEnergy's customers. They concede that the rising rider amounts being billed to customers to pay for EE/PDR programs and shared savings incentives constitute a valid concern but argue that FirstEnergy's EE/PDR rider amounts to only \$2 to \$3 per month for a typical residential customer and that FirstEnergy's EE/PDR programs are subject to budget limits and prudence reviews for any cost overruns (Tr. II at 446-47; Co. Ex. 14). They contend that the Opinion and Order fails to address concerns raised in the record that the 4% Cap may result in higher bills for customers. They cite *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312, 513 N.E.2d 337 (1987) in arguing that the Opinion and Order

violates R.C. 4903.09 by failing to set forth, in sufficient detail, the facts in the record upon which the order is based, and the reasoning of the Commission in reaching its conclusion; and *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195 at ¶30, for the proposition that the Commission abuses its discretion if it renders an opinion on an issue without record support.

{¶ 8} The Environmental Advocates note that the 4% Cap approved in the Opinion and Order will limit FirstEnergy's recovery of EE/PDR program costs and shared savings to approximately \$107 million and, assuming FirstEnergy is able to earn its maximum shared savings incentive payment of \$15.6 million, the resulting annual program budget of \$91.4 million will require the Companies to cut about \$4.1 million from its projected average annual budget of \$95.5 million for 2018 and 2019 (Opinion and Order at ¶¶52-53, 57; Co. Ex. 17, at 8; Env. Int. Ex. 1 at 14). The Environmental Advocates argue that since these programs have been determined to be cost effective, as required by Ohio Adm.Code 4901:1-39-04(B), these programs cost less than the generation they replace, and the 4% Cap will result in higher customer bills overall.

{¶ 9} This argument was fully considered by the Commission. Opinion and Order at ¶¶47-55. As noted by the Commission, the 4% Cap on the potential EE/PDR program costs and shared savings to be borne by ratepayers is a reasonable measure given the rising EE/PDR rider amounts billed to customers, as reported by Staff witness Donlon (Staff Ex. 1 at 5-7; Tr. II at 328; Tr. III at 446-47). Although cost-effective EE/PDR programs may ultimately result in lower bills for ratepayers in the aggregate, this Commission must weigh the potential program benefits against the potential bill impacts to individual customers in the 2017-2019 Portfolio Plan period. Opinion and Order at ¶55. The Commission must balance the current costs of the Companies' EE/PDR riders against the potential future cost savings to customers from the Companies' EE/PDR programs. Accordingly, as the Environmental Advocates have not raised any new issues for the Commission's consideration, their application for rehearing will be denied.

B. FirstEnergy's Application for Rehearing

1. THE COMMISSION LACKS AUTHORITY TO ADOPT THE 4% CAP.

{¶ 10} In their application for rehearing, the Companies argue that the Opinion and Order is unlawful and unreasonable on three separate grounds, the first being that the Commission lacks statutory authority to adopt the 4% Cap on the Companies' recovery of EE/PDR program costs and shared savings. FirstEnergy argues that the Commission is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute, citing *Pike Nat. Gas Co. v. Pub. Util. Comm.*, 68 Ohio St. 2d 181, 183, 429 N.E.2d 444 (1981) and *Canton Storage & Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St. 3d 1, 5, 647 N.E.2d 136, 141 (1995). Further, FirstEnergy maintains that R.C. 4928.66 does not authorize the Commission to approve the imposition of an overall cost cap on the efforts of Ohio's electric distribution utilities (EDUs) to meet their respective statutory EE/PDR benchmarks. FirstEnergy notes that both R.C. 4928.64 and 4928.66 were enacted as part of the same legislation in 2008, and that the renewable energy standards include a cost cap under R.C. 4928.64(C)(3), whereas R.C. 4928.66 does not include a similar provision for the EE/PDR standards. This distinction, FirstEnergy argues, clearly demonstrates the General Assembly's intent to treat the provisions differently with respect to the imposition of a cost cap.

{¶ 11} These arguments were considered and rejected by the Commission. Opinion and Order at ¶¶49-51, ¶56. As noted in the Commission's decision, the 4% Cap is a reasonable measure to moderate the bill impacts of rising EE/PDR rider charges on FirstEnergy customers under this Commission's broad authority to administer and enforce the provisions of R.C. Title 49, which has been recognized by the Court. *Kazmaier Supermarket, Inc. v. The Toledo Edison Co.*, 61 Ohio St.3d 147, 150, 573 N.E. 2d 655, 658 (1991).

{¶ 12} The renewable energy cost cap provision cited by FirstEnergy in R.C. 4928.64(C)(3) allows an electric utility or competitive retail electric service (CRES) provider to avoid compliance penalties even if it fails to meet its renewable energy benchmarks, if the

reasonably expected cost of compliance would exceed the reasonably expected cost of otherwise producing or acquiring the requisite electricity by three percent or more. This provision is not mandatory and is an option for the utility or CRES provider, participating in a competitive marketplace. Moreover, EE/PDR costs are recovered from all customers on a nonbypassable basis.

{¶ 13} In contrast, the 4% Cap adopted in the Opinion and Order will protect the utility's customers from increasing rider charges, particularly where the utility's EE/PDR program budgets seek to achieve targets beyond the utility's statutory mandates under R.C. 4928.66. Accordingly, and because FirstEnergy raises no new issues for the Commission's consideration, this ground for rehearing will be denied.

2. THE 4% CAP WAS NOT SUBJECTED TO OHIO'S MANDATORY RULE-MAKING PROCEDURES.

{¶ 14} As its second ground for rehearing, FirstEnergy argues that the Opinion and Order is unlawful because our adoption of the 4% Cap constitutes the creation of a legal standard that did not previously exist, and therefore is a rule that has not been adopted under the appropriate rule-making requirements of R.C. 111.15. FirstEnergy cites *Fairfield Cty. Bd. of Comm'rs. v. Nally*, 143 Ohio St. 3d 93, 100, 2015-Ohio-991, 34 N.E.3d 873, in which the Court held that the Ohio Environmental Protection Agency must comply with the similar administrative rule-making procedures in R.C. Chapter 119 in establishing a total maximum daily load water-quality standard. FirstEnergy also references *B&T Express, Inc. v. Pub. Util. Comm. of Ohio*, 145 Ohio App. 3d 656, 665, 763 N.E.2d 1241 (2001) in which the Commission's adoption of federal motor carrier safety regulations were held to constitute rules under R.C. 111.15 because they had a "general and uniform operation" for motor carriers operating in Ohio. FirstEnergy asserts that Ohio's electric utilities have never before had to adjust their proposed EE/PDR plans to comply with an overall cost cap, and that the 4% Cap is being applied in a general and uniform manner to the recovery of EE/PDR program costs and shared savings for all of the Ohio electric utilities. Furthermore, FirstEnergy notes the Commission's adoption of Ohio Adm.Code 4901:1-40-07 for the

renewable energy cost cap under R.C. 4928.64(C)(3), suggesting that the 4% Cap for recovery of EE/PDR costs must likewise be codified.

{¶ 15} In its memorandum contra, OCC argues that the lack of an explicit cost cap in R.C. 4928.66 does not strip the Commission of its more general authority to regulate customers' utility rates under R.C. 4905.22 and 4928.02. OCC cites the caps approved for FirstEnergy's delivery capital recovery rider in FirstEnergy's 2010 and 2012 ESP cases, despite there being no explicit mention of a cost cap in R.C. 4928.143. *In re Ohio Edison Co., et al. to Establish a Standard Service Offer under an Elec. Security Plan*, Case No. 10-388-EL-SSO, Opinion & Order (Aug. 25, 2010), and Case No. 12-1230-EL-SSO, Opinion & Order (July 18, 2012).

{¶ 16} This argument was raised and rejected by the Commission. Opinion and Order at ¶¶49-51, 54-57. We disagree that the 4% Cap constitutes the creation of a legal standard that did not previously exist and is, therefore, a rule subject to the rule-making requirements of R.C. 111.15. The 4% Cap adopted in the Opinion and Order is not a "guideline" like the water standard in *Nally, supra*, which applied generally and uniformly to a large segment of the public. And while we have applied a 4% Cap on the recovery of EE/PDR costs for each Ohio electric utility, the Commission has done so on an individual basis, giving each utility an opportunity to litigate its position on this issue. This cost cap provision is not a requirement imposed upon the electric utility. Rather, the 4% Cap is a limitation on the utility's recovery of EE/PDR costs, which balances the impact upon the customer who is required to pay for a program before the full cost savings from such program is realized. The result is that customer bills increase as the EE/PDR rider increases, notwithstanding any future benefits that such program may ultimately produce to lower customer bills at some future date.

{¶ 17} Moreover, the Commission's rule now promulgated as Ohio Adm.Code 4901:1-40-07 was adopted in response to the renewable energy cost cap under R.C. 4928.64(C)(3). There was no similar statutory provision for EE/PDR programs to suggest

that the Commission incorporate a cost cap for the rules now codified in Ohio Adm.Code Chapter 4901:1-39. This Commission has broad discretionary authority to make rules in its supervision of electric utilities under R.C. 4905.05, 4905.06, and 4928.06. Moreover, the choice to proceed by rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency. *Duff Truck Line, Inc. v. Pub. Util. Comm.*, 46 Ohio St.2d 186, 348 N.E.2d 127, 75 O.O.2d 229 (1976), citing *Securities & Exchange Comm. v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947); *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974). Accordingly, and because FirstEnergy fails to raise any new issues for the Commission's consideration, this ground for rehearing will be denied.

3. THERE IS NO EVIDENCE TO SUPPORT THE 4% CAP, WHICH IS INHERENTLY UNFAIR AND LEADS TO SIGNIFICANT INEQUITIES AMONG OHIO'S EDUs.

{¶ 18} As its final ground for rehearing, FirstEnergy argues that there is no evidence to support the adoption of the 4% Cap, which is inherently unfair and leads to significant inequities among Ohio's EDUs.

{¶ 19} These argument were raised and fully considered in the Opinion and Order at ¶¶52-57. As discussed above, the 4% Cap was adopted as a reasonable measure to limit the rate impact on FirstEnergy customers in response to credible Staff testimony regarding the Companies' increasing EE/PDR riders. While the impact of the 4% Cap may affect each of the Ohio EDUs somewhat differently, the application of a four percent cap based on each EDU's reported total sales to ultimate customers should mitigate any unfairness to FirstEnergy shareholders. Accordingly, this ground for rehearing and FirstEnergy's application for rehearing will be denied.

IV. ORDER

{¶ 20} It is, therefore,

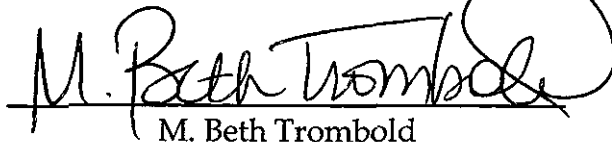
{¶ 21} ORDERED, That the applications for rehearing filed by the Environmental Advocates and FirstEnergy be denied. It is, further,

{¶ 22} ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Asim Z. Haque, Chairman



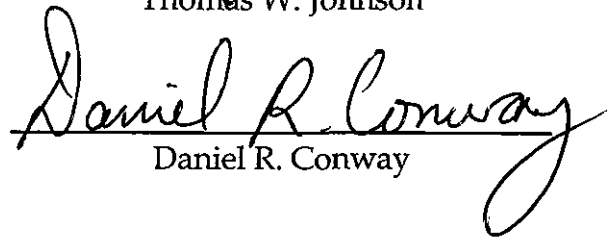
M. Beth Trombold



Thomas W. Johnson



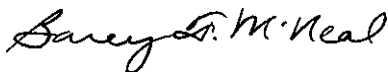
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