

**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.	)	

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

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The Finding and Order<sup>1</sup> (“Order”) fundamentally alters the way that the Public Utilities Commission of Ohio (“PUCO”) reviews and approves electric distribution utilities’ energy efficiency and peak demand reduction portfolio plans. Some of these changes are welcome changes that benefit consumers. For example, the new rules (i) would prevent utilities from using banked energy savings to charge customers higher profits (shared savings),<sup>2</sup> (ii) require the Ohio Technical Reference Manual to be updated periodically,<sup>3</sup> which should provide more accurate counting of energy and demand savings, and (iii) require more frequent independent review of energy efficiency program

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<sup>1</sup> Finding and Order (Dec. 19, 2018).

<sup>2</sup> Order, Attachment A at 25 (Rule 4901:1-39-05(A)(1)(c)).

<sup>3</sup> Order, Attachment A at 27 (Rule 4901:1-39-05(C)).

performance.<sup>4</sup> The Order also protects customers as it pertains to charges for renewable energy mandates by requiring utilities to demonstrate that their renewable energy charges to customers comply with the statutory 3% cost cap.<sup>5</sup>

At the same time, however, the PUCO should modify the Order (and the corresponding rules) on rehearing to address certain shortcomings in consumer protection for the following reasons:

1. The Order is unlawful and unreasonable because it eliminates the PUCO's process of approving energy efficiency programs in advance, does not allow for meaningful stakeholder participation in energy efficiency proceedings, and allows utilities to charge customers any amount they want, in any manner they want, without PUCO approval, in violation of R.C. 4905.22.

The Ohio Consumers' Counsel ("OCC") respectfully requests that the PUCO grant this application for rehearing and modify the Order and corresponding rules consistent with OCC's recommendations.

Respectfully submitted,

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<sup>4</sup> Order, Attachment A at 23-28 (Rule 4901:1-39-05(A)-(F)).

<sup>5</sup> Order, Attachment B at 24 (Rule 4901:1-40-05(A)(e)(d)); Attachment B at 27-29 (Rule 4901:1-40-07).

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

Ohio’s electric utility consumers pay hundreds of millions of dollars each year to their electric distribution utilities for energy efficiency and peak demand reduction programs.<sup>6</sup> These charges include the administrative costs of running the programs; program marketing costs; rebates to customers; and “shared savings,” which is another way of saying utility profits.

R.C. 4905.22 requires all charges to customers to be just and reasonable. As described below, the Order would allow utilities to charge customers for energy efficiency programs, including utility profits (shared savings), without any PUCO

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<sup>6</sup> See Case No. 16-574-EL-POR (up to \$108 million per year for AEP Ohio customers); Case No. 16-743-EL-POR (up to \$111 million per year for FirstEnergy customers); Case No. 16-576-EL-POR (up to \$38 million per year for Duke customers); Case No. 17-1398-EL-POR (up to \$33 million per year for DP&L customers).

approval for those charges. The PUCO should modify the Order and the corresponding rules to protect consumers from this unjust and unreasonable result.

## **II. STANDARD OF REVIEW**

After an order is entered, intervenors in a PUCO proceeding have a statutory right to apply for rehearing “in respect to any matters determined in the proceeding.”<sup>7</sup> An application for rehearing must “set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”<sup>8</sup>

In considering an application for rehearing, R.C. 4903.10 provides that the PUCO may grant and hold rehearing if there is “sufficient reason” to do so. After such rehearing, the PUCO may “abrogate or modify” the order in question if the PUCO “is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted.”<sup>9</sup>

The Order is unlawful, unreasonable, unjust, and unwarranted under R.C. 4903.10. The PUCO should grant OCC’s application for rehearing. It should modify the Order as OCC recommends in this application for rehearing.

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<sup>7</sup> R.C. 4903.10.

<sup>8</sup> R.C. 4903.10(B). *See also* Ohio Adm. Code 4901-1-35(A).

<sup>9</sup> R.C. 4903.10(B).

### III. ASSIGNMENT OF ERROR

**Assignment of Error: The Order is unlawful and unreasonable because it eliminates the PUCO's process of approving energy efficiency programs in advance, does not allow for meaningful stakeholder participation in energy efficiency proceedings, and allows utilities to charge customers any amount they want, in any manner they want, without PUCO approval, in violation of R.C. 4905.22.**

Under the PUCO's current energy efficiency rules, utilities are required to file an energy efficiency portfolio application, including any proposal for charges to consumers, by April 15, every three years.<sup>10</sup> Parties have 60 days to file objections to a utility's application, and then the matter is required to be set for hearing.<sup>11</sup> When implemented properly, this process works. It allows utilities to propose new programs, changes to their energy efficiency programs, and charges to consumers. It allows consumer advocates and other stakeholders a fair opportunity to review the programs and proposed charges and to provide recommendations to the PUCO. And it allows the PUCO adequate time to review stakeholder input, hold a hearing, and approve programs to be implemented the following year.

The new rules, to the detriment of customers, however: (i) relieve the PUCO from issuing an order on any issue related to energy efficiency programs and any charge that customers pay; (ii) allow the utility to continue implementing programs and file a portfolio update (as opposed to a portfolio application that requests approval of programs over a specified time period) on September 1 instead of April 15<sup>12</sup>; (iii) allow the utility to propose charges to customers for energy efficiency programs, including charges for

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<sup>10</sup> Ohio Adm. Code 4901:1-39-04(A).

<sup>11</sup> Ohio Adm. Code 4901:1-39-04(D)-(E).

<sup>12</sup> Order, Attachment A at 16 (Rule 4901:1-39-04(A)).

lost revenues and utility profits (shared savings), and stakeholders have only 30 days to respond<sup>13</sup>; and (iv) the utility's proposed charges to consumers are automatically approved, with no requirement that the PUCO hold a hearing or even enter an order.<sup>14</sup> Each of these changes is problematic for consumers.

First, by allowing the utility to wait until September 1 to file its proposal for charges to consumers, there is very little time for the PUCO to take action regarding the filing. While parties and the PUCO will undoubtedly work diligently to resolve these cases, it is unlikely that there will be enough time for discovery, settlement negotiations, and if necessary, a hearing and post-hearing briefing, followed by an opinion. The problem is made worse by the fact that all four of Ohio's electric distribution utilities will likely file their applications on the same day (September 1), thereby causing parties like OCC to attempt to resolve each of them simultaneously over a very short period of time.

Second, the new 30-day response period is half of the current 60-day period. The PUCO's rules provide for a 20-day response deadline for discovery.<sup>15</sup> A 30-day window for comments leaves virtually no opportunity for parties to review the utility's application (which can be quite long—FirstEnergy's and AEP's most recent portfolio applications were over 400 pages each<sup>16</sup>), serve discovery, review discovery responses, and prepare comments. This unfairly restricts parties' right to meaningfully participate in these proceedings.<sup>17</sup>

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<sup>13</sup> Order, Attachment A at 29 (Rule 4901:1-39-06(B)).

<sup>14</sup> Order, Attachment A at 30 (Rule 4901:1-39-06(B)).

<sup>15</sup> Ohio Adm. Code 4901-1-19(A), 4901-1-20(C), 4901-1-22(B).

<sup>16</sup> Case Nos. 16-743-EL-POR, 16-574-EL-POR.

<sup>17</sup> R.C. 4903.082.

Third, the Order eliminates the requirement that a hearing be held on any request for program approval, or changes in charges to consumers (increased shared savings or lost revenues, cost allocation among customer classes, higher cost caps, etc.). Under the current rules, the PUCO holds a hearing in each energy efficiency portfolio case.<sup>18</sup> The new rules, in contrast, require no hearing. And in fact, the utility's proposed charges to consumers are *automatically* deemed reasonable and approved if the PUCO takes no action within 30 days of parties' comments on the proposal. This automatic approval of charges to consumers is unlawful.

The potential for energy efficiency charges to be approved by the PUCO without the procedural protections of Ohio's ratemaking statutes is problematic. The Supreme Court of Ohio has previously stated its great concern over the wielding of power by administrative agencies in the absence of procedural integrity that satisfies due process requirements. Quoting *Ohio Bell Tel. Co. v. Pub. Util. Comm. of Ohio* (1937), 301 U.S. 292, 304-305, the Ohio Supreme Court approvingly stated the great need in regulatory proceedings ““that the inexorable safeguard \* \* \* of a fair and open hearing be maintained in its integrity. \* \* \* The right to such a hearing is one of the ‘rudiments of fair play’ \* \* \* assured to every litigant by the Fourteenth Amendment as a minimal requirement.””<sup>19</sup> Under Ohio law, whenever a public utility wishes to increase its rates, the utility must file an application with the PUCO to accomplish the change and must adhere to greater notice and procedural requirements than exist under filings with the PUCO that do not involve a change in rates or charges.<sup>20</sup> Those procedural requirements are not being adhered to by the PUCO in this case.

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<sup>18</sup> Ohio Adm. Code 4901:1-39-04(E) (“The commission *shall* set the matter for hearing...” ) (emphasis added).

<sup>19</sup> *State ex rel. Ormet Corp. v. Industrial Commission of Ohio* (1990), 54 Ohio St. 3d 102, 103.

<sup>20</sup> See, e.g., R.C. 4909.19 and R.C. 4909.43.

R.C. 4905.22 requires all charges to customers to be just and reasonable. Under the PUCO's new rules, however, a utility could propose unjust and unreasonable rates, and those unjust and unreasonable rates would automatically go into effect and then be charged to customers, without the PUCO making a determination that such charges are just and reasonable.

There are numerous ways in which a utility's proposal could result in unjust and unreasonable rates that get automatically approved under the new rules:

- Contrary to the PUCO's stated intent to control the costs of energy efficiency programs, a utility could propose a cost cap far in excess of the current 4% cost cap, or no cost cap at all.
- A utility could propose a substantial increase in the amount of shared savings (utility profits) that customers pay.
- A utility could propose that residential customers subsidize the costs of nonresidential programs.
- A utility could propose that customers pay for programs that are not cost-effective.
- A utility could propose that customers pay for shared savings with respect to savings that they achieve on their own, contrary to prior PUCO orders.<sup>21</sup>
- A utility could propose that nonresidential customers that have opted out still be required to pay for programs.<sup>22</sup>
- A utility could propose that customers simultaneously pay both decoupling charges and lost revenues, thus resulting in double-charges.
- A utility could propose that it be allowed to charge customers for shared savings even if it does not meet its statutory mandates.
- A utility could propose that nonresidential customers be allowed to participate in programs without paying the energy efficiency rider.

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<sup>21</sup> Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing, ¶324 (Oct. 12, 2016).

<sup>22</sup> R.C. 4928.6611, R.C. 4928.6613.



In the past, any of these unjust and unreasonable proposals would be subjected to objections and a hearing, and none of them could be implemented without an affirmative finding by the PUCO. Indeed, the process of requiring a hearing and order was critical in the PUCO's recent rulings protecting consumers with an energy efficiency cost cap. In the cases of both Duke Energy and FirstEnergy, the PUCO rejected settlements that did not include sufficient protection for consumers in the form of an annual limit on the amount that customers could be charged for energy efficiency programs.<sup>23</sup>

These rulings complied with R.C. 4905.22 because the rates charged were just and reasonable as a result of the cost cap. Under the new rules found in the Order, this never would have happened. Instead, the utilities would have proposed uncapped spending, and those charges would have automatically been deemed reasonable under the new rules. This would be a bad result for consumers—and an unlawful one, since the resulting charges to consumers would have been uncapped and thus unlawful and unreasonable under R.C. 4905.22.

Under the new rules as approved in the Order, utilities have carte blanche to propose literally any type of charges to customers of any magnitude, and the mere passage of time—just 60 days<sup>24</sup>—will allow the utility to begin charging customers these new rates.

The PUCO cannot abdicate its responsibility for reviewing new rates before they go into effect. The law requires the PUCO to protect consumers from paying unjust and

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<sup>23</sup> Case No. 16-576-EL-POR; Case No. 16-743-EL-POR.

<sup>24</sup> Parties have 30 days to file comments, and 30 days after that, the utility's proposal is "automatically deemed to be reasonable." *See* Order, Attachment A at 30 (Rule 4901:1-39-06(B)).

unreasonable rates.<sup>25</sup> The new rules are inconsistent with this law, and thus, the Order (and corresponding rules) should be modified on rehearing. The rules should provide that a utility's proposed charges to consumers for energy efficiency programs cannot go into effect unless and until the PUCO has affirmatively approved them after sufficient due process is had by all interested stakeholders.

#### **IV. CONCLUSION**

The PUCO should modify the Order and the corresponding rules to protect consumers from paying unjust and unreasonable rates, as proposed by OCC in this application for rehearing.

Respectfully submitted,

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/s/ Christopher Healey  
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<sup>25</sup> R.C. 4905.22.

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Application for Rehearing was served on the persons stated below via electronic transmission, this 18th day of January 2019.

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