

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission’s Review)
of Chapter 4901:1-36 of the Ohio) Case No. 18-1189-EL-ORD
Administrative Code.)

**COMMENTS ON RULES TO PROTECT CONSUMERS FROM PAYING
UNREASONABLE TRANSMISSION COST RECOVERY CHARGES
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

The Public Utilities Commission of Ohio (“PUCO”) seeks comments on its proposal to modify rules related to electric transmission cost recovery¹, which OCC notes is becoming more costly to customers over the years. The purpose of Chapter 4901:1-36 is to provide a framework for an electric utility to collect from its customers, via a reconcilable charge on the electric utility’s distribution rates, the transmission and transmission-related costs that the Federal Energy Regulatory Commission (“FERC”) or a regional transmission organization or independent system operator charges to the utility.² The chapter establishes the means by which an electric utility may file an application to collect transmission and transmission-related costs from customers through a transmission cost recovery rider (“TCRR”). If the rider application is approved, each utility is required to update the rider annually.

The only change in the Entry’s circulated draft rules is a “nonsubstantive” language change proposed by Staff to Ohio Adm.Code 4901:1-36-02, which concerns purpose and

¹ *In the Matter of the Commission’s Review of Chapter 4901:1-36 of the Ohio Adm.Code*, Case No. 18-1189-EL-ORD, Entry (June 19, 2019); Ohio Adm.Code 4901:1-36.

² Ohio Adm.Code 4901:1-36-02.

scope of the chapter, and Ohio Adm.Code 4901:1-36-04, which concerns limitations on the TCRR. Staff proposed changing language that currently refers to an “independent transmission operator” to an “independent system operator.”³

No explanation is given for this language change. The Office of the Ohio Consumers’ Counsel (“OCC”) does not object to this change but suggests in these comments two modifications to this chapter to protect Ohio consumers. One, that language be added in the Application section, 4901:1-36-03, that rider applications must include language that they are subject to reconciliation and refund. Second, OCC proposes that the 75-day automatic approval of TCRR applications be ended.

OCC’s proposed changes to the PUCO’s rules accomplish two significant consumer protections. Consumers should be protected from paying for rider collections later deemed improper. And proceedings which establish rates that customers pay should allow for adequate time for intervention, discovery, and comments. This will allow for a more thorough review of the charges to customers. OCC submits these comments regarding the PUCO’s TCRR rules on behalf of all of Ohio’s residential utility consumers.

II. RECOMMENDATIONS

A. The PUCO should amend Ohio Adm.Code 4901:1-36-03 to provide that all TCRR applications include language that the rider is subject to reconciliation and refund.

The PUCO should amend Ohio Adm. Code 4901:1-36-03 to add that each transmission cost recovery rider application should include language that the rider is subject to reconciliation and refund. There exists multiple recent precedent where the

³ Case No. 18-1189-EL-ORD, Entry at 2-3.

PUCO has adopted tariff language stating that electric utility riders are subject to reconciliation and refund.⁴ This language is necessary to remedy the *Keco*⁵ no refund issue which has cost customers over \$1 billion since 2009.⁶ Customers have lost out on refunds under Ohio Supreme Court precedent allowing utilities to keep (without refunding) charges they collected from consumers even after the Court's decisions finding that the charges were unlawful.⁷

Supreme Court of Ohio precedent has interpreted as R.C. 4905.32 as barring any refund of recovered rates unless the tariff applicable to those rates sets forth a refund mechanism.⁸ To avoid this problem, OCC recommends that each rider application include the language "subject to reconciliation and refund" so that in the event that a transmission cost recovery rider happens to be reviewed by an independent auditor, court, or the PUCO itself, and found to be unlawful, refunds to consumers are able to be ordered and implemented. Currently there is no language in this chapter allowing for this.

OCC proposes the following additional language to Section 4901:1-36-03(B):

Each electric utility with an approved transmission cost recovery rider shall update the rider on an annual basis pursuant to a schedule set forth by commission order. Each application to update the transmission cost recovery rider shall include all information set forth in the appendix to this rule. This Rider is subject to

⁴ See, e.g., Duke Energy Ohio, Rider DCI Distribution Capital Investment Rider, Case No. 18-1378-EL-RDR, PUCO Electric No. 16, Sheet No. 103.16, effective July 1, 2019.

⁵ See, *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957) (The commission was prohibited from later ordering a refund of costs under a "filed" rate schedule.)

⁶ See, *In re: Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 847 N.E.2d 655, ¶¶17-20 (\$63 million); *In re: Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶56 (\$368 million); *In re: Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-3490 (\$330 million); *In re Application of Ohio Edison Co.*, Slip Opinion No. 2019-Ohio-2401, ¶23 (\$442 million) for this concept.

⁷ *Id.*

⁸ *In re Application of Ohio Edison Co.*, Slip Op. No. 2019-Ohio-2401 citing *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 106 N.E.3d 1 (2018).

reconciliation or adjustment, including but not limited to, increases or refunds if determined to be unlawful, unreasonable, or imprudent by the Commission or Supreme Court of Ohio in the docket those rates were approved, or the docket where the audit of those rates occurred.

Section 4901:1-36-04 describes the limitations pertaining to a utility's transmission cost recovery rider. Paragraph (A) states:

The transmission cost recovery rider costs are reconcilable on an annual basis, with carrying charges to be applied to both over-and-under recovery of costs.⁹

This provision applies to the annual reconciliation of rider costs in the event that such reconciliation finds an over-or under-collection. However, it does not address the situation where a rider charge is found to be unlawful and refunds are ordered implemented. Thus, the reconciliation and refund language proposed for 4901:1-36-03 (B) is a necessary consumer protection.

B. The PUCO should amend Ohio Adm.Code 4901:1-36-05 to eliminate the 75-day automatic approval of electric utility TCRR applications.

Current rules in Ohio Adm.Code 4901:1-36-05 allow proposed rates in a utility's TCRR application to be automatically approved within 75 days of the filing of the application, unless the matter is set for hearing. Rules 4901:1-36-05 reads as follows:

Unless otherwise ordered by the commission, the legal director, the deputy legal director, or the attorney examiner, the commission shall approve the application or set the matter for hearing within seventy-five days after the filing of a complete application under this chapter. Proposed rates will become effective on the seventh-fifth day subject to reconciliation adjustments following any hearing, if necessary, or in its subsequent filing.

⁹ Ohio Adm.Code 4901:1-36-04(A).

OCC recommends that the portion of the rule allowing for automatic approval of these applications be eliminated because this short procedural time frame is an inadequate amount of time in which to intervene and conduct discovery necessary to protect customers. It is an unreasonably short time period in which to allow for discovery, particularly given the twenty-day turnaround for discovery under PUCO rules. Thus, thorough review is hampered, and due process is sorely lacking.

In support of this recommendation, OCC notes that since the adoption of FERC Order No. 679 in 2006, the level of investment in electric transmission infrastructure across the nation has increased dramatically. The Energy Information Administration (“EIA”) reports that FERC-jurisdictional utilities spent \$21 billion in capital additions in 2016 alone.¹⁰ EIA reported that “[s]pending on infrastructure to deliver power to homes and businesses has increased steadily over the past ten years as utilities build, upgrade, and replace station equipment, poles, fixtures, and overhead lines and devices.”¹¹ Over that ten-year period, investment in transmission infrastructure increased from approximately \$8 billion per year to more than \$21 billion per year in 2016, with a total investment between 2010 and 2016 of almost \$115 billion and an additional \$62 billion in planned investment through 2019.¹²

In light of this significant increase in utility transmission infrastructure spending and subsequent costs to customers, the PUCO should amend Ohio Adm.Code 4901:1-36-05 to allow parties 75 days for intervention and to file comments after the date of the

¹⁰ *Utilities Continue to Increase Spending on Transmission Infrastructure* at 8-9 (February 9, 2018), available at <https://www.eia.gov/todayinenergy/detail.php?id=34892>.

¹¹ *Id.*

¹² *Id.* at 8, 11.

filing of an application, unless otherwise ordered by the PUCO. The 75-day period should be coupled with an expedited discovery process allowing for a seven-day turnaround for discovery responses. A 75-day comment period with expedited discovery would allow for a more thorough review by the parties and assist the PUCO in its review of these applications which may increase rates to customers.

OCC recommends the following amendment:

Unless otherwise ordered by the commission, the legal director, the deputy legal director, or the attorney examiner, the commission shall allow for 75 days from the filing of the application for intervention and comments, including an expedited discovery process allowing for seven (7) days for discovery responses.

III. CONCLUSION

The PUCO should amend Ohio Adm.Code 4901:1-36-03 to include that transmission cost recovery rider applications must include language that they are subject to reconciliation and refund. Additionally, the rules should be changed to rescind part of Ohio Adm.Code 4901:1-36-05 to eliminate the 75-day automatic approval of TCRR applications. These proposed changes are necessary to protect consumers from paying for rider costs later deemed improper, and allow for additional time for parties to intervene, conduct discovery, and provide comments to assist the PUCO in its review of these applications in light of the significant costs to customers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these Comments were served on the persons stated below via electronic transmission, this 12th day of July 2019.

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Summary: Comments Comments on Rules to Protect Consumers from Paying Unreasonable
Transmission Cost Recovery Charges by the Office of the Ohio Consumers' Counsel
electronically filed by Ms. Deb J. Bingham on behalf of Botschner-O'Brien, Amy