

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates.))	Case No. 20-585-EL-AIR
))	
In the Matter of the Application of Ohio Power Company for Tariff Approval.))	Case No. 20-586-EL-ATA
))	
In the Matter of the Application of Ohio Power Company for Approval to Change Accounting Methods.))	Case No. 20-587-EL-AAM
))	

**MEMORANDUM CONTRA THE APPLICATIONS FOR REHEARING OF
INTERSTATE GAS SUPPLY AND NATIONWIDE ENERGY PARTNERS
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

Energy marketers and submeterers don't come readily to mind when thinking about consumer protection. Now, marketer Interstate Gas Supply, Inc. ("IGS") and submeterer Nationwide Energy Partners, LLC ("NEP") have applied for rehearing to undo a number of the market protections for consumers that the PUCO approved in the case Settlement. Their marketer and submeterer proposals were not agreed to as part of the overall Settlement package and were not supported by the evidence. IGS and NEP have failed to show that the PUCO's approval of the Settlement is unreasonable or unlawful. Therefore, the PUCO should deny the IGS and NEP applications for rehearing and protect Ohioans from their proposed anti-consumer modifications.

As background, on November 17, 2021, the PUCO approved a Joint Stipulation and Recommendation ("Settlement") between AEP, the PUCO Staff, Office of the Ohio

Consumers' Counsel ("OCC") and many other parties.¹ The PUCO correctly determined that the Settlement as a package satisfies the three-part test the PUCO considers in evaluating settlements and approved it without modification.² The PUCO found that the Settlement was the product of extensive and serious negotiations among diverse and knowledgeable parties, that it provides significant benefits to consumers, and violates no regulatory principles.³

II. RECOMMENDATIONS

- A. The PUCO lawfully decided to approve the Settlement and the signatory parties' agreement to keep the Retail Reconciliation Rider and SSO Credit Rider at a zero charge to consumers. The PUCO's decision is grounded in the public interest, the evidentiary record and fully explained in the PUCO's Order. (IGS Assignments of Error Nos. 1-4).**

The signatory parties agreed in the Settlement that "[t]he Retail Reconciliation Rider (RRR) and SSO Credit Rider (SSOCR) will remain at a zero charge . . ."⁴ The zero charge coincided with the PUCO Staff Report's recommendation. Marketer IGS opposes this provision of the Settlement for a zero charge and seeks rehearing of the PUCO's Order approving it. The PUCO should deny rehearing.

Through the testimony of IGS witness Frank Lacey,⁵ IGS proposed \$64 million in charges to consumers who purchase electricity through AEP's standard service offer ("AEP SSO") instead of from marketers like IGS. IGS would have the charges imposed

¹ PUCO Opinion and Order (November 17, 2021) ("Order").

² *See id.* at ¶¶108, 150, 206.

³ *Id.*

⁴ Order at ¶63.

⁵ Marketer Direct Energy Business, LLC and Direct Energy Services, LLC (collectively "Direct") co-sponsored with IGS the testimony of Frank Lacey. However, Direct did not file an Application for Rehearing of the PUCO's Order.

on consumers through the AEP Retail Reconciliation Rider.⁶ IGS also proposed a \$64 million offsetting credit to *all* consumers (both SSO and shopping) through AEP's SSO Credit Rider.

IGS's proposed redistribution would result in a typical residential AEP SSO consumer paying an extra \$4.20 per month—more than \$50 per year.⁷ On the other hand, a typical residential marketer consumer would get a *credit* of \$1.50 per month, or \$18 per year.⁸ IGS's proposal essentially amounts to a \$32 annual penalty for residential consumers choosing the AEP SSO.⁹ That's bad, so it's a good thing that the parties did not include it in the Settlement. IGS provided no cost or state policy justification for its proposed penalty on residential AEP SSO consumers. The PUCO correctly rejected IGS's proposal, finding that the Settlement is in the public interest and does not violate regulatory principles or practices. IGS's application for rehearing should be denied.

1. The PUCO's Order that kept the Settlement's consumer protection intact does not violate R.C. 4903.09. (IGS Assignments of Error Nos. 1, 2, and 4).

Marketer IGS claims that the PUCO's decision to approve language in the Settlement setting the Retail Reconciliation Rider and SSO Credit Rider at zero violates the requirement in R.C. 4903.09 that the PUCO sufficiently explain the rationale for its decision.¹⁰ IGS is wrong.

⁶ IGS Ex. 2 (Lacey Direct) at 14:1 (“I calculate a full allocation of costs to SSO service to be \$64,377,767...”).

⁷ Assuming typical usage of 1,000 kWh per month and IGS's proposed rate of \$0.0042 per kWh for SSO consumers. *See* Tr. Vol. V at 1058:23 – 1059:1 (IGS witness Lacey testifying that under their proposal, SSO consumers would pay \$0.0042 per kWh).

⁸ *See* Tr. Vol. V at 1059:2-5 (IGS witness Lacey testifying that under their proposal, consumers of marketers, sometimes called “shopping” consumers, would get a credit of \$0.0015 per kWh).

⁹ The different between a \$50 charge and an \$18 credit.

¹⁰ IGS AFR at 10.

The basis for the PUCO's decision is clearly set forth in the Order. The PUCO determined that, based on the evidence presented by the PUCO Staff, AEP, and OCC, the provision setting the riders at zero does not violate any regulatory principle or practice.¹¹ The PUCO stated that its decision was also based on its rejection of IGS's unbundling proposal in previous cases.¹²

The PUCO further explained why it rejected IGS's evidence, stating:

In support of their position, IGS and Direct Energy point to the testimony of their witness, Mr. Lacey, who advised that \$64.4 million in SSO-related costs should be reapportioned and collected through the RRR (IGS/Direct Ex. 2 at 10). We find, however, that ***Mr. Lacey's recommendation should not be adopted, as the witness did not comply with the Commission's directive in the ESP 4 Case, which required an analysis of known, quantifiable costs that are collected from customers through distribution rates and that are clearly incurred by AEP Ohio to support the SSO, as well as costs reflected in distribution rates that are distinctly ascribed to the customer choice program.*** ESP 4 Case, Opinion and Order (Apr. 25, 2018) at ¶¶ 214-215. Despite this directive, Mr. Lacey opined, from a purported business and policy perspective, that it does not "make sense to reduce the allocation of costs to [the] SSO because costs are incurred to run the choice program" (IGS/Direct Ex. 2 at 44). Mr. Lacey, therefore, admitted that he made no attempt to factor choice program costs into his recommendation as to the RRR and SSOCR. ***In the absence of a complete analysis that fully encapsulates costs clearly and directly attributed to the SSO and to the customer choice program, there is no record support for the respective claims of IGS and Direct Energy that the Stipulation runs afoul of R.C. 4928.02(H), R.C. 4928.03, R.C. 4928.17, any other statutory provision, or any important regulatory principle or practice.***¹³

This explanation shows that the PUCO weighed the evidence in considering IGS's proposal, but discounted Mr. Lacey's testimony because he did not include costs for the consumer choice program in his analysis.

¹¹ Order, at ¶183.

¹² *Id.* at ¶¶183-184.

¹³ Order, at ¶184 (footnotes omitted).

In addition, the PUCO explained that it was not persuaded by IGS's argument that AEP failed to satisfy the PUCO's prior directive that AEP "provide, in these rate case proceedings, an analysis of its distribution costs to identify any known, quantifiable costs to support the SSO, as well as any known, quantifiable costs to promote competition or maintain the choice program."¹⁴

The PUCO found that evidence presented by AEP witness Mr. Rousch showed that AEP had in fact conducted this analysis, but that AEP, the PUCO Staff, and others disagreed regarding the quantification and allocation of the costs¹⁵ This was confirmed by the PUCO Staff Report and PUCO Staff witness Mr. Smith.¹⁶ The PUCO Staff also presented evidence that there was a lack of granular accounting information in AEP's system to produce a thorough analysis.¹⁷ According to the PUCO, the lack of sufficient data to complete a more thorough analysis did not mean that AEP actually *failed* to conduct the analysis as IGS claimed.¹⁸

The PUCO further explained that its decision to approve the Settlement did not foreclose charges through the Retail Reconciliation Rider and SSO Credit Rider provided that a proper analysis of AEP's costs to provide SSO service and the consumer choice program was conducted in the future.¹⁹

Plainly, IGS is not satisfied with the PUCO's decision to reject Mr. Lacey's testimony and adopt the Settlement without modification. However, that does not mean

¹⁴ Order, at ¶185.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

that the PUCO's Order violates R.C. 4903.09. The Ohio Supreme Court recently held that the purpose of the requirements of R.C. 4903.09 is so a reviewing court has "enough information to know how the commission reached its result."²⁰ To satisfy R.C. 4903.09, the PUCO must provide a reasoned explanation for its decision and "identify the facts in the record on which it based its decision."²¹ The PUCO did exactly that in the Order approving the Settlement.²²

IGS cites the Ohio Supreme Court's decision in *FirstEnergy Advisors* to support IGS's (erroneous) argument that the PUCO violated R.C. 4903.09 by improperly relying on the PUCO Staff Report.²³ IGS's reliance on *FirstEnergy Advisors* is grossly misplaced. In *FirstEnergy Advisors*, there was no discovery, no testimony, and no evidentiary hearing. The PUCO's decision in that case was based on the PUCO Staff's two-paragraph report that summarily concluded that FirstEnergy Advisors was fit and capable of operating as a competitive retail electric service broker and aggregator in Ohio and capable of complying with the PUCO's rules.²⁴ The PUCO's order lacked an explanation of the basis for the PUCO's decision or the evidence on which it relied.²⁵ As a result, there was no way for the Ohio Supreme Court to determine how the PUCO arrived at its decision.

²⁰ *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*, Slip Opinion No. 2021-Ohio-3630 ("*FirstEnergy Advisors*"), ¶21.

²¹ *FirstEnergy Advisors*, ¶27.

²² Order, at ¶¶183-186.

²³ IGS AFR, at 19. (IGS refers to *FirstEnergy Advisors* as the "*Suwon*" case.).

²⁴ *FirstEnergy Advisors*, ¶24.

²⁵ *FirstEnergy Advisors*, at ¶¶23-26.

By contrast, the parties in this case had an opportunity to conduct extensive discovery, the PUCO Staff issued a detailed report on AEP's application for a rate increase, parties (including IGS) engaged in extensive settlement negotiations to resolve the issues in the case, signatory and non-signatory parties filed testimony regarding the Settlement, an evidentiary hearing was conducted where witnesses testified regarding the Retail Reconciliation Rider and the SSO Credit Rider, and parties filed initial and reply briefs on the issues.

Unlike *FirstEnergy Advisors*, the PUCO relied on more than just the Staff Report in making its decision. The PUCO fully explained the basis for its decision not to modify the Settlement and precisely identified the evidence supporting that decision.²⁶ The PUCO also explained how its decision was consistent with its past precedent rejecting the same proposals by IGS in other cases.²⁷

IGS also asks that if the PUCO does not adopt its proposal to redistribute \$64 million collected from SSO consumers to all consumers, it should at a minimum reallocate \$4.7 million of costs purportedly attributed to AEP's SSO.²⁸ But that argument should be rejected as well. As the PUCO found, a proper analysis of costs to be allocated through the Retail Reconciliation Rider and SSO Credit Rider requires an analysis of AEP's costs for the SSO *and* the Consumer Choice Program.²⁹ There is no such evidence regarding AEP's costs for the consumer choice program. It would be unfair to allocate

²⁶ Order, at ¶¶183-186.

²⁷ *Id.*

²⁸ IGS AFR, at 11-12.

²⁹ Order, at ¶184.

any costs to SSO consumers without also analyzing and allocating the costs to Choice consumers.

IGS's claim that the PUCO's Order violates R.C. 4903.09 has no merit.

Accordingly, the PUCO should reject IGS's request for rehearing.

2. The PUCO's Order that kept the Settlement's consumer protection intact does not violate R.C. 4909.15, 4928.02, and 4928.05. (IGS Assignment of Error No. 3).

Marketer IGS argues that the PUCO should grant rehearing because keeping the Retail Reconciliation Rider and SSO Credit Rider at zero allows AEP to collect generation costs for the SSO through distribution rates. IGS claims that the zero charge is in violation of R.C. 4909.15, 4928.02, and 4928.05.³⁰ IGS is wrong.

Under R.C. 4928.141, AEP "shall provide consumers ... a standard service offer." When a consumer that shops with a marketer is no longer able to receive service from that marketer (for example, if the marketer goes out of business), the consumer reverts to the SSO to make certain that the consumer continues to receive electricity.³¹ In other words, even consumers that do not *currently* take service under the SSO benefit from the SSO because the SSO stands ready and able to serve them at any time, if necessary. IGS's own witness agreed, testifying that the SSO provides benefits to all consumers.³²

In an earlier case involving Duke Energy, IGS made arguments similar to the ones it makes now with respect to AEP Ohio, namely, that certain alleged SSO costs should be

³⁰ IGS AFR, at 15-18.

³¹ Tr. Vol. V at 1087:7-11 (Lacey Cross Examination) ("Q. [I]f a CRES fails to supply generation service to a shopping consumer, that would result in consumers defaulting to the utility's SSO, correct? A. That is correct.").

³² Tr. Vol. V. at 1088:9-16 (Lacey Cross Examination) ("Q. And you would agree that the SSO benefits all customers, SSO and shopping customers alike? A. ... [T]here is some benefit to the market, to SSO, to everybody, yes.").

“unbundled” from distribution rates and paid only by SSO consumers.³³ The PUCO rejected IGS’s argument for several reasons. Among those reasons was that “all consumers benefit from Duke’s ability to provide the SSO.”³⁴

IGS’s witness agreed with the general proposition that when something benefits all consumers, all consumers should pay for it. According to IGS’s witness, all consumers benefit from the ability to shop, so all consumers should pay for any costs related to shopping.³⁵ And as explained above, IGS’s witness also agreed that all consumers benefit from the SSO. Following that logic, all consumers should pay for distribution costs related to the SSO.

Accordingly, the PUCO should deny IGS’s request for rehearing on this issue. The PUCO correctly determined that “there is no record support for the respective claims of IGS and Direct Energy that the Stipulation runs afoul of R.C. 4928.02(H), R.C. 4928.03, R.C. 4928.17, *any other statutory provision, or any important regulatory principle or practice.*”³⁶

B. The PUCO’s Order correctly approved the Settlement with its consumer protection in AEP’s provision of “shadow billing” data to OCC and the PUCO Staff. (IGS Assignments of Error Nos. 6 and 7).

Marketer IGS seeks rehearing of the PUCO’s Order approving the provision in the Settlement where AEP agrees to share “shadow billing” information with OCC and

³³ *In re Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer*, Case No. 17-1263-EL-SSO, Second Entry on Rehearing ¶¶ 30-32 (July 27, 2019).

³⁴ *Id.* ¶ 32.

³⁵ IGS Ex. 2 (Lacey Direct) at 43 (“the clear answer is to charge all customers for the costs of the choice program, for all customers benefit from the choice program”).

³⁶ Order, at ¶184 (emphasis added).

the PUCO Staff.³⁷ Shadow billing is an important consumer protection term in the Settlement. Shadow billing provides consumer educational information that compares what consumers paid to marketers with what they would have paid under the utility's SSO. Shadow billing thus gives helpful insight for consumers into whether consumers have been saving or losing money, *in the aggregate*, as a result of shopping with marketers. It seems that IGS does not like this information being made public because it generally shows that residential consumers pay more for marketers' service than service under AEP's SSO.

The PUCO found that IGS provided no valid reason for excluding the shadow billing provisions from the Settlement and that the Settlement does not violate any regulatory principles or practices.³⁸ IGS claims that the PUCO's Order approving the shadow billing provisions is unreasonable, unlawful, and contrary to prior PUCO precedent.³⁹ IGS's arguments should be rejected.

IGS claims that the Order violates R.C. 4903.09 because the PUCO did not fully explain the basis for its decision.⁴⁰ That is not correct. Again, just because IGS is dissatisfied with the PUCO's decision does not mean there has been a violation of R.C. 4903.09. In the Order, the PUCO explained how the shadow billing provisions are not unreasonable, and that they are part of a larger settlement package that benefits consumers and the public interest.⁴¹ The PUCO stated that: "We emphasize that the

³⁷ IGS AFR, at 29-34.

³⁸ Order, at ¶¶131, 198.

³⁹ *Id.*

⁴⁰ IGS AFR, at 31.

⁴¹ Order, at ¶131.

Commission must evaluate the benefits of the Stipulation as a package and each provision of the Stipulation need not provide a direct and immediate benefit to ratepayers and the public interest.”⁴²

IGS claims that the Order is unreasonable because shadow billing information focuses on the price for service.⁴³ The PUCO addressed that argument by stating that while consumers may consider other factors besides price when they shop for service, shadow billing “may serve to confirm information otherwise available about the competitive market or highlight issues for further review and analysis.”⁴⁴ The PUCO should not entertain fanciful rationalizations from marketers about price not being important to consumers.

In any event, IGS’s claims that aggregate shadow billing is inaccurate or misleading are contrary to AEP’s commitment to provide the information to OCC and the PUCO Staff based on objective calculations, subject to the terms identified on Attachment D to the Settlement.⁴⁵ OCC and the PUCO Staff are more than capable of understanding what the shadow billing information means.

Further, IGS argues that the PUCO erred by failing to explain the PUCO’s so-called “break” with past precedent rejecting prior OCC requests for the PUCO to require industrywide utility shadow billing.⁴⁶ But contrary to IGS’s claims, the Order did not “break” with past PUCO precedent. Instead, the PUCO expressly explained in the Order

⁴² *Id.*

⁴³ IGS AFR, at 30.

⁴⁴ Order, at ¶131.

⁴⁵ Joint Ex. 1 (Settlement), Attachment D (explaining the various methodologies for what is included or excluded in the aggregate shadow billing calculations).

⁴⁶ IGS AFR, at 32-34.

that it rejected IGS's argument because nothing prevents an *individual utility* from *agreeing* to provide shadow billing data to OCC.⁴⁷ The PUCO explained:

The Commission finds that IGS and Direct Energy have not shown that the shadow-billing provisions in the Stipulation violate any important regulatory principle or practice. First, the Stipulation requires AEP Ohio to perform aggregate shadow-billing calculations for residential customers and report the information to OCC and Staff (Joint Ex. 1 at 11). Although we do not here address the value of such information, we do not agree that AEP Ohio's mere provision of the calculations to OCC or Staff violates the third part of the three-part test or that the provision must be rejected because it is insufficiently clear. ***As Direct Energy has previously acknowledged, a utility company may, as AEP Ohio has done here, elect to engage in shadow billing by agreement.*** In re Commission's Review of Its Rules for Electrical Safety and Service Standards Contained in Chapter 4901:1-10 of the Ohio Administrative Code, Case No. 17-1842-EL-ORD, Finding and Order (Feb. 26, 2020) at ¶ 160, citing In re Columbia Gas of Ohio, Inc., Case No. 12-2637-GA-EXM, Opinion and Order (Jan. 9, 2013).⁴⁸

The PUCO further stated that:

As IGS notes, the Commission has previously declined to adopt a number of shadow-billing proposals, in light of the availability of useful price-comparison resources like the Commission's Energy Choice Ohio website. ***IGS, however, has not explained how these prior decisions of the Commission preclude AEP Ohio's agreement to include a shadow-billing proposal in an amended application filed in the Company's pending bill format case.***⁴⁹

IGS similarly fails to explain in the application for rehearing how the shadow billing provisions – agreed to by AEP and OCC as a part of a larger settlement package – are unreasonable or violate regulatory principals.

⁴⁷ Order, at ¶198.

⁴⁸ Order, at ¶198 (emphasis added).

⁴⁹ Order, at ¶199 (emphasis added).

The PUCO should reject IGS's attempt to materially modify the Settlement by removing a key consumer protection. The PUCO should deny the IGS application for rehearing.

C. The PUCO correctly evaluated whether the Settlement as a package benefits consumers and the public interest. The PUCO should deny NEP's request that the PUCO modify the Settlement to include NEP's additional proposals. (NEP Assignment of Error No. 2).

NEP claims that the PUCO erred when it declined to adopt various proposals that NEP argues would benefit certain consumers.⁵⁰ NEP's proposals rejected by the PUCO primarily concern issues on which OCC took no position during the case, such as proposed tariff language regarding low-load factor consumers, construction and line extension requests, and the BTCR pilot program.⁵¹ OCC does take issue however, with NEP's assertion that the PUCO should now grant rehearing and modify the Settlement to include these proposals. These proposals were not agreed to by the signatory parties, and the PUCO appropriately rejected them in favor of the settlement *package* benefitting consumers and the public interest. The PUCO should not place the Settlement, with its consumer protections, at risk.

The PUCO stated that “[w]e have repeatedly found value in the parties’ resolution of pending matters through a stipulation package, as an efficient and cost-effective means of bringing the issues before the Commission, while also avoiding the considerable time and expense associated with the litigation of a fully contested case.”⁵² Thus, as the PUCO noted in the Order in this case, the PUCO’s analysis does not consider “whether

⁵⁰ NEP AFR, at 9-11.

⁵¹ See Order at ¶¶140, 146, 149, and 151.

⁵² Order, at ¶151.

there are different or additional provisions that would better benefit ratepayers and the public interest but whether the Stipulation, as a package, benefits ratepayers and the public interest.”⁵³ Accordingly, NEP’s claim that the PUCO acted inconsistently by not approving NEP’s proposed modifications⁵⁴ should be rejected.

Finally, NEP’s application for rehearing (in claim number 2) references paragraph 134 of the PUCO’s Order. In that paragraph, the PUCO rejects Armada’s proposed water heater pilot program.⁵⁵ In our Reply Brief, OCC opposed Armada’s proposal to charge consumers for its water heater pilot program.⁵⁶ The PUCO correctly rejected Armada’s proposed modification of the Settlement. Note that Armada did *not* file an application for rehearing of the Order.

The PUCO should not change its original ruling against modifying the Settlement for the Armada water heater proposal, based on NEP’s rehearing application. The PUCO should not even entertain this water heater issue because NEP, in framing its application for rehearing, failed to satisfy the requirement in O.A.C. 4901-1-35(A) to set forth “specific grounds” for why an order is unreasonable or unlawful.

III. CONCLUSION

The PUCO rightfully rejected IGS’s and NEP’s proposals in the Order and thoroughly explained the evidentiary support and rationale for the Settlement that they would undo. The PUCO should reject the applications for rehearing as well. To protect

⁵³ Order, at ¶151.

⁵⁴ NEP AFR, at 10.

⁵⁵ NEP AFR, at 9.

⁵⁶ OCC Reply Brief (July 6, 2021), at 21-24.

consumers, the PUCO should preserve and protect the Settlement from material modification by IGS and NEP.

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 30th day of December 2021.

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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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Summary: Memorandum Memorandum Contra the Applications for Rehearing of Interstate Gas Supply and Nationwide Energy Partners by Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of O'Brien, Angela Ms.