

Before the Public Utilities Commission of Ohio

**In the Matter of the
Commission's Review of the
Rules in Ohio Administrative
Code Chapter 4901:1-9**

Case No. 20-1800-EL-ORD

Reply Comments of the Retail Energy Supply Association

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I. Introduction

In this proceeding, the Public Utilities Commission of Ohio is reviewing its rules in Chapter 4901:1-9, including one that implements R.C. 4905.70. That section of the Revised Code provides that the Commission shall adopt rules providing that each electric light company offer to its residential customers whose residences are primarily heated by electricity the option of their usage being metered by a demand or load meter and require each company to bill such of its customers who select that option at a rate per kilowatt

¹ The statements expressed in this filing represent the position of the Retail Energy Supply Association as an organization, but may not represent the view of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable, and customer-oriented competitive retail energy markets. Delivering value-added electricity and natural gas service to retail, residential, commercial, and industrial customers, RESA members operate throughout the United States. More information on RESA can be found at www.resausa.org.

hour that reflects the lower cost of providing service during off-peak periods.² Under R.C. 4905.70, the Commission has adopted Rule 4901:1-9-03.³

After conducting a workshop, the Staff of the Commission recommended no changes to Chapter 4901:1-9. Entry ¶ 3 (Mar. 10, 2021). In initial comments, however, the Office of the Ohio Consumers' Counsel ("OCC") and Citizens' Utility Board of Ohio ("CUB") recommend substantial new requirements that would mandate consumer education programs that would go well beyond programs directed to residential heating customers. Initial Comments by the Citizens' Utility Board of Ohio at 3 (Mar. 22, 2021)

² R.C. 4905.70 provides:

The public utilities commission shall initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption, promote economic efficiencies, and take into account long-run incremental costs. Notwithstanding sections 4905.31, 4905.33, 4905.35, and 4909.151 of the Revised Code, the commission shall examine and issue written findings on the declining block rate structure, lifeline rates, long-run incremental pricing, peak load and off-peak pricing, time of day and seasonal pricing, interruptible load pricing, and single rate pricing where rates do not vary because of classification of customers or amount of usage. The commission, by a rule adopted no later than October 1, 1977, and effective and applicable no later than November 1, 1977, shall require each electric light company to offer to such of their residential customers whose residences are primarily heated by electricity the option of their usage being metered by a demand or load meter. Under the rule, a customer who selects such option may be required by the company, where no such meter is already installed, to pay for such meter and its installation. The rule shall require each company to bill such of its customers who select such option for those kilowatt hours in excess of a prescribed number of kilowatt hours per kilowatt of billing demand, at a rate per kilowatt hour that reflects the lower cost of providing service during off-peak periods.

³ Rule 4901:1-9-03 provides:

Each electric utility shall maintain on file with the commission a tariff, in which the electric utility:

(A) Offers residential customers, whose residences are primarily heated by electricity, the option of metering usage by a demand, load, or time differentiated pricing meter.

(B) May require customers to pay for any demand, load, or time differentiated pricing meter they select and its installation, if no such meter is already installed or the technology deployed.

(C) Shall bill customers with demand, load, or time differentiated pricing meters for kilowatt hours in excess of a prescribed number of kilowatt hours per kilowatt of billing demand, at a rate per kilowatt hour that reflects the lower cost of providing service during off-peak periods.

(“CUB Comments”)⁴; Comments Proposing Amendments to PUCO Rules to Help Consumers Use Their Expensive New Advanced Meters to Save Money by Office of the Ohio Consumers’ Counsel (Mar. 22, 2021) (“OCC Comments”). OCC goes further and recommends that the rules mandate that electric distribution utilities provide demand, load, or time differentiated products as part of the standard service offer. Because these recommendations are not supported by Ohio law and would undermine the development of electric competition in Ohio, the Commission should reject them.⁵

II. OCC’s recommendation that the Commission require demand, load, or time differentiated alternatives to the standard service offer is not lawful or reasonable

There is certainly value to be gained through advanced metering infrastructure. OCC’s recommendation that the Commission adopt a demand, load, or time differentiated standard service offer option, however, exceeds the Commission’s rulemaking authority under the applicable statute and would promote a bad policy choice.

Administrative rules cannot exceed the rulemaking authority delegated to the agency by the General Assembly. *Central Ohio Joint Vocational School Dist. Bd. of Educ. v. Bureau of Employment Servs.*, 21 Ohio St. 3d 5, 10 (1986); *Sterling Drug, Inc. v. Wickham*, 63 Ohio St. 2d 16 (1980).⁶ Although R.C. 4905.70 charges the Commission

⁴ CUB also recommends a rule change that would allow automatic approval of a bill format change if a utility files an application for a new tariff offering time-varying rates to residential customers. CUB Comments at 3. This proposed rule makes little sense since the proposed product would require a separate Commission approval under R.C. 4928.143. The bill format change application could be addressed in either the electric security plan case or a subsequent application under current Rule 4901:1-10-22(C). Because the proposed change is unnecessary, the Commission should reject this recommendation.

⁵ Addressing another rule in Chapter 4901:1-9, Duke Energy Ohio recommended that document retention schedules be revised. Initial Comments of Duke Energy Ohio, Inc. (Mar. 19, 2021). Failure to address this particular item does not indicate RESA’s support of the recommendation.

⁶ This statement regarding the limits on agency authority to issue rules is consistent with the frequent admonition of the Ohio Supreme Court that the Commission is a creature of statute and may not exceed the

to initiate programs that will encourage energy conservation, the legal authority to require an electric distribution utility to have a demand, load, or time differentiated pricing meter option is limited. In part, R.C. 4905.70 provides, “The commission, by a rule adopted no later than October 1, 1977, and effective and applicable no later than November 1, 1977, shall require each electric light company to offer *to such of their residential customers whose residences are primarily heated by electricity* the option of their usage being metered by a demand or load meter.” (Emphasis added.) The section goes on to state, “The rule shall require each company *to bill such of its customers who select such option* for those kilowatt hours in excess of a prescribed number of kilowatt hours per kilowatt of billing demand, at a rate per kilowatt hour that reflects the lower cost of providing service during off-peak periods.” *Id.* (emphasis added). On its face, this section is a requirement to provide an option limited to residential heating customers. It does not provide the Commission the authority to expand the application of this requirement to all residential customers with advanced metering.

The other rate making authority provided to the Commission likewise does not authorize the Commission to summarily mandate demand, load, or time differentiated offers from an electric distribution utility. R.C. 4909.18 is not applicable because such an offer would concern a competitive electric service. R.C. 4928.05(A). While the Commission can authorize other generation related products beyond the standard service offer under R.C. 4928.143(B) to the extent that such a product is one of the types permitted by that division as part of an electric security plan, that section requires a

authority provided to it by the General Assembly. *Dayton Comms. Corp. v. Pub. Utils. Comm’n of Ohio*, 64 Ohio St. 2d 302, 307 (1980).

broader review of the lawfulness of the terms of the plan and a finding that the plan is better in the aggregate than a market rate offer. Thus, none of the alternative methods of securing approval of a new demand, load, or time differentiated product can lawfully support OCC's recommendation that the Commission mandate such a product for all standard service offer customers.

The policy choice underlying OCC's recommendation is also wrong. For years, competitive suppliers have sought access to more granular information about customers' electric usage so that they can provide products addressing customers' wants and needs. Ohio energy policy supports that effort. R.C. 4928.02.⁷ Competitive suppliers, however, already have to overcome a substantial barrier to entry to introduce generation service products in a market in which the electric distribution utility controls most of the underlying infrastructure and maintains a direct link to the customer.

These market considerations are already incorporated in Commission policy directed toward limits on distribution utility offerings based on advanced metering. As part of a settlement approved by the Commission,⁸ the FirstEnergy affiliated electric distribution utilities implemented a residential offering that expands default service to include load management options. In the Matter of the Filing by Ohio Edison Co., The Cleveland Electric Illuminating Co. and The Toledo Edison Co. of a Grid Modernization Plan, Case Nos. 16-481-EL-UNC, *et al.*, Opinion and Order ¶ 38 (July 17, 2019). The

⁷ A principle pursued by RESA provides, "Clean energy alternatives such as energy efficiency, demand response, and renewables are best delivered by competitive retail suppliers offering market-based solutions rather than through regulated distribution companies. *The regulated distribution companies should be a competitively neutral conduit for the provision of these value-added services by the competitive market.*" RESA Statement of Principles, viewed at <https://www.resausa.org/about-us/resa-principles> (emphasis added).

⁸ Again, the Commission did not mandate the limited offering of the distribution utility; instead, it approved a recommendation contained in a settlement.

agreement, however, included a provision that will terminate the availability of the time-differentiated options when three products using advanced metering data offered by competitive retail electric service providers are available. *Id.* This termination provision is recognition that the competitive retail electric service providers, not electric distribution utilities, should be driving the growth of new generation products that will be possible when adequate metering is available. Additionally, the effect of the termination provision is to limit the ability of an electric distribution utility to leverage its relationship with distribution customers, access to customer information, and utility resources in ways that would adversely affect competition.⁹

OCC's proposal to require the electric distribution utility to offer a demand, load, or time varying rate to all customers with advanced metering would lift further the barriers that frustrates competitive entry even after twenty years of explicit pro-competition energy policy in Ohio. Accordingly, the Commission should not endorse OCC's proposal by approving a rule change mandating that electric distribution utilities be required to offer demand, load, or time differentiated rates to all customers with advanced metering.

III. The Commission should reject the CUB and OCC proposals to expand electric distribution utility customer marketing programs

Customer education is fundamental to competitive markets, but the term can be misused.¹⁰ Under the guise of "consumer education," CUB and OCC recommend that electric utilities market to customers the potential benefits of demand, load, or time

⁹ For a discussion of the need to prevent leveraging behavior of monopolists to thwart competitive harms, see Lina M. Kahn, *Amazon's Antitrust Paradox*, 126 *Yale L.J.* 710, 737-39 (2017).

¹⁰ Consumer education is another core principle pursued by RESA members. RESA Statement of Principles, viewed at <https://www.resausa.org/about-us/resa-principles>.

differentiated rates. CUB Comments at 3; OCC Comments at 4-5.¹¹ Apart from the fact that the Commission cannot mandate the offers which the education program would address, this proposal is reminiscent of the repeated attempts by OCC to advance policy outcomes that favor default service over competitive alternatives. See, e.g., In the Matter of the Review of the Uniform Purchased Gas Adjustment Clause Rules in Chapter 4901:1-14 of the Ohio Administrative Code, Case No. 18-1291-GA-ORD, Finding and Order ¶ 18 (Jan. 3, 2019).¹² These proposals are premised on the same policy errors that infect the recommendation for mandated offers. In effect, the proposals would cast the electric distribution utilities into the role of marketers of demand, load, and time differentiated rates, a role that is contrary to state policy. Accordingly, the Commission should reject the education proposals recommended by CUB and OCC.

IV. The recommendation that the Commission require an online resource to assist customers in managing usage and determining savings is duplicative of a requirement already provided by electric service standards

As part of its proposal, OCC also recommends that the Commission require electric utilities to maintain an online calculator. OCC Comments at 6. CUB makes a similar proposal. CUB Comments at 3. The Commission, however, has already approved changes to the electric service standards that will require electric utilities to maintain an online calculator. In the Matter of the Commission’s Review of its Rules for Electrical Safety and Service Standards Contained in Chapter 4901:1-10 of the Ohio

¹¹ OCC goes further and recommends that the Commission require OCC’s “input” on educational materials provided by electric distribution utilities. OCC Comments at 5.

¹² The recommendation to set up education programs also raises an issue of funding. Neither CUB nor OCC offers any indication as to how this mandate will be funded. There is little doubt that they both do not want to encourage additional residential rate increases to cover the cost of these new marketing requirements they are asking for, but the costs must be borne by someone.

Administrative Code, Case No. 17-1842-EL-ORD, Entry on Rehearing (Jan. 27, 2021) (proposed rule 4901:1-10-22(C)). There is no need for the Commission to require a second one. Accordingly, the Commission should reject this proposed change to the rule.

V. Conclusion

The availability of advanced metering will offer opportunities to improve the sale and use of electricity, but mandating electric distribution utilities to offer such products to all customers with advanced metering and then directing them to market the new offering would unlawfully and unfairly interfere with the competitive generation market. Accordingly, the Commission should reject the recommendations for the rule changes proposed by CUB and OCC.

Respectfully submitted,

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Certificate of Service

I certify that on March 29, 2021 a copy of the Reply Comments of the Retail Energy Supply Association was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio. Additionally, this document was served on the following persons.

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