

Before
The Ohio House of Representatives
Public Utilities Committee

Testimony on House Bill 260
(Requiring Refunds of Improper Charges to Utility Consumers)

By
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On Behalf of the Office of the Ohio Consumers' Counsel

May 26, 2021

Hello Chair Hoops, Vice-Chair Ray, Ranking Member Smith, and Committee members. I hope you and your colleagues are well.

Consumers' Counsel Weston and I thank you for this opportunity to testify as a proponent of House Bill 260. I am testifying on behalf of the Office of the Ohio Consumers' Counsel, for Ohio residential utility consumers.

In 2019, the OCC Governing Board passed a resolution seeking regulatory reform, to require refunds of improper utility charges. (It is attached.) House Bill 260 would require refunds to utility consumers when the Supreme Court or other authority determines that the PUCO improperly approved the charges. We thank the bill sponsors for seeking to end this longstanding travesty of justice for Ohioans.

For the past sixty years (after the Court's "*Keco*" decision), utilities have been allowed to keep what they collect from customers even when the Supreme Court of Ohio (or other authority) later finds the charges to be unlawful or unreasonable. Since 2009 alone, this injustice has cost Ohioans \$1.5 billion in denied refunds from electric utilities. Attached is OCC's chart.

The Supreme Court has recognized that denying refunds is unfair for consumers. The Court has commented that it is a matter for the legislature and/or the PUCO to address. But that solution hasn't happened. It would be understandable if Ohioans think the system is rigged against them in favor of the utility industry.

For instance, in a 2011 appeal by OCC and others, AEP consumers were deprived of a \$63 million refund for charges the Court found unlawful. The Court recognized that "the no-refund rule transforms OCC's win on the merits into a somewhat hollow victory" for consumers. (*In re Columbus Southern Power*, 2011-Ohio-1788, ¶17.) But the Court advised that fixing the issue is a matter for the legislature to consider.

In a 2014 case appealed by OCC and others, the Court held that even though AEP had collected \$368 million from consumers in unjustified charges, the law did not allow for customer refunds. Former Justice Lanzinger, writing for the Court's majority, described the unfairness of the no-refund rule:

AEP collected \$368 million in POLR charges during the ESP, without any evidence that would justify the cost recovery. But under *Keco's* no-refund rule, AEP is permitted to keep it, resulting in a windfall for AEP. (*In re Columbus Southern Power Co.*, 2014-Ohio-462, ¶56.)

And former Justice Pfeifer wrote in dissent that the denial of refunds is "unconscionable." Justice Pfeifer further remarked that:

In this case, we are talking about \$368 million in unjustified charges that, instead of redounding to the people who paid them, reside in the coffers of a public utility without the justification of actual costs. This illusory charge will become pure unwarranted profit based on this court's decision today. And it does not have to be this way. (*In re Columbus Southern Power Co.*, 2014-Ohio-462, ¶56.)

We think the *Keco* case should be overruled or distinguished by the Court, as we have advocated. Sixty years later that hasn't happened. The PUCO could solve the problem. But it doesn't. The General Assembly hasn't acted as the tally of denied consumer refunds climbs into billions of dollars, to the benefit of utilities. We hope House Bill 260 breaks this logjam of consumer rip-offs.

Here is an example of the problem House Bill 260 will solve. The PUCO, after creating a multi-billion dollar subsidy for FirstEnergy in the form of a power purchase agreement, was rebuked by FERC for exceeding its state authority. The PUCO then went searching for a new way to subsidize FirstEnergy, which led to the infamous Distribution Modernization Rider. In a successful appeal by OCC and others, the Court invalidated the charge. It is bad enough that the PUCO writes unlawful rate orders, but that travesty was compounded for consumers. The Court found that the law:

bars any refund of recovered rates unless the tariff applicable to those rates sets forth a refund mechanism [citations omitted]. FirstEnergy's tariffs for the DMR, however, contain no refund mechanism. (*In re Application of Ohio Edison Co.*, 2019-Ohio-2401, ¶23)

So two million FirstEnergy consumers lost nearly a half-billion dollars in refunds, because the PUCO did not order a refund mechanism. The utility, FirstEnergy, certainly did not seek a refund mechanism for its consumers. But OCC and the Ohio Manufacturers' Association did seek a FirstEnergy refund mechanism from the PUCO. The PUCO said no. According to the PUCO's December 21, 2016 ruling, it denied a refund mechanism because "[m]aking Rider DMR subject to refund would be counterproductive and impose additional risks on the Companies." (Order, Case 14-

1297, ¶16 (Dec. 21, 2016).) Note that the PUCO did not say in its Order that it couldn't require a refund mechanism. It just wanted to protect FirstEnergy instead of consumers.

We read in the news that the PUCO expressed a view that its refund authority is very limited. Attached is a May 22, 2021 editorial in the Toledo Blade, that references this PUCO claim. But neither the Supreme Court nor the PUCO stated that view in their recent rulings that we quoted in this testimony. And O.R.C. 4905.32 does not support the PUCO's view.

The consumer refund problem at the PUCO needs to be viewed in the context of legislative reform for the process of selecting PUCO commissioners. There needs to be balance created, by enacting a requirement for appointing commissioners with a consumer background.

But today you have before you a bill that can solve the injustice by changing the law. We hope you pass it.

At last week's Committee hearing there was some commentary about proposing a percentage limit on refunds or delaying and limiting refunds to a credit against a future utility rate increase. The proposals could result in consumers receiving less refunds than the amount they were charged (or even no refunds) under a wrongful PUCO order. That result would perpetuate some or all of the current injustice for consumers, to the benefit of utilities. Also, the future netting proposal could lead to utilities claiming it is unconstitutional ratemaking. Please decline such proposals.

It was said that parties already are able to obtain a stay to prevent rates from taking effect, so there is no need for legislation. That claim overlooks the fact that to obtain a stay of a PUCO Order, an appellant must post a bond. (O.R.C. 4903.16.) Utilities have the resources to post a bond, such as when FirstEnergy did so. But OCC and other government or consumer organizations generally cannot afford to post a bond with the Court. An alternative secondary solution (for OCC) could be to change O.R.C. 2505.12 and 4903.16 to clarify that OCC, like other state agencies, would not have to post a bond when it files appeals.

In conclusion, thank you again for your consideration of House Bill 260 and our recommendations. Please pass House Bill 260 for consumer protection.



Resolution

Governing Board of the Office of the Ohio Consumers' Counsel

In Support of Legislation for Regulatory Reform to Protect Consumers by Enabling Refunds of Improper Utility Charges

- WHEREAS,** Electricity, natural gas, telephone, and water services are essential for Ohioans; and
- WHEREAS,** Ohio consumers should have utility services that are adequate, reliable, safe, and reasonably priced; and
- WHEREAS,** In 1999, the Ohio General Assembly enacted Senate Bill 3, the electric deregulation law, to give Ohioans the benefits of power plant competition, among other things; and
- WHEREAS,** In 2008, the Ohio General Assembly enacted Senate Bill 221, which created new ratemaking processes (including so-called "electric security plans") that favor electric utilities and disfavor residential consumers with a result of electric consumers paying above-market subsidies and other charges; and
- WHEREAS,** Under a 60-year old Ohio Supreme Court precedent, consumers are denied refunds of utility charges even if the charges to consumers are later determined by the Ohio Supreme Court or other authorities to be improper; and
- WHEREAS,** On June 19, 2019, the Ohio Supreme Court ruled that FirstEnergy's PUCO-approved charge for its so-called "distribution modernization rider" is unlawful;

WHEREAS, In its ruling that the charges FirstEnergy collected from consumers are unlawful, the Supreme Court denied refunds (about \$456 million) to consumers because the PUCO originally declined to make the charges subject to refund (despite the Ohio Consumers' Counsel and the Ohio Manufacturers' Association jointly asking the PUCO to make the charges refundable); and

WHEREAS, Since 2009 (the year after the 2008 electric deregulation law), Ohio consumers of electric utilities have been denied about \$1.2 billion in PUCO-approved utility charges that the Supreme Court has found to be improper.

THEREFORE, BE IT RESOLVED, that the Governing Board of the Office of the Ohio Consumers' Counsel urges the Ohio General Assembly to enact consumer protection legislation to enable refunds of improper utility charges.

AND, BE IT FURTHER RESOLVED, that the Governing Board of the Office of the Ohio Consumers' Counsel urges the Public Utilities Commission of Ohio to make utility charges subject to refund in the event the Ohio Supreme Court or other authorities find the charges to be improper.

I verify that this Resolution has been approved by the Governing Board of the Office of the Ohio Consumers' Counsel, this 16th day of July 2019.



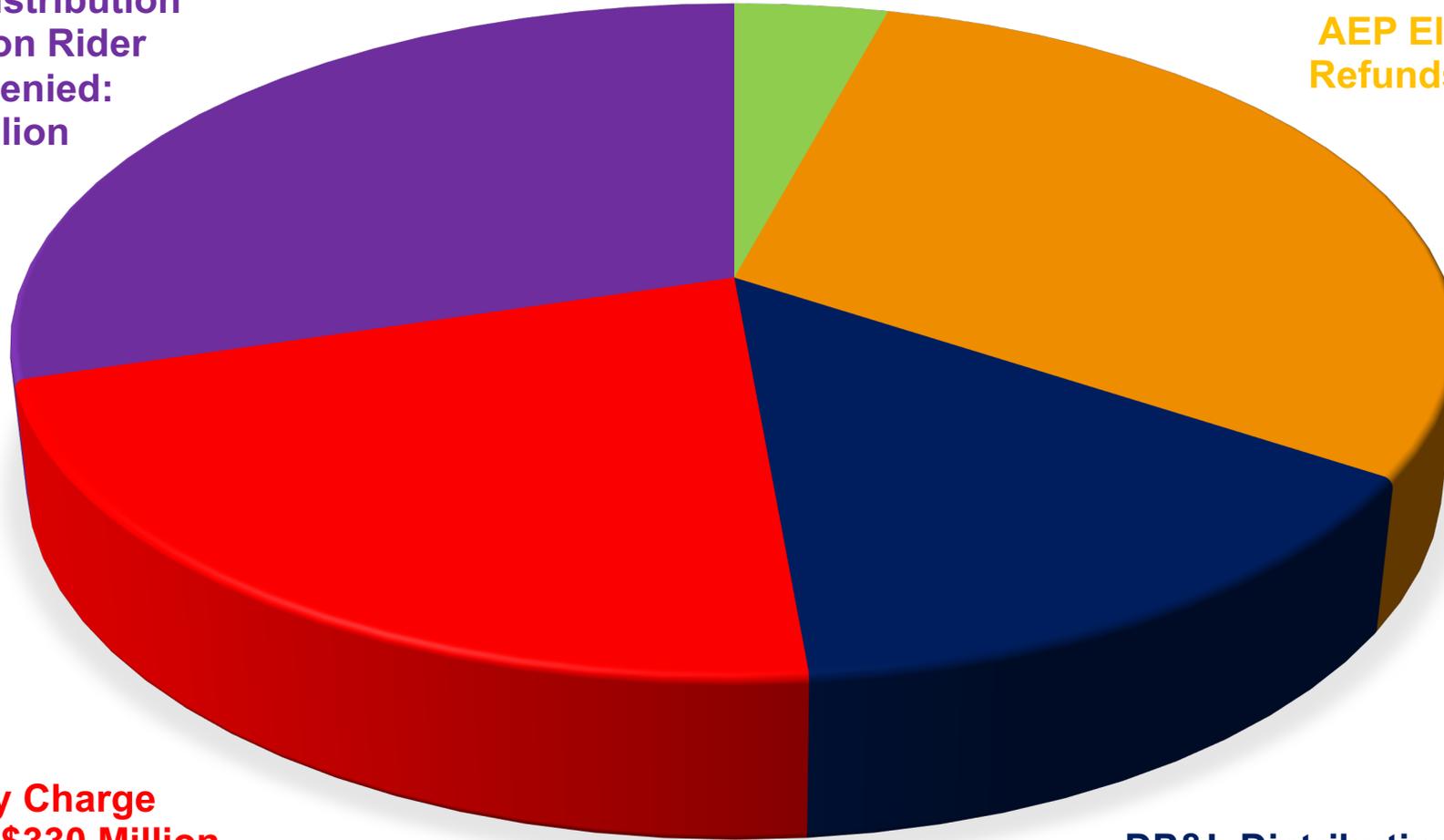
Michael Watkins, Chairman
Governing Board of the Office of the Ohio Consumers' Counsel

OHIOANS DENIED \$1.5 BILLION IN ELECTRIC REFUNDS SINCE 2009

AEP Electric Security Plan I
Refunds Denied: \$63 Million

FirstEnergy Distribution
Modernization Rider
Refunds Denied:
\$456 Million

AEP Electric Security Plan II
Refunds Denied: \$463 Million



DP&L Stability Charge
Refunds Denied: \$330 Million

DP&L Distribution Modernization Rider
Refunds Denied: \$218 Million

PUCO leader must lead

5/22/2021

THE EDITORIAL BOARD

The new chair of the Public Utilities Commission of Ohio, Jenifer French, said the right thing.

Ms. French aims to restore public confidence in the agency and to do that plans to increase transparency on the board's actions. Far more is needed, not only from Ms. French but from the governor and legislators — including the election of PUCO members.

That is all well and good, but actions to follow through on those words are necessary. The agency lost public confidence long before the recent \$61 million bribery scandal. PUCO rarely appears in the role of consumer watchdog, which is what it should be.

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The last few days haven't done much to change that perception. Ms. French said PUCO can't force electric companies to pay back billions of dollars in overcharges to consumers, according to the Ohio Capital Journal.

Here's what makes PUCO look particularly bad. PUCO allowed those charges and later the courts said the charges were illegal. And now PUCO can't do much about it?

That position didn't go over well with senators. Sen. Mark Romanchuck (R., Ontario) said he believed the courts would allow pursuit of charges.

Instead of saying what the commission couldn't do, Ms. French should have said she'd look at every option to get the money back to consumers. Her position doesn't show the aggressive consumer advocacy the agency needs to restore confidence. It sounds all too much like more of the same. Consumers take what we, the PUCO, and the utility companies dish out.

In Ms. French's defense, she is new to the job. But the new chairman must fight harder for consumers, perhaps it's the former judge's focus on the need for impartiality — but the new job does not require the impartiality a judge must manifest.

Transparency about the decision-making process is great, but not if bad decisions continue to flow from the agency.

Reform can't wait any longer.

It takes two simple things along with transparency: turning the agency into a consumer watchdog and the election of commission members.

Those two moves would go a long way to restoring public trust and confidence, in the PUCO.