Southern Environmental Law Center

Authority for Rural Electric Membership Corporations to adopt the PAYS® System of Tariffed On-Bill Financing for Energy Efficiency in North Carolina

INTRODUCTION

About two years ago, Roanoke Electric Membership Cooperative launched an innovative energy-efficiency program—called Upgrade to $ave—to serve its members. [1] On the strength of Roanoke's success, other rural electric membership corporations ("EMCs" or "co-ops") in North Carolina have considered adopting a similar initiative. "Upgrade to $ave" is a tariffed, on-bill financing program based on the Pay As You Save® ("PAYS®") system.[2]

As EMCs have considered tariffed on-bill financing, two questions regarding their authority under existing North Carolina law have emerged: (1) Can the cost-recovery charge be tied to the meter;[3] and (2) Can the utility disconnect for nonpayment of the cost-recovery charge?[4] The Southern Environmental Law Center[5] has prepared this memorandum to address these concerns and any potential complaints that could be brought by a co-op's members. Before addressing these issues, we provide an overview of the PAYS system.

Following Roanoke Electric's successful adoption of Upgrade to $ave, we have not identified any legal or regulatory barriers for EMCs to implement a PAYS tariff in North Carolina. This conclusion is consistent with the experience of electric co-ops in Arkansas, Kansas, New Hampshire, and Kentucky that have also successfully implemented PAYS tariffs. Moreover, we have not identified any viable legal or consumer claims that a member might have against an EMC that adopts a similar program.

As set forth in more detail below, EMCs are uniquely positioned in North Carolina to adopt PAYS programs that save their members money, stimulate the local economy with jobs for contractors, improve the quality of the building stock, facilitate compliance with the Renewable Energy and Energy Efficiency Portfolio Standards (REPS), and reduce the EMC's costs for providing energy, saving all of its members money. It truly is a win-win-win proposition for EMCs, their members, and the local economy.

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[1] http://roanokeelectric.com/UpgradeToSave

[2] Pay As You Save® and PAYS® are registered trademarks and the intellectual property of the Energy Efficiency Institute, http://www.eeivt.com/

[3] By tying the recovery-charge to the meter, and not the initiating customer, the tariff continues for any successor customer at a location where the utility has made efficiency investments until the utility has recouped its costs.

[4] There are no reported cases of disconnections for nonpayment of a PAYS cost-recovery charge. The requirement is essential to the program design, however, in order to minimize risk of nonpayment, which helps to keep financing costs for the utility at a minimum.

[5] The Southern Environmental Law Center is part of a North Carolina On-Bill Financing Working Group that is providing technical support to NC EMC and EMCs in the state. This Working Group includes: Appalachian Voices, the Environmental Finance Center of the UNC School of Government, the Southeast Energy Efficiency Alliance, Environmental Defense Fund, NC Sustainable Energy Association, and the Southern Alliance for Clean Energy.

I. Overview of Pay As You Save, or PAYS

PAYS has proven to be a successful and replicable model for paying for energy efficiency, one that can meet the needs of renters, low-income customers, homeowners, governments, and businesses. The PAYS tariff allows utilities to invest in energy-efficiency upgrades at a member's home or business. The utility recovers its costs for those upgrades over a fixed term with a cost-recovery charge, or tariff, on the customer's monthly bill. This tariff is designed to be significantly less than the customer's estimated savings achieved as a result of those efficiency measures. When the cost-recovery term is complete, the customer enjoys 100 percent of the savings. PAYS has three essential elements:

(1) A utility tariff that links repayment for efficiency upgrades to a specific meter, not to an individual customer, to recover the cost of the program;

(2) Cost-recovery is achieved with on-bill payments, permitting the utility to disconnect service for non-payment just as it could for non-payment of any tariffed services; and

(3) Independent certification ensures that efficiency measures are appropriate and that estimated savings estimates significantly exceed payments.[6]

In addition to these elements, there are three minimum program requirements:

(1) The customer does not bear any risk, removing a key barrier to participation.[7]

(2) The utility collecting PAYS cost-recovery charges agrees to pay the capital provider regardless of collections, the same way it treats all other debt; and

(3) PAYS offers will not be forced to compete with other rebate options.[8]

PAYS elegantly aligns incentives among all participants. The utility benefits by meeting its energy efficiency goals while reducing peak demand. Participating members benefit by

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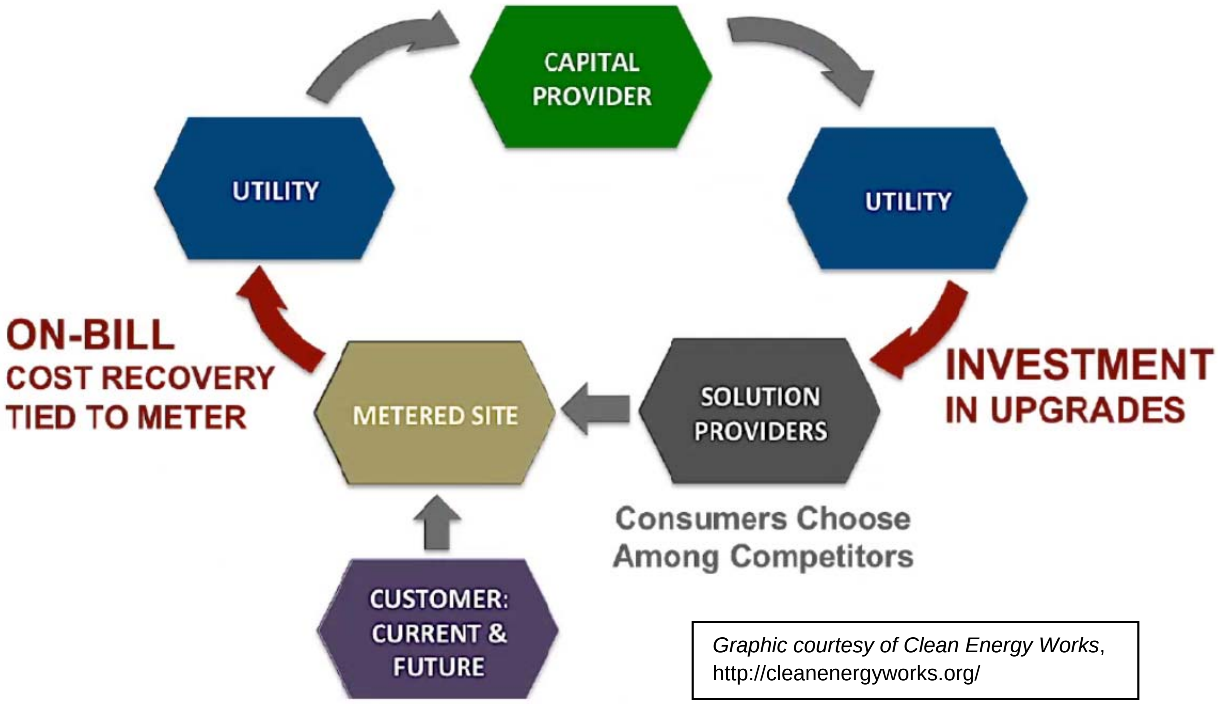
[6] The PAYS program guarantees that *estimated* savings will significantly exceed the tariffed cost-recovery charge, but cannot guarantee specific savings. Actual bill savings depend on rates, occupants' usage, and the accuracy of the cost-effectiveness analysis. The Energy Efficiency Institute recommends that utilities use the 75% or 80% rule, which requires that the cost-recovery charge is limited to 75% or 80% of estimated savings. In addition, the Energy Efficiency Institute recommends that program operators use reliable cost-effectiveness analyses. At the outset, two PAYS program evaluations verify that estimated savings are significantly higher than the on-bill cost-recovery tariff.

[7] Risk is eliminated because the customer does not pay for the upfront costs for the upgrades, does not take on personal debt or responsibility for repayment if he or she moves away, and because the cost-recovery charge ceases if the efficiency measures fail to perform.

[8] *PAYS® Essential Elements & Minimum Program Req*uirements, http://www.eeivt.com/?page_id=48; *see also* Paul A. Cillo & Harlan Lachman, *Potential for Development of PAYS® in New York*, Energy Efficiency Institute (with Daniel Rosenblum & Fred Zalcman, Pace University Energy Project) (Aug. 3, 2005), http://www.eeivt.com/NYSERDAWhitePaper.pdf.

receiving cost-saving energy-efficiency upgrades, which save them money on their power bills. Those savings and cost-recovery obligations are tied to the meter so that any successor customer pays a proportional share for those upgrades, while also receiving the cost savings from the upgrades. Qualifying contractors benefit by getting paid by the utility, which has the leverage to enforce warranties and maintain quality control. The utility recovers its costs through the cost-recovery charge, a tariff on the participating member's bill for a fixed term, providing a revenue stream to repay the capital provider. In Roanoke EMC's case, the capital provider is the USDA Rural Utility Service's Energy Efficiency and Conservation Loan Program.[9]

The figure below shows how participants in the PAYS program interact:



Graphic courtesy of Clean Energy Works, http://cleanenergyworks.org/

This tariffed, on-bill program solves several problems that have slowed the adoption of other efficiency programs. Low-income members and renters are frequently limited in their ability to participate in energy-efficiency programs. Rebates require full, upfront payment for higher-efficiency appliances, water heaters, or HVAC systems, often at prices out of reach for low-income families. Loan programs require credit checks that will exclude most low-income members, while other members are too debt-constrained to risk taking on more personal loans to pay for energy-efficiency upgrades. Low-income members and renters often do not know how long they will remain at any given location, making it difficult to invest in measures with longer payback periods. Renters are not inclined to invest directly in property that belongs to someone

[9] https://www.rd.usda.gov/programs-services/energy-efficiency-and-conservation-loan-program.

else. Likewise, landlords have little incentive to invest in energy-efficiency because tenants typically pay the utility bills.

PAYS solves all of these problems. It allows low-income residents and renters to participate because it does not require upfront payments; it limits the cost-recovery charge to the meter where the upgrades have been installed; and it avoids debt obligations for participants.

Because the tariff runs with the meter, the program requires that notice of the cost-recovery charge be given to any prospective purchaser or tenant. As a condition of participating in the program, the EMC can contractually require the owner of the property to notify any subsequent purchaser or renter that the meter at that location is subject to the PAYS tariff. Even if the owner fails to disclose the cost-recovery tariff, the customer ultimately benefits by receiving bills that are lower than if the upgrades had not been installed.

PAYS has built-in consumer protections. The utility only invests in efficiency upgrades that result in a cost-recovery charge that is significantly less than the customer's estimated savings, resulting in a net cash benefit for the customer from the outset. If the efficiency measures fail and are not repaired, the cost-recovery charge ceases. In addition, under a PAYS tariff, the utility is not extending personal loans or financing to its customers, but is instead making investments in energy efficiency upgrades for which costs are recovered through a tariff that is tied to the meter. Since a utility implementing the PAYS system is not making loans or extending credit to its members, it is not subject to federal banking, securities, or consumer financial protection laws that apply to lending activity.[10] Because all members—regardless of ownership status, credit scores, or duration of occupancy—can opt in to the tariff, the PAYS tariff is the most non-discriminatory energy-efficiency program available to EMCs.

II. EMCs Have Broad Authority Under North Carolina Law

The General Assembly has granted co-ops wide latitude to conduct their operations in the service of their members. As a general matter, EMCs in North Carolina operate without the need to seek prior approval from the North Carolina Utilities Commission. An EMC is "vested with all power necessary or requisite for the accomplishment of its corporate purpose."[11]

The central purpose of an EMC is to provide electrical service to members "at the lowest cost consistent with sound economy and prudent management" of the co-op.[12] Programs that enhance the co-op's ability to provide electric service at a lower cost are consistent with this purpose. This grant of authority is plenary; co-ops are vested with all power that is capable of being delegated by the legislature in order to carry out their corporate purpose. No particular

[10] According to the Energy Efficiency Institute, in the more than fifteen years since the first PAYS tariff was adopted, no participating utility has reported any issues relating to state or federal consumer protection or lending laws.
[11] N.C. GEN. STAT. § 117-17.
[12] N.C. GEN. STAT. §§ 117-10 & 117-16.

power granted by statute to EMCs can be read to impair or limit this general grant of power.[13] Thus, the purpose and authority of EMCs encompass the ability to implement cost-saving energy-efficiency measures that serve their members such as the PAYS system.

An EMC's board of directors is charged with exercising this authority.[14] If faced with member complaints, decisions made by co-op boards are not subject to judicial second-guessing.[15] Instead, North Carolina courts have adopted the "business judgment" rule to review any challenged decision of an EMC's board. This rule: (1) presumes that, in making a decision, the "directors acted with due care (i.e., on an informed basis) and in good faith in the honest belief that their action was in the best interest of the corporation"; and (2) applies, absent rebuttal of the first presumption, "a powerful substantive presumption that a decision by a loyal and informed board will not be overturned by a court unless it cannot be attributed to any rational business purpose."[16] In practice, decisions of an EMC's board of directors will not be disturbed when challenged unless there is substantial evidence that the board acted arbitrarily.

The broad discretion North Carolina EMCs enjoy comes from their structure under North Carolina law as member-owned cooperatives. An EMC's board of directors is elected by its members. Because members are in the position of control, they can serve as a check on any potentially unfair practices—a power that customers of regulated investor-owned utilities lack.[17]

Unlike investor-owned utilities, such as Duke Energy, co-ops have been granted the power to set their own rates and tariffs for service.[18] The only exception to this general rule is the requirement to seek approval from the Utilities Commission for incentive programs that encourage members to switch fuel sources.[19] For example, a program that offers rebates to an electric co-op's member to replace a natural gas furnace with an electric heat pump must first be approved by the Utilities Commission.[20]

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[13] N.C. GEN. STAT. § 117-17.
[14] N.C. GEN. STAT. § 117-14.
[15] *Hammonds v. Lumbee River Elec. Membership Corp.*, 178 N.C. App. 1, 22, 631 S.E.2d 1, 14 (2006) ("N.C. Gen. Stat. § 117-14 [a co-op board of directors "shall have power to do all things necessary or convenient in conducting the business of a corporation"] and § 117-17 ["[e]ach corporation formed under this Article is hereby vested with all power necessary or requisite for the accomplishment of its corporate purpose and capable of being delegated by the legislature"] unequivocally establish the legislature's intent that a "'rule of deference,'…be applied to restrict judicial oversight of the actions of co-op Board members unless there is no rational basis for the Board's decisions").
[16] *Id.* (quoting Russell M. Robinson, II, *Robinson on North Carolina Corporation Law*, § 14.06, at 14-16-14-17 (2005)).
[17] N.C. GEN. STAT. § 117-13.
[18] EMC tariffs are filed with the Utilities Commission and the Rural Electrification Authority, but neither body has power to disapprove such tariffs. N.C. GEN. STAT. § 62-138(f); N.C. GEN. STAT. § 117-3; 4 N.C. ADMIN. CODE 08.0206; 4 N.C. ADMIN. CODE 11, R8-33.
[19] N.C. GEN. STAT. § 62-140(c); 4 N.C. ADMIN. CODE 11.R8-68.
[20] Roanoke EMC's Upgrade to $ave does not give its members incentive to purchase more electricity from the utility or to install new equipment that would use additional electric service from Roanoke. Instead, the program is designed to result in its members' purchasing less electricity and paying decreased electric bills. For these reasons, Upgrade to $ave does not fall under the category of a regulated incentive program. A utility could, however, seek

The only other requirement that state law imposes on the rate-making authority of co-ops is that their rates and tariffs must be reasonable and non-discriminatory.[21] The obligation to serve all within their service territory impartially and without unreasonable discrimination is an outgrowth of their role as natural monopolies. The prohibition against unjust discrimination by public utilities, including EMCs, exists to ensure that utilities do not abuse their monopoly power to favor one class of customers over others.[22] This prohibition does not stop utilities from offering different services to different members, so long as such differences are reasonable.[23]

III. Adopting a PAYS Tariff is Consistent with EMCs' Authority in North Carolina

As noted above, the only statutory requirements imposed on EMCs when setting tariffs for service are the prohibition against unreasonable prejudice and the obligation to provide service at the lowest cost consistent with sound management. These requirements present no obstacles for a co-op to adopt a tariffed on-bill program to provide cost-saving energy-efficiency services to members.

Co-op members who opt in to the PAYS tariff rider and those who do not are charged the same underlying rates for electricity, so there is no discrimination among members in rates they are charged. However, members who opt in pay a cost-recovery tariff that others do not, and that charge is designed to be more than offset by estimated cost savings from energy-efficiency measures at the given metered location. Thus, the members who opt in enjoy a net savings in their electric bills, not because they are charged a preferential rate, but because the tariff they pay recovers the cost of energy-efficiency installations at a given meter. In other words, the cost-recovery tariff is reasonable and nondiscriminatory because it is directly related to investments made for the benefit of the occupant at that metered location.[24] All reasonable tariffs are designed to recover the EMC's costs for providing services to its members. The PAYS tariff is no exception.

Several additional factors should assure EMCs that a PAYS tariff is reasonable. First, such a tariff—including the essential features of tying it to the meter and allowing disconnection

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Commission approval to offer members who heat with gas the same option as members who heat with electricity, justifying it as an equity issue for its owner-members and as beneficial electrification since energy use for heating would be reduced.

[21] The common law prohibition on unreasonable discrimination was codified for co-ops in 1965. N.C. GEN. STAT. § 117-16.1 (no electric membership corporation shall "make or grant any unreasonable preference or advantage to any member or subject any member to any unreasonable prejudice or disadvantage" with regard to rates or services).

[22] *Salisbury & S. Ry. Co. v. S. Power Co.*, 179 N.C. 18, 101 S.E. 593, 602 (1919) (noting that charging higher prices for hydroelectric power to some industrial customers than to others would quickly lead to putting the disadvantaged customers out of business).

[23] *Horner v. Oxford Water & Elec. Co.*, 153 N.C. 535, 69 S.E. 607, 609–10 (1910) (finding no unjust discrimination where some customers were billed for metered service and others were on a flat rate because the underlying charges to plaintiff were fair and because the utility was in the process of transitioning all customers off of flat rates and on to metered service).

[24] *State ex rel. Utilities Comm'n v. Mead Corp.*, 238 N.C. 451, 465, 78 S.E.2d 290, 300 (1953) (holding that when there are different rates, those differences must be based on "dissimilarities in conditions of service" and that there must be some "reasonable proportion between the variance in the conditions and the variances in the charges").

for nonpayment—has been approved by public utilities commissions in at least five states: New Hampshire, Kansas, Kentucky, Hawaii, and Arkansas.[25] In four of these states, each of the utilities that sought to implement a PAYS tariff is regulated by its state utilities commission and sought approval of a tariffed on-bill program in the same manner that they would seek approval for any regulated service.[26] In the other state, Hawaii, the legislature directed the utilities commission to investigate the viability of an on-bill financing program.[27] The ultimate decision to approve any such on-bill program was left to the utilities commission in Hawaii. Each of these states has a statute barring discriminatory or preferential rates that is similar to North Carolina's.[28]

The New Hampshire Public Utilities Commission—the first Commission to approve a PAYS tariff—considered several potential concerns under state law with regards to: (1) authority to disconnect for nonpayment and (2) the tariff running with the meter.[29] In approving both of those key elements, the Commission concluded that laws relating to "real estate transfers, contracts of adhesion, recorded security interests or mechanics liens" were not relevant to the program. Instead, the fundamental issue was the Commission's authority to approve rates and tariffs for regulated public utilities. Once such tariffs are approved by the Commission, they have the force of law.

As noted above, the North Carolina Utilities Commission has no jurisdiction over rates or tariffs set by EMCs. North Carolina co-ops can nevertheless look to these rulings from other states for confirmation that PAYS is a thoroughly vetted program and a reasonable way to meet energy-efficiency goals.

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[25] For a more detailed review of those five public utilities commission orders approving PAYS® tariffs, see *PAYS® Tariffed On-Bill Programs for Energy Efficiency Meet with Approval from State Utilities Commissions*, Southern Environmental Law Center Memorandum (2016).

[26] In Kansas, the legislature passed a law authorizing agreements between electric or natural gas utilities and their customers to finance energy conservation measures on the utility bill, but left it to the State Corporation Commission to approve any particular tariffed on-bill program. KAN. STAT. ANN. § 66-1248. Midwest Energy, the first utility that sought to implement the PAYS system in Kansas, initiated its request to the Commission before the enactment of that statute. The Commission determined in its order approving the PAYS tariff that it had the authority to do so before the enactment of § 66-1248. Importantly, the statute does not itself provide authority for tying the tariffed on-bill recovery charge to the meter, allowing the cost-recovery tariff to be charged to successor occupants. Nor does it provide authority for disconnection if a customer fails to pay the cost-recovery tariff. Nevertheless, the Commission in Kansas approved these two essential elements of the PAYS system. In Arkansas, electric membership cooperatives are regulated by the state's Public Service Commission. Under certain circumstances, Arkansas cooperatives can change their rates without oversight by the Commission, but it is not clear that those provisions would have applied to Ouachita Electric Cooperative's implementation of a PAYS program. ARK. CODE ANN. § 23-4-902.

[27] HAW. REV. STAT. § 269-125.

[28] N.H. REV. STAT. ANN. § 378:10; KAN. STAT. ANN. § 66-101b; KY. REV. STAT. ANN. § 278.170(1); HAW. REV. STAT. § 269-16; ARK. CODE ANN. § 23-3-114.

[29] *New Hampshire Electric Cooperative, Inc. and Public Service Company of New Hampshire Pilot Pay-As-You-Save (PAYS) Energy Efficiency Program*, New Hampshire Public Utilities Commission, Docket No. DE 01-080, Order No. 23,758 (Aug. 7, 2001).

In addition, co-ops have a mandate to comply with requirements under the Renewable Energy and Energy Efficiency Portfolio Standards (REPS), which can be met in part with efficiency programs.[30] Given that the General Assembly has imposed such a requirement on EMCs, it is reasonable for EMCs to adopt energy-efficiency programs, such as PAYS, that facilitate compliance with those mandates.

Because participants can expect a lower bill following implementation of the upgrades, it should be easier for those members to pay their bills.[31] But inherent in the power to set rates for service is the power to disconnect for nonpayment or for non-compliance with the terms and conditions of membership. In Kansas, for example, the state utilities commission found that it was reasonable to allow disconnection for nonpayment of the tariff because it is "complementary and interlocked with the provision of utility services and is an integral part of the utility service."[32] As a practical matter, there are no reported cases of disconnection for non-payment of the cost-recovery charge for any utility implementing the PAYS system.

A PAYS tariff is not the only example of an optional charge that is not paid by all members. There are other instances in which EMCs offer tariffs for specific services or different rates for different classes of members. For example, EMCs routinely provide different rates for commercial and residential customers, or offer special, optional tariffs for lighting services. None of these different services first required legislative approval or runs afoul of the prohibition to serve members without undue discrimination.[33]

One example of such a tariff is net energy metering. Some EMCs in North Carolina offer an optional net metering tariff for those members who have installed a behind-the-meter solar-power system that is interconnected to the grid.[34] Typically, a net-metering tariff compensates the member for excess electricity that is generated by the solar-power system and distributed on the local grid at the retail rate. The number of net metering credits varies from month to month depending on how much solar power the system generates and how much electricity is used by the member. If the family who installed the solar-power system and adopted the optional net-metering tariff sells its house and a new purchaser signs up as a member of the EMC, that new

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[30] N.C. GEN. STAT. § 62-133.8 (from 2018 onward, EMCs in North Carolina are required to meet a REPS requirement of ten percent of 2017 retail sales from the generation of renewable energy, the reduction of consumption through demand-side management or energy efficiency measures, electricity demand reduction, or a combination of these or other eligible clean energy measures). Though some EMCs meet their REPS requirements as part of their overall contract for electricity from a Generation and Transmission utility, those co-ops may opt in the future to meet their REPS requirements internally.

[31] Authority to disconnect for nonpayment is nevertheless an important element of program design for PAYS because it provides clarity about the utility's authority to recover its costs, helping to keep the cost of capital low.

[32] Kansas State Corporation Commission, *In the Matter of Midwest Energy Seeking Commission Approval to Implement Pay-as-You-Save Program for its Electric Service*, Docket No. 07-MDWE-788-TAR (Dec. 20, 2007).

[33] By the same token, some EMCs in North Carolina have offered loan-based on-bill repayment programs to finance energy efficiency upgrades, though there is no statute that specifically authorizes EMCs to offer loans to their members with on-bill repayments.

[34] No specific statute grants authority to EMCs to adopt net energy metering tariffs or a facilities interconnection charge, but EMCs may institute such tariffs without seeking approval under their general grant of authority.

member would likewise be subject to the net-metering tariff if the solar panels are to remain interconnected to the grid, even though somebody else initiated net metering.

Like the new member who takes over the use of a solar photovoltaic system and is thus subject to the co-op's net-metering tariff, the new member who signs up for service at a location where the utility has made energy-efficiency upgrades pursuant to a PAYS program is subject to the cost-recovery tariff. If the successor member were to oppose the net-metering tariff on the grounds that it was imposed without their consent, they would nevertheless be subject to that tariff if they want to receive value from the excess electricity those solar panels put onto the grid.

In some respects, net metering functions like the cost-recovery charge under the PAYS® system, but in reverse. Members who participate in a tariffed on-bill, energy-efficiency program receive the cost savings from the efficiency upgrades that are paid for by the utility. The EMC recovers its costs for those efficiency upgrades through the additional charge on the participating members' monthly bills, a charge that is less than the estimated savings produced by those upgrades. In the net-metering example, members are able to recover their upfront investment in the solar-power system over time, in part by receiving credits from the utility for the excess electricity generated by that system. In either instance, the party that makes the initial investment is able to recover its costs in a way that is directly related to the benefits provided, regardless of who initiated the tariff.

EMCs have the legal authority to set their own rates and tariffs for service, to set their own terms and conditions for membership, and to render service for their members consistent with REPS mandates and prudent economy. EMCs in our state can look to the approval of the PAYS system from utilities commissions in other states—including approval of tying the tariff to the meter and to and having authority to disconnect for non-payment—as strong evidence that such a tariff is reasonable. Co-ops in North Carolina routinely use their rate-making authority to establish specific rates or tariffs for specific kinds of service. No regulatory body in the state has the authority to review a co-op's tariffs. For all of these reasons, there is no reason to doubt that EMCs have the existing authority to implement a PAYS tariff.

IV. No Legitimate Basis Exists for Member Complaints

If a new member who occupies a property with a cost-recovery tariff were unhappy with the charge, it is hard to conceive of a viable legal or consumer claim against the co-op. As set forth above, there is no reason to doubt the EMC's inherent authority to offer such a program and implement such a tariff. A new member who signs up for service with an EMC does so subject to the terms and conditions of membership.[35] Those terms are not individually bargained for, but are set by the board of directors for all members, are made publicly available, and are not subject to outside review, absent a showing of malfeasance or arbitrary decision-making by the EMC's board.

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[35] N.C. GEN. STAT. § 117-16.

Under the terms and conditions of a PAYS tariff, the owner of the metered location where upgrades are performed is contractually obligated to provide notice to any successor tenants or purchasers that the electric service at that building is subject to the cost-recovery charge. By requiring that the owner provide notice to any subsequent renter or potential purchaser, the optional nature of the tariff is retained, even for subsequent members who did not initiate the energy-efficiency investments. With notice of the tariff prior to leasing or purchase, a potential member has the choice whether to occupy the metered location.

By the same token, if a landlord or property seller fails to provide notice, the subsequent occupant's cause of action—if any—would be against the landlord or seller. It is the owner who is obligated to make sure the subsequent member is informed about the cost-recovery charge. As a practical matter, a subsequent occupant would not be harmed by the lack of notice, as long as the program is continuing to provide cost savings on the member's power bill. And, under the PAYS system, if the upgrades fail to provide savings and are not repaired, the charges end, so there can be no complaint. Without actual damages, there would be no viable cause of action.

Under the PAYS program, a utility only invests in upgrades that are cost-effective. The threshold for cost-effectiveness is that the upgrades must result in a net savings. The Energy Efficiency Institute recommends that the cost-recovery charge not exceed 75 or 80 percent of the estimated savings. As a result, the cost-recovery charge would be significantly less than the estimated savings on an annual basis. The fixed charge does not increase when rates increase, so that net savings from efficiency upgrades increase as rates rise. As a result, a successor customer would receive the benefits of an improved building and receive a lower bill than would otherwise be due for the electricity consumed at that site. In addition, because of the on-bill payments made by the prior member who was served by that meter, a successor member will have fewer billing cycles remaining until cost recovery is complete, at which point they will enjoy 100 percent of the savings. Assuming that the energy-efficiency upgrades otherwise continue to function, the member will face lower bills than without the cost-recovery tariff.

Similarly, a successor member would be in no position to argue that he or she did not enter into the contract for the efficiency upgrades at that location, and thus, should not have to pay the cost-recovery charge. Regardless of whether the notice requirements mentioned above were followed by the property owner, an EMC member accepts service from the utility subject to the terms and conditions of membership. A cost-recovery charge associated with efficiency upgrades made by the utility at that metered location is part of those terms and conditions, and one that would have been approved by the co-op's board of directors.

For these reasons, EMCs have an extremely low risk of exposure to any valid legal claim from a successor member. Members are subject to the terms and conditions of membership and are obligated to pay his or her bills for service, including the benefits conferred by the efficiency measures paid for by the utility under the PAYS tariff program. [36]

CONCLUSION

As noted above, EMCs are uniquely situated to adopt tariffed, on-bill financing as a way to serve their members, comply with REPS requirements, save on peak-demand charges, improve the local housing stock, and contribute to the local economy. There should be no doubt that EMCs can move forward with this innovative service under their existing authority. Given the notice requirements built in to the program and the tangible benefits participating members receive under such a program—benefits that extend to successor members—there is little reason to fear member complaints. Regardless, EMCs face little risk of any viable legal or customer claims if they incorporate the PAYS design elements and minimum program elements set forth above.

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[36] Even if there were some colorable reason why those terms and conditions should not apply to a successor member, the EMC should be able to recover payments from the occupant under the doctrine of unjust enrichment. The equitable doctrine of unjust enrichment allows recovery in situations where it would be unfair for someone to retain benefits without compensating the party who provided those benefits. In this instance, the EMC could demonstrate that the benefits from the energy conservation measures were conferred on the property that the member is occupying under circumstances that require that member to account for those benefits. *Collins v. Davis*, 68 N.C. App. 588, 591, 315 S.E.2d 759, 761 (1984); *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 417, 537 S.E.2d 248, 266 (2000).