BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan.	)))))))	Case No. 14-1297-EL-SSO

MEMORANDUM CONTRA APPLICATIONS FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND THE NORTHWEST OHIO AGGREGATION COALITION

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I. INTRODUCTION

In response to legal action[1] by the Ohio Consumers' Counsel and others, the Federal Energy Regulatory Commission (FERC) issued orders to provide Ohioans the benefits of competitive markets and lower electric rates.[2] FERC's ruling protected captive customers of monopoly utilities (like FirstEnergy) from cross-subsidizing the utilities' power sales with affiliates (like FirstEnergy Solutions). FERC's ruling has the potential to save each of FirstEnergy's 1.9 million electric consumers hundreds of dollars over the next eight years, while advancing the competitive market envisioned by the Ohio legislature.

Yet, the saga continues for FirstEnergy's customers. FirstEnergy has now proposed an end-run around the FERC ruling. It presents in its Application for Rehearing

[1] See *Electric Power Supply Association et al. v. FirstEnergy Solutions Corporation*, FERC Docket No. EL16-34-000, Complaint (Jan. 27, 2016) (EPSA Complaint).

[2] *Electric Power Supply Association et al. v. FirstEnergy Solutions Corporation*, FERC Docket No. EL16-34-000, Order Granting Complaint (Apr. 27, 2016).

a modified Rider RRS that is even worse for customers than its original proposal. The PUCO should reject FirstEnergy's unlawful attempts to introduce a modified Rider RRS as part of its application for rehearing.

The Office of the Ohio Consumers' Counsel ("OCC") and Northwest Ohio Aggregation Coalition file this Memorandum Contra the FirstEnergy Utilities ("Utilities or "FirstEnergy") Application for Rehearing. We oppose, inter alia, the Utility's attempt to unlawfully reopen the record, submit a modified electric security plan, and reverse the PUCO's Order on a number of important issues impacting consumers. For the following reasons, FirstEnergy's Application for Rehearing should be denied.

II. RECOMMENDATIONS

A. FirstEnergy's has failed to preserve its right to raise issues associated with the Federal Energy Regulatory Commission's (FERC) ruling in the EPSA Complaint. (FirstEnergy's Assignment of Error 8).

In FirstEnergy's assignment of Error 8, it claims that the PUCO's Order is unreasonable because it does not reflect FERC's Order issued in the EPSA Complaint Case.[3] This assignment of error, however, fails to provide a proper basis for granting rehearing and should be rejected for the reasons set forth in detail below.

1. FirstEnergy's assignment of error eight violates R.C. 4903.10, and therefore, the PUCO lacks jurisdiction to consider it.

The requirements for an application for rehearing under R.C. 4903.10 have not been met by FirstEnergy. R.C. 4903.10 requires, among other things, that the

[3] FirstEnergy Application for Rehearing at 2.

"application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[4]

FirstEnergy has failed to state with any specificity the reasons why the PUCO's Opinion and Order was unreasonable or unlawful. FirstEnergy's only claim is that the Order does not reflect the April 27, 2016 FERC ruling. However, the PUCO issued its Opinion and Order on March 31, 2016, and FERC issued its Order on April 27, 2016. For timing reasons alone, it was impossible for the PUCO to reflect the FERC Order in its Opinion and Order. FirstEnergy's assignment of error lacks the specificity required by R.C. 4903.10. The PUCO as a matter of law lacks jurisdiction to consider such an application.

2. FirstEnergy violates Ohio law by proposing to change its electric security plan ("ESP") through the rehearing process, to the detriment of consumers. At this stage of these proceedings FirstEnergy's options under Ohio law are limited.

At this stage of an ESP proceeding, Ohio law presents two paths that utilities generally could follow as a result of a PUCO's Order modifying a utilities' ESP application. A utility could accept the PUCO's changes to the ESP application, or withdraw and terminate its ESP application.

The path of accepting the PUCO's modifications to FirstEnergy's ESP Application, however, has been preempted by the April 27, 2016 FERC Order. In that Order FERC rescinded the waiver and found that, prior to transacting under the Affiliate PPA, FE Solutions must submit the Affiliate PPA for review and approval under *Edgar*

[4] See, e.g., *Discount Cellular Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 859 N.E.2d 957.

and *Allegheny* in accordance with 18 C.F.R. § 35.39(b).[5] FirstEnergy must have its PPA approved by FERC before the first dollar could ever be collected from customers under Rider RRS. Therefore, the PUCO's approval of Rider RRS at a capped level for two years[6] was preempted and FirstEnergy can no longer accept the PUCO's modifications to its ESP Application and Stipulations.

As a result of FERC's action, the ESP statute leaves FirstEnergy with one viable path to pursue. R.C. 4928.143 provides the following path:

> (a) If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.[7]

If FirstEnergy withdraws its ESP Application, then FirstEnergy must file a standard service offer in the form of either an ESP or a market rate offer. The available options do not include the path that FirstEnergy has chosen. FirstEnergy has tried to fundamentally change (or save) its ESP Application, through the rehearing process. The fundamental change to FirstEnergy's ESP Application and Stipulations is to modify Rider RRS. The modification eliminates the PPA between FirstEnergy and its unregulated affiliate, FirstEnergy Solutions ("FES").[8] The modification proposes a process that uses "assumed levels of MWs, MWhs and costs included in the record, which will not be adjusted to

[5] *EPSA v. FirstEnergy Solutions*, FERC Docket No. EL16-345-000 at 22 (April 27, 2016).

[6] Opinion and Order at 86.

[7] R.C. 4928.143 (C)(2)(a).

[8] FirstEnergy Application for Rehearing at 18.

reflect actual conditions or operation." Additionally, the modified Rider RRS "will not be subject to the operational performance of any particular generation facilities ***."[9]

FirstEnergy's proposal drastically departs from its ESP Application, modified by the Stipulations. FirstEnergy cannot fundamentally change its application, after the PUCO's order, without proceeding through the statutory process of filing a new standard service offer. Given FERC's decision, FirstEnergy must withdraw and terminate its Application. The PUCO has no jurisdiction to entertain FirstEnergy's proposal for rehearing. Rehearing should be denied.

3. FirstEnergy's modified proposal, supplemental testimony and proposed procedural schedule are nothing more than an untimely motion to reopen the record.

The evidentiary hearing in this case concluded on January 22, 2016. Initial briefs and reply briefs were filed. An Order was issued on March 31, 2016. FirstEnergy was directed to file tariffs consistent with the PUCO's Order.[10] We are now in the rehearing stages of the proceeding. The record in these proceedings has been closed. FirstEnergy acknowledges this fact in its Application for Rehearing. FirstEnergy states: "The record need not, and in fact, should not be reopened except as necessary for the limited purpose to explain the modified Rider RRS."[11]

But according to the PUCO rules, reopening of the record may only occur *prior* to the issuance of a final order, upon a showing of good cause.[12] It is too late for the PUCO

[9] FirstEnergy Application for Rehearing at 18.

[10] The Attorney Examiner by Entry extended that deadline for tariff filing to allow the Companies sufficient time to review FERC' April 27, 2016 Order. A subsequent order was issued on May 10, 2016, requiring FirstEnergy to submit its tariffs by May 13, 2016.

[11] FirstEnergy Application for Rehearing at 21.

[12] Ohio Adm. Code 4901-1-34.

to reopen the record in this proceeding because it has issued a final order--its March 31, 2016 Order.

R.C. 2502.02 defines a "final order" as one which affects a "substantial right." A substantial right, as defined by R.C. 2505.02(A)(1) is a right "that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." The Ohio Supreme Court has determined that "substantial right" involves an "immediate and pecuniary interest."[13] The PUCO has recognized that residential customers have a pecuniary interest with respect to rates.[14]

Because the March 31, 2016 Order was a final order, FirstEnergy's request to reopen the record is untimely under PUCO Rule 4901-1-34. The PUCO has recognized that the obvious application of the rule is between the close of a hearing and the issuance of an order.[15] In that instance a party may seek to reopen the record to introduce evidence that was not available at the time of the hearing. That situation is not present here. The Utility's request to reopen should be denied.

Moreover, while the PUCO may waive its rules for "good cause shown," FirstEnergy has failed to show good cause. FirstEnergy's explanation that FERC's order "has complicated the Companies' and Commission's efforts to provide customers with the stability and other retail rate benefits provided by stipulated ESP IV" [16] is insufficient. The PUCO should find that FirstEnergy has failed to show good cause as to why it should waive its rules. Rehearing should be denied.

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[13] *Ohio Domestic Violence Network v. Pub. Util. Comm.*, 65 Ohio St.3d 438, 605 N.E.2d 13 (1992).

[14] See, e.g., *In the Matter of the Application of Verizon North Inc. for Approval of an Alternative Form of Regulation*, Case No. 08-989-TP-BLS, Entry on Rehearing at 34 (June 3, 2009).

[15] Id. at 35.

[16] FirstEnergy Application for Rehearing at 13.

a. FirstEnergy's proposal is unlawful because the evidence FirstEnergy offers could have been offered upon the original hearing.

At the evidentiary hearing FirstEnergy presented a proposed power purchase agreement ("PPA"). The PUCO, despite numerous objections by a host of intervenors, approved that proposal, with modifications. But on April 27, 2016 FERC wisely stepped in and rescinded the waiver, due to changed circumstances. FERC ordered that if FES or any FirstEnergy affiliate wishes to make sales under an affiliate PPA, they must submit their agreement to the FERC under Section 205 of the Federal Power Act for analysis under the *Edgar* and *Allegheny* standards.[17]

In response to the FERC decision, FirstEnergy filed its modified Rider RRS proposal as part of its application for rehearing. In its application for rehearing, FirstEnergy claimed that the FERC Order now renders the PUCO's order unreasonable. While FirstEnergy complains that the FERC Order may have "complicated" things, it nonetheless provided clarity to the many "affiliate" issues that Intervenors raised in this proceeding. Those issues included cross-subsidization, affiliate transactions, and corporate separation.

FirstEnergy could have presented a proposal for Rider RRS to address these concerns, but it did not. FirstEnergy had ample opportunity to consider its position and modify its proposed application at any time during the proceedings. There was nothing that prevented FirstEnergy from doing so. The fact that FirstEnergy does not explain why this additional evidence could not have been presented earlier is telling. FirstEnergy had a fair opportunity to produce its alternative proposal as part of the eighteen month process

[17] EPSA Complaint, FERC Docket No. EL16-34-000, Order granting complaint at ¶62 (Apr. 27, 2016).

it characterized as an "extraordinarily lengthy, thorough and exhaustive evidentiary process with more than 4,100 discovery requests and 41 days of hearing,"[18] But it did not.

The modified Rider RRS must be rejected by the PUCO as a matter of law because that proposal could have been offered at the original hearing. R.C. 4903.10 precludes rehearing from being granted on this issue.

4. FirstEnergy's proposal is unreasonable and unlawful.

OCC and others have had FirstEnergy's proposal for less than ten days. With additional time to analyze and question FirstEnergy about the proposal, additional concerns are likely to arise. However, in the event rehearing is granted (which it should not be) the following are OCC's initial comments on the proposal.

a. The modified Rider RRS is unreasonable and not in the public interest because it would charge customers based on fictitious revenues and fictitious costs.

FirstEnergy is attempting to modify its ESP Application and Stipulations by eliminating the PPA between the Utilities and its unregulated affiliate FES. It would appear that it is seeking to do so to avoid having to file a PPA with FERC under Section 205 of the Federal Power Act for analysis under the *Edgar* and *Allegheny* standards.[19]

Under FirstEnergy's modified proposal, there are no *actual* revenues to be booked as part of any *actual* wholesale capacity or energy transactions. There are no *actual* costs attributable to operating *actual* generation facilities. The new rider RRS is based on a comparison of imaginary costs that the Utilities will not incur versus imaginary PJM market revenue that the Utilities will not receive. It is a series of hypothetical

[18] FirstEnergy Application for Rehearing at 15.

[19] EPSA Complaint, FERC Docket No. EL16-34-000, Order granting complaint at ¶62 (Apr. 27, 2016).

calculations. What is not imaginary is the Rider RRS payments by Utility customers and the resulting Utilities' windfall profits that would be exempt from the SEET.[20] The proposal is unreasonable and not in the public interest.

Under the original FirstEnergy proposal, all profits and financial impacts (absent a utility prudence disallowance) go to FES. Revenue would merely pass through FirstEnergy to FES. This appears to be no longer true under the new proposal, although the proposal has the potential to allow revenues from the modified Rider RRS to be passed up to the parent, and back down to FES.[21]

If the Utilities are on the losing side of the hedge (calculated market revenue exceeds assumed cost), the Utilities must provide a rate credit to customers. This then begs the question of where will those revenues for the rate credit come from? It would seem wrong if the revenues are collected from the Utility's distribution customers through a rate case or a request for emergency rate relief. In this sense customers would be forced to pay the intended benefit they were otherwise to receive. That would be unreasonable. The PUCO should reject this proposal.

b. The modified Rider RRS proposal maintains an unlawful subsidy and unreasonably incents FirstEnergy to keep uneconomic generation in the competitive market.

FirstEnergy's proposal cannot escape all the pitfalls that were uncovered by the April 27, 2016 FERC Order. There remains an aspect to this modified proposal that maintains the subsidy for uneconomic generation. The proposal allows the PUCO to

[20] See discussion infra.

[21] https://www/snl.com/interactiveX/article.aspx?ID=36413839&KPLT=2
https://www.snl.com/interactiveX/article.aspx?ID=36360355&KPLT=2

reduce the Rider RRS charge only if the FirstEnergy reduces their total formerly rate-based nuclear or fossil generation to help ensure continued operation of 3,200 MW of baseload generation.[22] It would appear that FirstEnergy can reduce one or the other of these assets and still collect the subsidies, as long as other FirstEnergy Corporation-owned generation keeps an output of over 3.200 MW.[23] However, if FirstEnergy Corporation's generation output drops below 3,200 MW, the Commission can reduce Rider RRS "proportionally."[24]

But the retirement provisions noted above still create some incentive to keep uneconomic generation in operation. Thus, FERC's interest in the PPA may not be completely extinguished by this latest FirstEnergy proposal that is crafted without a PPA. And it would be unreasonable for FirstEnergy to continue collecting significant charges from customers through a rider that was proposed to subsidize uneconomic generation, even after retiring some or all of the generation.[25]

A couple of scenarios point out the absurdity of FirstEnergy's modified Rider RRS proposal.

> Scenario #1: Suppose energy prices stay low longer, and/or coal prices are higher, than reflected in FirstEnergy's rider estimate. Then Sammis is uneconomic in many more hours, and FES will reduce the operation. But the rider will be calculated as if Sammis just keeps running at the same rate, resulting in unrealistically high assumed variable cost losses. While the payments are no longer connected to the FES plants, customers will nevertheless pay for costs that aren't even occurring. This could go on for years.

[22] Mikkelsen Rehearing Testimony at 15.

[23] Mikkelsen Rehearing Testimony at 15.

[24] Mikkelsen Rehearing Testimony at 15.

[25] Mikkelsen Rehearing Testimony at 10-11.

> Scenario #2: Suppose instead energy prices do rise quite a bit, and/or coal costs are lower than expected. Then FES will run Sammis in many more hours than assumed, in fact Sammis could become profitable much sooner (or in some years). But the Rider calculation could still show losses collected from customers, because the calculation won't recognize the higher GWh generation and higher revenues.

These outcomes show the unreasonableness of FirstEnergy's proposal. The rub in the proposal is that it is based upon fictitious costs and fictitious revenues. These fictitious costs and revenues could ultimately cost consumers significantly more than they would have paid under the original Rider RRS. Therefore, the PUCO should reject the modified Rider RRS proposal.

c. FirstEnergy's modified proposal is unreasonable because it lacks sufficient benefits for Ohioans who will be required to pay the Rider RRS charges.

FirstEnergy's original PPA proposal had been touted by the utilities as providing benefits attributable to the continued operation of the Sammis, Davis Besse and OVEC plants. FirstEnergy on brief argued:

> By supporting the continued operation of the Plants through the current short-term market turmoil, the Economic Stability Program also provides reliability benefits to customers and the state of Ohio by preserving resource diversity. . . . In addition, the Economic Stability Program provides economic development benefits as a result of: (1) the resource diversity and reliability benefits resulting from continued operation of the Plants; and (2) the avoided transmission investment that would be required if the Plants retired. If the Plants were to close, PJM would require transmission upgrades that could cost up to $1.1 billion, which could increase electric prices for the Companies' customers by between $1.7 and $4.1 billion. And these upgrades would just maintain (not improve upon) the reliability customers receive with the Plants in operation.

> Thus, the Economic Stability Program provides many economic benefits for customers.[26]

However, under the proposed plan, FirstEnergy can no longer claim benefits attributable to continued operation of these plants.

The PUCO relied upon an extensive record alleging that Rider RRS and the underlying PPA would preserve the viability and operation of Davis-Besse and Sammis.[27] The PUCO looked at that information as part of the "other factors to be considered in determining whether Rider RRS is in the public interest."[28] FirstEnergy claimed a range of public interest benefits from this physical linkage. FirstEnergy claimed employment retention, reliability, transmission cost savings, and supply diversity were furthered under Rider RRS.

These benefits, relied upon by the PUCO, now would be gone. Witness Mikkelsen suggests otherwise, but that testimony is not convincing. FES could have committed to continued operation of these power plants if the new Rider RRS mechanism is approved, but FES chose not to make such a commitment. This is another reason for the PUCO to reject the proposal.

d. FirstEnergy's proposal seeks to unlawfully exclude revenues from its modified Rider RRS from the Significantly Excessive Earnings Test (SEET) to the detriment of customers.

FirstEnergy proposes to exclude from the mandatory SEET test revenues pertaining to modified Rider RRS. That is unlawful under R.C. 4928.143(F).

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[26] FirstEnergy Initial Brief at 5-6.

[27] Opinion and Order at 87-88.

[28] Id. at 86.

The ESP statute includes a protection for consumers from the utilities earning significantly excessive profits through an ESP plan. R.C. 4928.143 (F) states:

> *With regard to the provisions that are included in an electric security plan under this section,* the commission shall consider, following the end of each annual period of the plan, *if any such adjustments resulted in excessive earnings* as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate.

The law requires the PUCO to evaluate earnings caused by the ESP plan -- "with regard to the provisions that are included in an electric security plan" the PUCO shall consider "if any such adjustments resulted in excessive earnings." The Ohio Supreme Court ruled the "such adjustments" language refers back to "the provisions that are included in an electric security plan."[29] Thus, in determining whether customers are entitled to a return of significantly excessive earnings, the PUCO is compelled to consider revenues (and expenses) related to ESP provisions. Otherwise, customers are deprived of the protection under R.C. 4928.143(F).

It seems that FirstEnergy wants to have its cake and to eat it too. FirstEnergy wants to circumvent FERC's decision by, in part, collecting money from consumers that will remain as utility revenues and no longer FES revenues. To make that work for FirstEnergy, it then wants to preserve those revenues regardless of whether the new revenues would result in charges to consumers for significantly excessive profits (which

[29] *In re: Columbus S. Power Co.*, 134 Ohio St.3d 392, 400.

Ohio law does not permit FirstEnergy to keep). FirstEnergy's profit scheme should be rejected because it fails to comply with R.C. 4928.143(F).

B. FirstEnergy should bear the costs for plant outages greater than 90 days. (FirstEnergy Assignment of Error 7).

The PUCO was correct in reserving the right to prohibit recovery of costs related to any unit for any period exceeding 90 days for any forced outage during the term of the ESP IV.[30] FirstEnergy argues that this decision was not part of the Application or Stipulation, upsets the balance of competing interests when the negotiating process is viewed as a whole, and is neither supported nor explained by the PUCO.[31] FirstEnergy is incorrect.

First, the PUCO made quite clear that this decision was made in an attempt to share the risks for retail electric service between the FirstEnergy and consumers. Therefore, this decision was contemplated in this proceeding and the PUCO sufficiently explained in its decision.

In addition, the PUCO's decision is just and reasonable. Similar to capacity performance penalties, FirstEnergy is best situated to avoid forced outage costs by investing its revenues to maintain and upgrade its generation. Obviously, not all forced outages are preventable. The PUCO accounted for such circumstances by authorizing FirstEnergy to charge costs related to forced outages for any period up to 90 days. It is only after a full 90 day period has elapsed that the PUCO would have the right to prohibit the recovery of costs from consumers due to a forced outage. FirstEnergy has not demonstrated why this PUCO decision is unreasonable or unlawful. Therefore, the PUCO

[30] FirstEnergy ESP IV Order at 91-92.

[31] See FirstEnergy Memorandum in Support of Application for Rehearing at 13.

should not reverse its decision, which would allow FirstEnergy to shift all the risk of a prolonged forced outage onto consumers.

C. FirstEnergy should bear the costs of capacity performance penalties. (FirstEnergy Assignment of Error 6).

The PUCO was correct in requiring FirstEnergy to bear any capacity performance penalties.[32] This ruling places the burden of performance on the Utilities instead of the consumers , and rightfully so. It is neither fair nor just to require customers to pay for FES's poor performance.[33]

FirstEnergy argues that this decision was not part of the Application or Stipulation, upsets the balance of competing interests when the negotiating process is viewed as a whole, and is neither supported nor explained by the PUCO.[34] FirstEnergy is incorrect.[35]

First, the PUCO made quite clear that this decision was made, in an attempt to share the risks for retail electric service between the FirstEnergy and consumers. Therefore, this decision was contemplated in this proceeding and the PUCO sufficiently explained in its decision.

In addition, the PUCO's decision is just and reasonable. Similar to forced outage costs, FirstEnergy is best situated to avoid capacity performance penalties by investing its capacity performance revenues to maintain and upgrade its generation so as to operate it

[32] FirstEnergy ESP IV Order at 91-92.

[33] The PUCO has disallowed recovery for actions that are deemed imprudent and not fair, just and reasonable. *See In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of Ohio Power Company and Related Matters*, Case No. 98-101-EL-EFC, Opinion and Order at 31 (May 26, 1999) (disallowing recovery for certain costs associated with exceeding EPA Emission Allowances)("1998 EFC Case").

[34] See FirstEnergy Memorandum in Support of Application for Rehearing at 13.

[35] The PUCO is well within its authority to disallow costs related to penalties that it deems imprudent. *See* 1998 EFC Case, Opinion and Order at 31 (May 26, 1999).

reliably. The PUCO concluded that if it bears the burden of penalties, FirstEnergy should get the reward of bonuses.[36] That FirstEnergy wants to give up the potential to earn capacity performance *bonuses*, as well as asking for the ability to flow through the Rider RRS capacity performance *penalties.* This confirms that FirstEnergy is very concerned with the PPA Units' ability to perform.[37] FirstEnergy has not demonstrated why this PUCO decision is unreasonable or unlawful. Therefore, the PUCO should not reverse its decision. Otherwise it would allow FirstEnergy to shift the risk of non-performance – and thus capacity performance penalties – away from FirstEnergy and onto consumers *when it is FirstEnergy that is running the plants and it bears absolutely no risk from making investments in them.*

D. The PUCO's Order does not unlawfully restrict the utilities' right to withdraw its application for an Electric Security Plan (FirstEnergy Assignment of Error 1).

To allegedly "protect customers against rate volatility and price fluctuations and to provide additional rate stability," the PUCO modified the Stipulations to include a mechanism to limit average customer bills.[38] The Utilities were directed to file compliance tariffs by May 1, 2016.[39] The PUCO also found that if the Companies "proceed with Rider RRS by filing tariffs and finalizing a power purchase agreement with

[36] See id. A conclusion with which OCC respectfully disagrees.

[37] FirstEnergy ESP IV Order at 91-92.

[38] Opinion and Order at 86.

[39] Opinion and Order at 99. That deadline has been extended by Attorney Examiner Entry. Entry at ¶7 (Apr. 29, 2016). A subsequent Entry was issued on May 10, 2016, requiring the Utilities to file tariffs by May 13, 2016.

FES" "we will construe such actions as the voluntary acceptance of the mechanism limiting average customer bills."[40]

The Utilities claim that if they are required to file tariffs and the filing constitutes acceptance of the modified electric security plans, the PUCO is unlawfully limiting their statutory right to withdraw.[41] The Utilities rely principally on *In re: Application of Ohio Power Co.,* 2015-Ohio-2056, ¶26, 144 Ohio St.3d 1, 8 (2015). The Utilities claim that their right to withdraw should extend through the conclusion of the application for rehearing and appeals process.[42]

The Utilities read the *Ohio Power* case and the law too broadly. That case turned upon the fact that the PUCO's actions made it impossible for the Utility to exercise its statutory right to withdraw and terminate the plan. Under the *Ohio Power* facts, the electric security plan had terminated, and the PUCO made changes to a deferral mechanism that was collecting phase-in charges from the ESP. Thus, the PUCO did more than alter the Utility's right to terminate--it terminated the Utility's right to withdraw.

But here the PUCO was reasonably limiting the Utility's right to terminate or withdraw. The PUCO was attempting to bring some finality and stability to the rates charged to customers under its order. Otherwise, the Utility could accept the benefits of the modified ESP (collecting higher rates) for some period of time and then withdraw its plan. That is not contemplated under the law. R.C. 4928.143(C)(2)(b) provides for stability and continuity of rates to customers if the Utility withdraws and terminates its

[40] Opinion and Order at 86.

[41] FirstEnergy Application for Rehearing at 2-4.

[42] FirstEnergy Application for Rehearing at 4.

application. Under that provision if the Utility withdraws (and terminates) its application, or the PUCO disproves its application, the PUCO must continue the provisions, terms, and conditions of the utility's most recent standard service offer.

The stability and continuity of rates for customers established under R.C. 4928.143(C)(2)(b) is undermined if the Utility puts new rates into effect, later withdraws its ESP (in response to PUCO rehearing or Ohio Supreme Court Order) causing rates to revert back to previous ESP rates, until a third set of rates is implemented under a new filing. The PUCO was acting reasonably to protect customers from such rate whipsawing.

Moreover, the trigger under the statute is action by the PUCO, not action by a court, such as the Ohio Supreme Court. This can be seen in the words of R.C. 4928.143(C)(2)(a): "If the *commission* modifies and approves." (emphasis added). In other words even if the Utility is correct that it has a right to terminate and withdraw after some period of time, that right could only reasonably extend to a PUCO decision (on rehearing) and not to a non-PUCO Order (an appeal). The Utilities' application for rehearing seeking a ruling to extend its right to withdraw and terminate to the conclusion of the appeals process is clearly reaching beyond what the statute could possibly allow. The Utilities' application for rehearing on this issue should be denied.

E. The PUCO acted reasonably and lawfully in not finding that Rider RRS relates to default service under R.C. 4928.143(B)(2)(d). (FirstEnergy Assignment of Error 3).

Under the order, the PUCO found that Rider RRS meets the statutory requirements of R.C. 4928.143(B)(2)(d) because, inter alia, it is a term, condition or charge related to a "limitation on customers shopping for retail electric generation

service."[43] The PUCO also determined that Rider RRS is a term, condition or charge related to bypassability.[44] The PUCO found it "unnecessary to reach the argument related to "default service."[45]

FirstEnergy claims that the PUCO's Order is unlawful[46] and unreasonable because the PUCO did not find that Rider RRS also meets the statute as a term, condition or charge related to "default service."[47] FirstEnergy alleges that the Rider RRS "relates to the SSO offered to both current and future non-shopping customers, i.e. 'default service'.[48]" FirstEnergy is wrong. Their application for rehearing in this respect should be denied.

FirstEnergy does not specify how the PUCO's decision was "unlawful." It failed to meet the requirements of R.C. 4903.10. That statute requires the application for rehearing to "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." See, e.g., *Disc Cellular Inc. v. Pub. Utili. Comm.*, 112 Ohio St.3d 360, 859 N.E.2d 957. Because an application for rehearing is governed by statutory requirements, which were not met, the PUCO cannot as a matter of law, consider this assignment of error. Its "unlawful" claim must, therefore, be denied.

Additionally, FirstEnergy's claim that it was unreasonable for the PUCO to not decide that Rider RRS relates to "default service" must also fail. It was not necessary for

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[43] Opinion and Order at 109.

[44] Id at 109-110.

[45] Opinion and Order at 109.

[46] FirstEnergy does not specify how the PUCO's decision was "unlawful." It failed to meet the requirements of R.C. 4903.10. See, e.g., *Disc Cellular Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 859 N.E.2d 957. Its application for rehearing is deficient in this respect.

[47] FirstEnergy Application for Rehearing at 8.

[48] Id. at 9.

the PUCO to reach the argument as to default service. The PUCO had already determined (albeit wrongfully) that Rider RRS complies with the statute as a "limitation on shopping" and as related to "bypassability."

And, FirstEnergy's conclusion that Rider RRS is related to "default service" is misguided. FirstEnergy mistakenly conflates the term "default service" with "SSO service." The two terms are not synonymous. "Default service" is legislatively defined. It does not mean the same thing as the "standard service offer."

Under R.C. 4928.14 "default service" is defined as the provision of service by the utility where the marketer fails to provide service to customers. Under that statute if a supplier fails to provide electric service to customers within the utility's service territory, the customers of the supplier default to the utility's standard service offer until the customer choses an alternative supplier. Default service is related to a utility's obligation to serve as a provider of last resort. See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶4, footnote 2 (citation omitted).[49] Default service can have competitive and non-competitive components.[50]

In contrast a standard service offer can consist only of "competitive" components of retail electric service. This can be seen under R.C. 4928.141 which defines the standard service offer as "all competitive retail electric services necessary to maintain

[49] See also *Constellation New Energy, Inc. v. Pub. Util. Comm.*, 1204 Ohio St.3d 530, 2004-Ohio 6767, 820 N.E.2d 885, ¶39, footnote 5 (describing POLR costs as costs incurred by the electric distribution utility for risks associated with its legal obligation as the default provider for customers who shop and then return to the electric distribution utility for generation service.).

[50] *Indus. Energy Users-Ohio v. Pub. Util. Comm*., 117 Ohio St.3d 486, 492, 2008-Ohio-990, 885 N.E.2d 195, ¶27 (Court found that rate base recovery to build and operate a generation facility was an allowable non-competitive cost associated with POLR, and determined that the PUCO's approval must be given under R.C. Chapters 4905 and 4909).

essential electric service to consumers, including a firm supply of electric generation service."

Certainly the General Assembly understood that the terms were "default service" and "standard service offer" are different terms that cannot be used synonymously. The PUCO should respect the General Assembly's intent and not change the statute (or its meaning) by adopting FirstEnergy's view of the words.

The PUCO was correct in not accepting FirstEnergy's rewrites to R.C. 4928.143(B)(2)(d). Rehearing should be denied.

F. The PUCO should reject the IGS Rider and the unlawful side agreement between FirstEnergy and IGS (FirstEnergy Assignment of Error 5).

In their Opinion and Order, the PUCO created a rider ("IGS Rider") to "unbundle from distribution rates the costs FirstEnergy incurs to support SSO service and to reflect those costs in the SSO price."[51] In their application for rehearing, FirstEnergy argues that the PUCO's order is unreasonable. FirstEnergy asks the PUCO to modify its order "to provide for a process that is consistent with Competitive Market Enhancement Agreement between IGS and the Companies."[52] While OCC agrees that the PUCO should modify the order with regards to the IGS Rider, the OCC believes this rider is inappropriate and unlawful.

FirstEnergy has taken the position that it would be improper to approve a provision that is not what is contemplated in the side agreement it has with IGS.[53] The PUCO should disregard FirstEnergy's side agreement with IGS and instead reject the

[51] Opinion and Order at 98.

[52] FirstEnergy Application for Rehearing at 10.

[53] FirstEnergy Application for Rehearing at 11.

rider altogether. Furthermore, the PUCO should not give any weight or credibility to a side agreement that gave IGS an unfair advantage in the bargaining process.

The provision currently contemplated in the Opinion and Order and the one in the side agreement would both arbitrarily inflate the price of the standard service offer ("SSO"). This proposal discriminates against customers served by the standard service offer. By adding a by-passable charge to SSO customers' bills solely for the purpose of incentivizing shopping, it unlawfully penalizes SSO customers.[54] The PUCO should grant rehearing on this issue, deny FirstEnergy's proposal for modification and rescind its approval for the IGS Rider.

G. The PUCO should reject Mid-Atlantic Renewable Energy Coalition's Application for Rehearing.

The Office of the Ohio Consumers' Counsel requests that the Public Utilities Commission of Ohio ("PUCO") deny the Mid-Atlantic Renewable Energy Coalition's ("MAREC") application for rehearing for failing to conform to the requirements set forth in Ohio law. R.C. 4903.10 requires that all applications for rehearing "shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[55] Furthermore, the Ohio Supreme Court has held that "when an appellant's grounds for rehearing fail to specifically allege in what respect the PUCO's order was unreasonable or unlawful, the requirements of R.C. 4903.10 have not been met."[56] MAREC has failed to set forth any specific grounds in their application for

[54] See R.C. 4928.02(A)(requiring availability to consumers of "adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service"); R.C. 4905.33 (prohibiting discrimination).

[55] R.C. §4903.10(B).

[56] *Discount Cellular Inc. v. PUCO*, 112 Ohio St.3d 360, 374 (2007) (*citing Marion v. PUCO*, 161 Ohio St. 276, 278-279 (1954)).

rehearing. They have only vaguely stated that they wish to secure their position and "preserve the benefits of the stipulation."[57] Therefore, the PUCO should deny their application for rehearing for failing to specifically set forth any grounds for which the PUCO's order is unreasonable or unlawful.

III. CONCLUSION

FirstEnergy's Application for rehearing, and others as indicated, should be rejected in large part as explained above. Denying the applications for rehearing will allow consumers to be protected from the modified Rider RRS which is even more harmful to customers than FirstEnergy's original Rider RRS proposal.

[57] Application for Rehearing of The Mid-Atlantic Renewable Energy Coalition (May 2, 2016).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memo Contra Applications for Rehearing by the Office of the Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition was served via electronic transmission, to the persons listed below, on this 12th day of May, 2016.

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