

**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)	Case No. 14-1297-EL-SSO
Provide a Standard Service Offer)	
Pursuant to R.C. § 4928.143 in the Form)	
of an Electric Security Plan.)	

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
THE NORTHWEST OHIO AGGREGATION COALITION**

The Office of the Ohio Consumers' Counsel ("OCC") and the Northwest Ohio Aggregation Coalition ("NOAC") file this application for rehearing¹ to protect 1.9 million FirstEnergy customers from paying increased rates under FirstEnergy's new bailout proposal its --"modified Rider RRS proposal."

On March 31, 2016, the Public Utilities Commission of Ohio issued an Opinion and Order modifying and approving FirstEnergy's ESP Application. That Order approved a series of stipulations that resulted in a standard service offer containing, inter alia, a Retail Rate Stability rider. Under the terms of the PUCO approved Retail Rate Stability Rider, FirstEnergy was to enter into a purchase power agreement ("PPA") with its affiliate, FirstEnergy Solutions.

¹ This application for rehearing is authorized under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

All customers of FirstEnergy were required to pay charges for the Retail Rate Stability Rider (“PPA Rider”) over the next eight years, based on the PPA.

On May 2, 2016, parties, including FirstEnergy applied for rehearing of the PUCO's March 31, 2016 Order. Memoranda contras were ordered to be filed by May 12, 2016, per Attorney Examiner Entry that accepted FirstEnergy's request.

But, inexplicably, on May 11, 2016, prior to the filing of memorandum contra, the PUCO issued an Entry on Rehearing. In that Entry the PUCO granted rehearing "because of the number and complexity of the assignments of error raised in the applications for rehearing as well as the potential for further evidentiary hearings in this matter."² The PUCO opined that granting rehearing "at this time" "will allow parties to begin discovery in anticipation of potential further hearings."³ The PUCO granted the applications for rehearing filed by the Companies, Sierra Club, P3/EPSC, Dynegy, RESA, MAREC, Cleveland Schools, Power4Schools, NOPEC, Environmental Advocates, OMAEG, and OCC/NOAC. The PUCO found that "sufficient reasons have been set forth by the parties to warrant further consideration of the matters specified in the applications for rehearing."⁴

The PUCO's May 11, 2016 Entry on Rehearing was unreasonable and unlawful in the following respects.

ASSIGNMENT OF ERROR 1: The PUCO unreasonably and unlawfully granted First Energy's Application for Rehearing, which allows FirstEnergy to withdraw and terminate its PUCO-modified and approved electric security plan through the rehearing process, violating R.C. 4928.141 and 4928.143 (C).

² Entry on Rehearing at ¶9.

³ Id.

⁴ Id. at ¶10.

ASSIGNMENT OF ERROR 2: The PUCO unreasonably and unlawfully granted FirstEnergy's Application for Rehearing, without specifying the scope of rehearing and without limiting the evidence on rehearing to that which could not have been offered upon the original hearing, violating R.C. 4903.10.

ASSIGNMENT OF ERROR 3: The PUCO unreasonably granted FirstEnergy's Application for Rehearing without first considering the other intervening parties' Memoranda Contra.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its Entry on Rehearing as requested by OCC and NOAC.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Cleveland Electric Illuminating Company, the Toledo Edison Company and the Ohio Edison Company (collectively “FirstEnergy” or “Utilities”) have sought rehearing and within that request included a new unlawful proposal that requires customers to pay enormous subsidies to the Utilities not based on any costs the utilities would actually incur. Under the new proposal, dollars collected under Rider RRS would go straight to FirstEnergy and will not support the generating plants operating in Ohio or secure the jobs those plants offer today. Gone are the benefits upon which the PUCO relied to find the ESP is in the public interest. Not only does their proposal violate Ohio Law and harm consumers, the Public Utilities Commission of Ohio (“PUCO”) has acted both unreasonably and unlawfully in granting their rehearing in this case. The OCC and NOAC, on behalf of FirstEnergy’s nearly 1.9 million residential seeks for the PUCO to grant this application for rehearing on their May 11, 2016 Entry which granted rehearing in this case.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute permits “any party who has entered an appearance in person or by counsel in the proceeding” to apply for rehearing in respect to “any matters determined in the proceeding.” Applications for rehearing must be filed within thirty days of the PUCO’s orders.

OCC filed a motion to intervene in this proceeding on August 14, 2014, which was granted by Entry dated December 1, 2014. OCC also filed testimony regarding FirstEnergy’s electric security plan (“ESP”). OCC was an active participant in the evidentiary hearings.

R.C. 4903.10 requires that an application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” Additionally, Ohio Adm. Code 4901-1-35(A) states: “An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing.”

In considering an application for rehearing, R.C. 4903.10 provides that “the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.” The statute also provides: “[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.”

The statutory standard for abrogating some portions of the Opinion and Order and modifying other portions are met here. The PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Opinion and Order of March 31, 2016.

III. PROCEDURAL BACKGROUND

On April 27, 2016, FERC issued an Order that has a profound effect on the Utility's electric security plan. FERC rescinded an earlier waiver given to FirstEnergy Corporation.⁵ FERC found that, prior to being allowed to transact under the Affiliate PPA, FirstEnergy Solutions (or any other FE Ohio Market affiliate) would have to submit the Affiliate PPA for review and approval under the tests set for the in the *Edgar* and *Allegheny* cases in accordance with 18 C.F.R. § 35.39(b).⁶ In other words, FirstEnergy Corporation needs for its PPA to be approved by FERC before moving forward with a power purchase agreement (and Rider RRS). And, to date, no such filing has been made at FERC. However, FirstEnergy decided to fundamentally alter the nature of the ESP they had filed as a result of the decision by FERC.⁷ This resulted in the filing of improper new testimony along with a new plan to separate the proposed Rider RRS (which originally included costs and revenues from the affiliate flowed through the PPA) from the PPA.⁸

⁵ *EPSA v. FirstEnergy Solutions*, FERC Docket No. EL16-345-000, Order Granting Complaint (Apr. 27, 2016).

⁶ *EPSA v. FirstEnergy Solutions*, FERC Docket No. EL16-345-000 at 22 (April 27, 2016)(“EPSA Complaint Case”).

⁷ Rehearing Testimony of Eileen Mikkelsen at 4 (filed May 2, 2016).

⁸ *See Id.*

IV. ERRORS

ASSIGNMENT OF ERROR 1: The PUCO unreasonably and unlawfully granted FirstEnergy's Application for Rehearing, which allows FirstEnergy to withdraw and terminate its PUCO-modified and approved electric security plan through the rehearing process, violating R.C. 4928.141 and 4928.143 (C).

In granting the rehearing, the PUCO acted unlawfully and in violation of R.C. 4928.141 and 4928.143 which do not allow for an ESP application to be so fundamentally altered at this phase of the process. At this stage of an ESP proceeding, Ohio law presents two paths that a utility generally could follow as a result of a PUCO's Order modifying a utility's 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* and *Allegheny* in accordance with 18 C.F.R. § 35.39(b).⁹ 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 years¹⁰ 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:

⁹ *EPSA v. FirstEnergy Solutions*, FERC Docket No. EL16-345-000 at 22 (April 27, 2016).

¹⁰ Opinion and Order at 86 (March 31, 2016).

(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.¹¹

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").¹² The modification proposes a process that uses "assumed levels of MWs, MWhs and costs included in the record, which will not be adjusted to reflect actual conditions or operation." Additionally, the modified Rider RRS "will not be subject to the operational performance of any particular generation facilities ***."¹³

FirstEnergy's proposal drastically departs from its ESP Application, modified by the Stipulations. In granting rehearing, the PUCO has allowed FirstEnergy to 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. The PUCO should grant OCC's/NOAC's rehearing request and abrogate or modify its order to require FirstEnergy to withdraw and terminate its application.

¹¹ R.C. 4928.143 (C)(2)(a).

¹² FirstEnergy Application for Rehearing at 18 (May 02, 2016).

¹³ FirstEnergy Application for Rehearing at 18.

ASSIGNMENT OF ERROR 2: The PUCO unreasonably and unlawfully granted FirstEnergy's Application for Rehearing, without specifying the scope of rehearing and without limiting the evidence on rehearing to that which could not have been offered upon the original hearing, violating R.C. 4903.10.

The PUCO acted unreasonably and unlawfully in granting rehearing because in doing so, it did not limit the scope of the hearing to evidence that could not have been offered in the original in ESP case as required by Ohio law. The evidence that was included by FirstEnergy in their application for rehearing should be precluded because it is inadmissible in an application because it could have been heard at the time of the original hearing.

The scope of rehearing prohibits the PUCO from taking “any evidence that, with reasonable diligence, could have been offered upon the original hearing.”¹⁴ As the Ohio Supreme Court has stated, “A rehearing is limited, in the commission's discretion, first, to matters determined in the earlier proceedings, and second, among those, to matters for which, in the judgment of the commission, sufficient reason has been shown. The General Assembly did not intend for a rehearing to be a *de novo* hearing.”¹⁵ Therefore, rehearing cannot be granted by the PUCO without first limiting the hearing to evidence that could not have offered upon the original hearing.

In submitting evidence that could have easily been offered in the first hearing, FirstEnergy is violating the terms of the statute, and the PUCO has acted unlawfully to grant that rehearing. In fact, not only was FirstEnergy aware of the issues raised by the affiliate PPA, they claimed it had no bearing on the case: “FirstEnergy reasons that the *EPSA Complaint Case* is on a narrow issue that holds no bearing on Stipulated ESP

¹⁴ R.C. 4903.10.

¹⁵ *Columbus & S. Ohio Elec. Co. v. Pub. Util. Comm'n*, 10 Ohio St.3d 12, 13 (1984) (allowing for certain events that occurred outside the test-year to be considered).

IV.”¹⁶ The PUCO even acknowledged that these issues were raised by OCC, NOAC and NOPEC in the original case.¹⁷ However, in her filed rehearing testimony FirstEnergy witness Mikkelsen claims that rehearing had to be granted because “it did not reflect the findings and determinations made in the FERC order.”¹⁸ For FirstEnergy to claim that the FERC has no bearing on the issues and then ask for rehearing because FERC issued an order is disingenuous. FirstEnergy could have very easily foreseen this outcome because the PUCO even acknowledges that this was an issue raised by the intervenors.¹⁹ FirstEnergy should have presented evidence on this very topic, yet they choose not to. Under Ohio law, they are barred from offering any more evidence on this issue. Therefore, the PUCO should modify or abrogate their entry on rehearing which granted rehearing and prevent evidence on this issue from being considered.

ASSIGNMENT OF ERROR 3: The PUCO unreasonably granted FirstEnergy’s Application for Rehearing without first considering the other intervening parties’ Memoranda Contra.

When the PUCO granted hearing, the other intervening parties had not yet had a chance to file memorandum’s contra to FirstEnergy’s application. This was a violation of the PUCO’s own rules and as such, rehearing should be granted on this issue. Under the PUCO’s rules for rehearing, “Any party may file a memorandum contra within ten days after the filing of an application for rehearing.”²⁰ Furthermore, the parties relied on the Attorney Examiner’s entry which directed that all parties

¹⁶ Opinion and Order at 105.

¹⁷ Opinion and Order at 103.

¹⁸ Rehearing Testimony of Eileen Mikkelsen at 4.

¹⁹ Opinion and order at 103.

²⁰ Ohio Admin. Code 4901-1-35.

should file memorandums contra on May 12, 2016.²¹ Procedurally, the PUCO acknowledged that it was expecting memorandums contra and should have waited until these were filed before granting rehearing. Additionally, due process requires that administrative proceedings include “right to a reasonable notice of hearing as well as a reasonable opportunity to be heard.”²² Notice was provided by the rules of PUCO which establish the ten-day hearing deadline²³ and the Attorney Examiner’s entry further reinforced that date.²⁴ However, the PUCO failed to provide a notice to be heard by other parties by granting rehearing without first allowing the memorandum contras to be filed. Therefore, the PUCO should modify or abrogate their entry on rehearing which granted rehearing without taking into consideration the Memo Contras Applications for Rehearing that were filed on May 12, 2016.²⁵

V. CONCLUSION

The PUCO erred in granting rehearing without defining the scope of the rehearing and without considering the Memo Contras Applications for Rehearing that were filed. The PUCO should grant this application for rehearing and abrogate or modify its rehearing in accordance with the above-mentioned assignments of error.

²¹ Attorney Examiner’s Entry, ¶8 (May 2, 2016).

²² *State ex rel. LTV Steel Co. v. Indus. Comm’n*, 102 Ohio App.3d, 100, 103 (Ohio Ct. App. 1995).

²³ Ohio Admin. Code 4901-1-35.

²⁴ Attorney Examiner’s Entry, ¶8 (May 2, 2016).

²⁵ Memo Contra Application(s) for Rehearing by Nucor Steel Marion, Inc.; IEU-Ohio; ELPC, OEC, EDF; Cleveland Municipal School Districts; OCC, NOAC; NOPEC; IGS; OEG; FirstEnergy; ESPA, P3; Sierra Club; OMAEG (May 12, 2016).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing by the Office of the Ohio Consumers' Counsel and the Northwest Ohio Aggregation Coalition was served via electronic transmission, to the persons listed below, on this 10th day of June 2016.

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Summary: App for Rehearing Application for Rehearing by the Office of the Ohio Consumers' Counsel and the Northwest Ohio Aggregation Coalition electronically filed by Ms. Deb J. Bingham on behalf of Sauer, Larry S.