

**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)	Case No. 19-2121-EL-ATA
Edison Company for Approval to)	
Establish a Legacy Generation Resource)	
Rider)	

**MOTION TO AMEND LEGACY GENERATION RESOURCE RIDER TARIFFS
AND FOR AN EXPEDITED RULING
BY THE CITIZENS' UTILITY BOARD OF OHIO**

Pursuant to Ohio Administrative Code (“Ohio Adm. Code”) 4901-1-12, the Citizens’ Utility Board of Ohio (“CUB Ohio”) files this Motion to request that the Public Utilities Commission of Ohio (“Commission”) order the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, “FirstEnergy EDUs”) to file amended Legacy Generation Resource Rider tariffs providing that the amounts collected pursuant to those riders are subject to refund from the date of the Commission’s order if Ohio Revised Code (“R.C.”) 4928.148 is repealed or otherwise modified to reduce the amount collected. The Commission authorized the FirstEnergy EDUs to establish these riders as a mechanism to funnel ratepayer money to bail out two uneconomic, 65-year-old coal plants, as required by R.C. 4928.148. At the time, the Commission rejected a request to establish any customer refund mechanism in the Legacy Generation Resource Rider tariffs as inconsistent with that statutory provision, which was enacted in 2019 as part of House Bill (“H.B.”) 6.

Since then, federal prosecutors have indicted the former Speaker of the Ohio House and his associates on charges that they engaged in racketeering by accepting \$60 million of dark money in connection with the effort to pass H.B. 6, and the General Assembly is actively considering repeal or modification of the law’s provisions – including R.C. 4928.148. However,

under the current version of the FirstEnergy EDUs' Legacy Generation Resource Rider tariffs, any charges collected prior to a repeal or modification are unlikely to be returned to customers. For these reasons, and as further explained in the attached Memorandum in Support, CUB Ohio respectfully requests a Commission order requiring establishment of a refund mechanism in these tariffs so that, if H.B. 6 and R.C. 4928.148 are repealed or modified to reduce the amount collected, neither the FirstEnergy EDUs nor the owners of these failing coal plants receive a windfall of ratepayer funding as the fruit of alleged political corruption.

CUB Ohio also requests an expedited ruling by October 28 (the earliest regularly scheduled Commission meeting occurring after the deadline for responses to this Motion) so that any over-collection can be minimized by establishing a refund mechanism starting as early as possible.¹

October 1, 2020

Respectfully submitted,

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¹ CUB Ohio is unable to certify that no party objects to the issuance of an expedited ruling.

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**MEMORANDUM IN SUPPORT OF THE MOTION TO AMEND LEGACY
GENERATION RESOURCE RIDER TARIFFS
AND FOR AN EXPEDITED RULING
BY THE CITIZENS' UTILITY BOARD OF OHIO**

I. INTRODUCTION

In this proceeding, the Public Utilities Commission of Ohio (“PUCO”) approved “Legacy Generation Resource Rider” tariffs that went into effect as of January 1, 2020 for customers of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, “FirstEnergy EDUs”) pursuant to R.C. 4928.148. These tariffs impose charges on customers of the FirstEnergy EDUs that are designed to cover the market losses of two uneconomic, 65-year-old coal plants operated by the Ohio Valley Electric Corporation (“OVEC”): the Kyger Creek Generating Station in Cheshire, Ohio; and the Clifty Creek Generating Station in Madison, Indiana. Although the Commission has not made publicly available any calculation of the total amounts being collected from Ohio customers under the Legacy Generation Resource Riders, the FirstEnergy EDUs have more than 1.8 million residential customers who are each currently paying \$0.58 per month toward OVEC costs, for a running total of at least \$1 million a month.

As discussed further below, the Ohio legislature is currently considering a repeal or modification of the statutory mandate for this coal plant bailout, which turns out to be the result

of alleged bribery and political corruption. However, even if such a repeal or modification occurs, Ohio Supreme Court precedent generally precludes the return to ratepayers of amounts previously collected under the Legacy Generation Resource Riders absent an express refund mechanism. Therefore, the Citizens' Utility Board of Ohio ("CUB Ohio") has filed this Motion to request that the Commission order the FirstEnergy EDUs to amend their Legacy Generation Resource tariffs to include language providing for a refund of any customer funds collected from the date of the order in the event that R.C. 4928.148 is repealed or modified to reduce the amounts collected. Without quick action by the Commission, FirstEnergy customers may end up needlessly losing millions of dollars to a non-refundable charge while the Ohio legislature deliberates over the details of whether and how to take action in response to the revelations of political scandal surrounding this coal plant bailout.

II. FACTS

A. The Legacy Generation Resource Riders

In July 2019, the Ohio General Assembly passed House Bill ("H.B") 6. That legislation took effect on October 22, 2019 and remains in effect today. The provisions of H.B. 6 include R.C. 4928.148, which requires the Commission to establish a non-bypassable rate for recovery of prudently incurred costs incurred by Ohio electric distribution utilities related to a "legacy generation resource," to be charged to ratepayers statewide starting January 1, 2020 and extending through December 31, 2030. The only "legacy generation resources" that meet the definition established in R.C. 4928.01(A)(41) for purposes of R.C. 4928.148 are the OVEC coal plants located in Madison, Indiana and Cheshire, Ohio. In analyzing the fiscal impacts of this coal bailout provision in H.B. 6, the Legislative Service Commission estimated the market losses

associated with the Ohio utilities' share of these coal plants to be \$94.3 million, with significant debt service coming due in the years between 2020 and 2030.²

In accordance with R.C. 4928.148, the Commission opened a docket (Case No. 19-1808-EL-UNC) to consider the implementation of the required Legacy Generation Resource Riders across all four Ohio electric distribution utilities. On November 21, 2019, the Commission issued an Entry establishing the rate design for these riders and ordering all utilities responsible for collecting the riders to file tariffs consistent with the Entry by December 9, 2019.³ In that Entry, the Commission also rejected suggestions that the Legacy Generation Resource Rider “should be ‘subject to refund’ if it is later invalidated,” on the ground that a refund provision would not be “consistent with the legislative intent of the OVEC recovery provisions.”⁴

The FirstEnergy EDUs filed proposed Legacy Generation Resource tariffs in this proceeding on December 9, 2019, establishing the amounts to be collected from ratepayers to bail out the OVEC coal plants consistent with the Commission Entry In Case No. 19-18-8-EL-UNC. These tariffs became effective on January 1, 2020; prior to that date, customers of the FirstEnergy EDUs were not responsible for any OVEC costs as part of their rates. In accordance with the Commission’s November 1, 2019 Entry, the Legacy Generation Resource Rider tariffs provide that the OVEC coal plant charges are to be refunded “solely upon the results of audits ordered by the commission.”⁵ R.C. 4928.148(A)(1) provides for such audits to occur only in calendar years 2021, 2024, 2027, and 2030.

² Ohio Legislative Service Commission, House Bill 6 Fiscal Note & Local Impact Statement at 12-13, available at <https://www.legislature.ohio.gov/download?key=12289&format=pdf>.

³ Case No. 19-1808-EL-UNC, Entry (Nov. 21, 2019) at 10-13.

⁴ *Id.* at 10.

⁵ Case Nos. 19-2121-EL-ATA and 89-6001-EL-TRF, FirstEnergy EDU Tariff Filings (Dec. 20, 2019).

B. The House Bill 6 Scandal

In July 2020, federal prosecutors announced the indictment of the former Speaker of the Ohio House and several of his associates on racketeering charges based on their collection of over \$60 million in “dark money” in exchange for undertaking range of actions to ensure the passage of House Bill 6. The U.S. Attorney for the Southern District of Ohio called these efforts “likely the largest bribery and money-laundering scheme ever in the state.”⁶

Soon thereafter, state legislators introduced three separate bills designed to repeal the provisions of H.B. 6, including R.C. 4928.148.⁷ The Ohio House and Senate have been holding hearings on those bills during the month of September. It may well be that the legislature does pass one of these bills, given popular support for repeal among voters in the state, and any such legislation may repeal R.C. 4928.148 or modify it to reduce the amounts collected from Ohio consumers.⁸ However, the timeline for any committee or floor votes, as well as the effective date of such legislation, is unclear. Accordingly, the Legacy Generation Resource Riders will remain in effect for the time being, even though the legislative intent behind them may be reversed by the end of the year or in the General Assembly’s next session.

⁶ Marty Schladen, *Ohio House speaker, four others arrested amid massive dark-money, pay-to-play allegations*, OHIO CAPITAL JOURNAL (July 21, 2020), available at <https://ohiocapitaljournal.com/2020/07/21/ohio-house-speaker-four-others-arrested-amid-massive-dark-money-pay-to-play-allegations/>.

⁷ Senate Bill 346, <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-346>; House Bill 738, <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-738>; House Bill 746, <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-746>.

⁸ Geoff Redick, *Poll: 80% of likely Ohio voters want HB6 repealed*, WSYX ABC 6 (Sept. 15, 2020), available at <https://abc6onyourside.com/news/local/poll-80-of-likely-ohio-voters-want-hb6-repealed>.

III. ARGUMENT

The currently effective Legacy Generation Resource Rider charges being paid by the FirstEnergy EDUs' residential customers amount to more than \$1 million a month, with even more being paid by business customers subject to the rider. The Ohio House and Senate are actively holding hearings on bills that could repeal the statutory authority for those charges or result in modifications that reduce the amounts collected, but if those bills pass it will take time for them to become effective and for the Commission to provide for the withdrawal of the Legacy Generation Resource Rider tariffs. Meanwhile, the Ohio Supreme Court has held that even when a rider is invalidated, no retroactive customer refund can occur where the tariff does "not specify a refund process."⁹ Therefore, in the time between a legislative repeal or modification of R.C. 4928.148 and the Commission's implementation of that legislation, the FirstEnergy EDUs may end up collecting millions of dollars through their respective Legacy Generation Resource Riders that cannot be refunded to customers under the existing tariffs and Ohio law. Even the Ohio Supreme Court has recognized that its approach to customer refunds may result in unfair overcharges by a utility.¹⁰

The Commission can easily avert this potential injustice and forestall the windfall that might result to either the OVEC coal plant owners or FirstEnergy itself. The straightforward remedy is for the Commission to order the FirstEnergy EDUs to add language to their tariffs providing that, as of the date of the order, all charges collected are subject to refund if the Ohio legislature enacts one of the currently pending H.B. 6 repeal bills and eliminates R.C. 4928.148

⁹ *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, ¶ 19 (citing R.C. 4905.32's bar on the refund or remittance of "any rate, rental, toll, or charge" in its tariff schedules "except such as are specified in such schedule").

¹⁰ *Id.* ¶ 18.

from Ohio law or modifies it to reduce the amounts collected from customers of the FirstEnergy EDUs.

As provided in R.C. 4909.16, the Commission has broad authority to “temporarily alter” or “amend . . . any existing rates, schedules, or order” in this manner whenever it “deems it necessary to prevent injury to the business or interests of the public.” Moreover, since the currently pending repeal bills will expire when the legislative session concludes at the end of 2020, the Commission can reevaluate at that point whether repeal remains a realistic possibility or whether to allow ratepayer funds to resume flowing freely to the OVEC coal plant owners. Because such an approach would represent only a temporary measure that would result in the refund of charges only where R.C. 4928.148 is actually repealed or relevantly modified, it does not run afoul of current law. Most importantly, adding a refund mechanism to the FirstEnergy EDUs’ Legacy Generation Resource Riders would allow for effective implementation of legislative intent if, in the wake of the H.B. 6 corruption scandal, state lawmakers do decide to revisit the OVEC coal plant bailout provision to reduce costs to Ohio consumers.

IV. CONCLUSION

While the legislative debate over the fate of House Bill 6 is ongoing, that does not preclude the Commission from instituting common-sense measures to prepare for a range of possible outcomes. Requiring the FirstEnergy EDUs to add a refund mechanism to their Legacy Generation Resource Rider tariffs would be a simple first step that would protect ratepayers by ensuring full refunds if a repeal bill passes, without undermining cost recovery for actual investments in utility service. CUB Ohio therefore respectfully requests that the Commission expeditiously issue an order to introduce this ratepayer safeguard as soon as possible. Specifically, CUB Ohio urges the Commission to issue an expedited ruling no later than October

28 (the earliest regularly scheduled Commission meeting occurring after the deadline for responses to this Motion) so that any over-collection can be minimized by establishing a refund mechanism starting as early as possible.

October 1, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

The e-filing system of the Public Utilities Commission of Ohio will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons listed below via electronic mail on October 1, 2020.

/s/ Madeline Fleisher
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Summary: Motion to Amend Legacy Generation Resource Rider Tariffs and for an Expedited Ruling by the Citizens' Utility Board of Ohio electronically filed by Ms. Madeline Fleisher on behalf of Citizens' Utility Board of Ohio