**BEFORE THE**

**PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the 2014 Review of the Demand Side Management and Energy Efficiency Riders of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company. | )))))) | Case No. 13-2173-EL-RDR |
| In the Matter of the 2015 Review of the Demand Side Management and Energy Efficiency Riders of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company. | )))))) | Case No. 14-1947-EL-RDR |

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| In the Matter of the 2016 Review of the Demand Side Management and Energy Efficiency Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company. | )))))) | Case No. 15-1843-EL-RDR |
| In the Matter of the 2017 Review of the Demand Side Management and Energy Efficiency Riders of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company. | )))))) | Case No. 16-2167-EL-RDR |

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| In the Matter of the 2018 Review of the Demand Side Management and Energy Efficiency Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company. | )))))) | Case No. 17-2277-EL-RDR |

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**MEMORANDUM CONTRA FIRSTENERGY’S MOTION FOR A 90-DAY DELAY IN THESE CASES INVOLVING ENERGY EFFICIENCY**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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The FirstEnergy Utilities owe consumers at least $98 million (by our count). The $98 million is owed to consumers for amounts that the FirstEnergy Utilities overcharged them for its so-called “lost revenues” related to energy efficiency from 2014 to 2018. FirstEnergy’s charge for lost revenues was about as bad as its infamous charge for decoupling/recession-proofing under tainted House Bill 6. The FirstEnergy Utilities now seek a 90-day continuance in the case schedule.[[1]](#footnote-2) For consumer protection, the PUCO should say no to this delay.

At the time of FirstEnergy’s motion, the hearing in these cases was scheduled for September 22, 2021. In response to the motion, the PUCO granted a 14-day extension, pending ruling on FirstEnergy’s request for a longer (90-day) extension.

FirstEnergy says that a 90-day extension is warranted “to actively pursue settlement discussions.”[[2]](#footnote-3) The 14-day extension granted means there is already ten weeks to discuss settlement, which is more than enough time to determine whether there is a reasonable possibility of settlement. Under FirstEnergy’s request for a 90-day extension, the hearing would not be until late December or possibly January 2022, thus giving parties nearly half a year to pursue settlement negotiations. This type of lengthy extension is unnecessary and unwarranted. Accordingly, FirstEnergy’s motion should be denied for lacking good cause under O.A.C. 4901-1-13(A).

Here is context why the FirstEnergy Utilities would want a three-month delay to seek a settlement, which also highlights the concern for consumers. The PUCO’s settlement process favors utilities (like FirstEnergy) over consumers by implicitly endowing utilities with superior bargaining power. As former PUCO Commissioner Roberto wrote, there is a “balance of power”

favoring utilities in electric security plan cases where intervenors “do not possess equal bargaining power.”[[3]](#footnote-4)

The utilities’ superior bargaining power is present in most all settlements, beyond the electric security plan cases that Commissioners Roberto wrote about. At the PUCO, there essentially is never a settlement unless the utility gives its consent to the settlement. It’s like an unwritten rule. Utility consumers, represented by OCC, are not given that corresponding power over settlements.

Moreover, the PUCO allows the bad practice of utilities offering cash and cash equivalents to parties willing to sign settlements. Of course, OCC does not have cash to counter the utility cash—nor would OCC want it, for this PUCO settlement practice that should be void as against public policy. There was a case where the PUCO itself expressed concern about utility payments of cash to special interests in settlements. The PUCO stated that settlements with cash payments to intervenors are “strongly disfavored by the Commission and are highly likely to be stricken from any future stipulation submitted to the Commission for approval.”[[4]](#footnote-5) As it wrote, the PUCO should be striking cash payments from settlements.

Further, the PUCO’s review of settlements is limited, where the PUCO merely considers the settlement as a “package” instead of considering the merits of each individual issue. Again, that favors the utilities that are always part of every settlement.

The settlement process problem for consumers can be seen in the recent experience for Dayton-area consumers. DP&L and the PUCO Staff (and others) signed a settlement where Dayton-area consumers were denied tens of millions of dollars in direct profits refunds and instead might receive a nebulous future offset to DP&L’s charges for grid investments. Various of the settling parties were paid cash or cash equivalents by DP&L.

Further, the settlement process offers the FirstEnergy Utilities the kind of secrecy that FirstEnergy seems to prefer, as has been learned from revelations about the secret world of the House Bill 6 scandal where FirstEnergy has now been charged with a federal crime.[[5]](#footnote-6) Unlike a fully litigated process for ratemaking in the public light, the process of negotiating a settlement is considered confidential from the public. Moreover, settlements give the FirstEnergy Utilities the benefit of the PUCO’s utility-favorable settlement standards, as described above.

The PUCO should deny the three-month delay proposed by the FirstEnergy Utilities for a settlement. But regarding any settlement process in these cases, the PUCO should require the process to be conducted as follows.

The PUCO should bar FirstEnergy from paying cash and cash equivalents to special interests for signing the settlement. Further, the PUCO should not consider a settlement unless it is signed by a bona fide[[6]](#footnote-7) consumer representative (such as OCC) that broadly represents the FirstEnergy Utilities’ consumers. Also, the participation of the PUCO Staff, given they are employees of the very people judging the case (Commissioners), should not be participants in the settlement process. Or, at most, the PUCO Staff’s role should be limited to impartial facilitation.

Therefore, the FirstEnergy Utilities’ motion to postpone the hearing date for 90 days should be denied. It would allow much more time for a settlement process that is unfair to consumers, while delaying justice for consumers. The FirstEnergy Utilities’ motion is prejudicial to the two million utility consumers that FirstEnergy overcharged.

Respectfully submitted,

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*/s/ Christopher Healey*

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the Memo Contra was served upon the following parties via electronic transmission this 30th day of July 2021.

 */s/ Christopher Healey*

 Christopher Healey

 Assistant Consumers’ Counsel

The PUCO’s e-filing system will electronically serve notice of the filing of this document on the following parties:

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1. *See* Motion for 90 Day Extension of the Remaining Case Schedule (July 23, 2021). [↑](#footnote-ref-2)
2. *Id.* at 1. [↑](#footnote-ref-3)
3. *In re Application of [FirstEnergy] for Authority to Establish a Standard Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Sec. Plan*, Case No. 08-935-EL-SSO, Concurring in Part & Dissenting in Part Opinion of Commissioner Cheryl L. Roberto (Mar. 25, 2009). [↑](#footnote-ref-4)
4. *See In re Application of Columbus S. Power Co. & Ohio Power Co. for Authority to Recover Cost Associated with the Ultimate Construction & Operation of an Integrated Gasification Combined Cycle Elec. Gen. Facility*, Case No. 05-376-EL-UNC, Order on Remand at 11-12 (Feb. 11, 2015). [↑](#footnote-ref-5)
5. *United States v. FirstEnergy Corp.*, Case No. 1:21-cr-86 (S.D. Ohio), Deferred Prosecution Agreement (July 22, 2021). [↑](#footnote-ref-6)
6. Given the unsavory role of alleged social welfare organizations in the H.B. 6 scandal, utility front groups (were any to enter the case going forward) would not qualify as bona fide consumer advocates. [↑](#footnote-ref-7)