**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application forEstablishment of a Unique Arrangement for Toshi CMC, LLC. | ))) | Case No. 21-1205-EL-AEC |

**REPLY IN SUPPORT OF MOTION TO INTERVENE**

**AND MEMORANDUM CONTRA MOTION TO STRIKE**

**OBJECTIONS AND COMMENTS**

**BY**

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The PUCO should reject Toshi’s (or “Applicant”) attempt to silence the state’s residential consumer advocate (OCC) in a case where residential customers may be asked to pay more because of the Applicant ‘s participation in a pilot program. OCC represents FirstEnergy’s 1.9 million residential consumers, all of whom may be affected by the application. The PUCO should grant OCC intervention in this case, as it has in numerous reasonable arrangement cases. OCC easily satisfies the statutory standard for intervention.

# I. REPLY IN SUPPORT OF OCC’S INTERVENTION

## A. OCC may be adversely affected by this proceeding and meets the criteria for intervention under Ohio law and the Ohio Administrative Code.

The law allows any person “who may be adversely affected” by a PUCO proceeding to seek intervention in that proceeding.[[1]](#footnote-2) The law further requires the PUCO to consider four factors in ruling upon a motion to intervene: (1) the “nature and extent” of the prospective intervenor’s interests, (2) the “legal position advanced” by the prospective intervenor and its “probable relation to the merits of the case,” (3) whether the prospective intervenor “will unduly prolong or delay the proceedings,” and (4) whether the prospective intervenor “will significantly contribute to full development and equitable resolution of the factual issues.”[[2]](#footnote-3) OCC’s motion for intervention explained how OCC has met this standard as well as the “real and substantial interest” standard of the Ohio Administrative Code, O.A.C. 4901-1-11(A)(2).

In its memorandum contra OCC’s motion to intervene, the Applicant argues that OCC does not have a “direct, real, or substantial interest” in this proceeding, and that OCC’s arguments are unrelated to the merits of the Application.[[3]](#footnote-4) But these arguments evidence a misunderstanding of OCC’s advocacy.

The Applicant argues that OCC should not be allowed to intervene because it believes that OCC’s concerns are “unrelated to the Application in this case.”[[4]](#footnote-5) The gist of Applicant’s position is that OCC’s objections pertain to the “hypothetical rate impacts of FirstEnergy’s Rider NMB Pilot Program which are not at issue in this case.”[[5]](#footnote-6) The Applicant also argues that OCC’s participation in the proceeding “is not necessary to address the issue OCC raises.”[[6]](#footnote-7) The Applicant claims that OCC’s request to “perform the hypothetical calculation” can be done without OCC’s intervention since “the Commission has all of the information at hand to consider the hypothetical calculation that OCC requests be conducted.”[[7]](#footnote-8)

Contrary to the Applicant’s arguments otherwise, OCC has shown that its interests may be adversely affected and that it has a real or substantial interest in this case. OCC is intervening to protect residential consumers from potential cost shifting. OCC’s concerns are rooted in any potential cost shifting to residential consumers which could occur if the untested pilot program is expanded to include the Applicant.[[8]](#footnote-9) The point of OCC’s objections is that *until* the PUCO completes its promised review of the pilot program, it would be unreasonable to allow the Applicant to participate, potentially adding to cost shifting that may already be occurring.

The whole point of the pilot program (indeed, of any pilot program) is to collect data and then use that data to inform future decisions. The PUCO, in approving the pilot, directed its Staff “to continuously review the actual results of the Rider NMB pilot program and periodically report their findings to the Commission.”[[9]](#footnote-10) The PUCO specified that the review “should include, at a minimum: whether there is an aggregate savings in transmission costs for all of the Companies’ customers, whether and how much in transmission costs are being shifted to customers not participating in the pilot program, whether the benefits of the pilot program outweigh any costs, and whether Rider NMB results in overall cost savings to customers.”[[10]](#footnote-11) The PUCO noted that the review “is necessary for the Commission to determine whether Rider NMB should be continued with the ability for customers to opt out, whether Rider NMB should be continued without the ability for customers to opt out, and whether Rider NMB should be terminated.”[[11]](#footnote-12)

The PUCO should not decide Applicant’s proposal without the benefit of a full evaluation of the pilot program. Along with evaluating the overall program, the PUCO should evaluate the impact of the Applicant participating in the pilot program.

While the Applicant may be correct that the PUCO can perform the evaluation of the pilot program it promised when it approved the pilot, OCC is not aware that the PUCO has done its evaluation. Nor is OCC aware of any Staff or PUCO agreement to evaluate the pilot or Applicant’s participation in the pilot before a decision is rendered in this proceeding. OCC’s intervention has brought the issue to the forefront. The Applicant did not vouch for the lack of cost shifting in the pilot program, although it did claim that its individual arrangement is a “zero-cost” method to “help secure a significant new economic development project.”[[12]](#footnote-13) OCC’s intervention is important if not only to explore this particular claim.

Accordingly, OCC has a legal interest in this case. If the PUCO grants the application without first reviewing the results of the pilot program, it could potentially cause greater cost shifting to non-participating consumers, like those OCC represents. This would be unreasonable and would adversely affect the consumers that OCC represents. OCC’s interest is real and substantial.

## B. OCC’s intervention will not unduly prolong and delay this proceeding and will contribute to the full development and equitable resolution of the factual issues.

The Applicant alleges that OCC has conceded that its intervention and request will cause delay.[[13]](#footnote-14) Applicant claims that “Commission Staff appears to be evaluating the Pilot and any evaluation of the Pilot will not provide any information specific to Toshi as Toshi is not a participant in the pilot.”[[14]](#footnote-15) The Staff should be evaluating the pilot, as it was directed to do so by the PUCO. The pilot should be evaluated before it is expanded to include more participants. If the Staff’s analysis is already underway, there should be no undue delay or prolonging of this proceeding. Rather its study will help to answer the questions the PUCO posed about the pilot nearly five years ago--questions that need to be answered before the PUCO rules on the Application.

## C. OCC should have the ability to raise cost-shifting issues associated with Rider NMB in this proceeding.

The Applicant alleges that the PUCO will not in any way impair OCC’s ability to protect its interests even if it denies OCC intervention.[[15]](#footnote-16) The Applicant claims that “[t]his case is not the proper forum for OCC to challenge the merits of FirstEnergy’s Rider NMB Pilot Program as a whole, or any directive that came from the ESP IV case to which Toshi was not a party.”[[16]](#footnote-17)

The Applicant is wrong. The PUCO should avoid kicking the can down the road when it can prevent potential cost shifting now, by addressing the issue head on in this case. It is well past the time for the PUCO to review the pilot program. It makes sense to conduct that evaluation prior to approving any more applications. Otherwise, new applications to join the program might increase the cost of the pilot program and potentially increase cost shifting that may be occurring.

Alternatively, if the PUCO determines that this is not the proceeding to evaluate the pilot program, then the PUCO should stay this proceeding until its promised review of the pilot is complete. Without knowing the extent of cost shifting under the pilot, it makes little sense to blindly expand the program and potentially exacerbate the cost shifting that may already be occurring.

# II. MEMORANDUM CONTRA MOTION TO STRIKE OBJECTIONS AND COMMENTS

## A. OCC’s objections are not improper or prejudicial.

The Applicant claims that “OCC’s objections should be stricken as unduly prejudicial.”[[17]](#footnote-18) The Applicant alleges that OCC’s objections should be stricken for “failing to comply with the Commission’s rules.”[[18]](#footnote-19) In this regard the Applicant claims that OCC “is not an affected party” under O.A.C. 4901:1-38-05(F) and therefore “its filing of objections in this case is improper and should be stricken.”[[19]](#footnote-20) The Applicant’s claims rest upon its misplaced arguments that OCC has failed to demonstrate any “direct,[[20]](#footnote-21) real or substantial interest in the Application.”[[21]](#footnote-22)

As OCC explained above, OCC may be adversely harmed if the Applicant’s participation in the program causes cost shifting to occur for the non-participants. OCC has an interest in preventing residential consumers from paying more under Rider NMB if the Applicant opts out. This is a real and substantial interest. While the Applicant can profess to offer a “zero cost”[[22]](#footnote-23) unique arrangement, OCC should have the ability to intervene in order to test this assertion. If the assertion is wrong, the consumers OCC represents will be adversely affected. The PUCO should find deny the Applicant’s Motion to Strike.

## B. OCC’s objections are well made.

### 1. The Rider NMB pilot program should be evaluated by the PUCO Staff according to the PUCO’s stated criteria before the pilot program is extended to allow additional participants.

The Applicant claims that “OCC’s first and second objections both relate to the Rider NMB Pilot Program as a whole, but do not articulate how these objections are related to the merits of this specific case.”[[23]](#footnote-24) In this regard the Applicant claims that the Rider NMB Pilot Program “was not created in this case,”[[24]](#footnote-25) and the Applicant “is not currently participating”[[25]](#footnote-26) in the Pilot. Thus, the Applicant argues an investigation of the Rider would be “procedurally improper and practically difficult.”[[26]](#footnote-27)

But Applicant’s claims are misplaced. The issue is not whether the pilot was created in this case, or whether the Applicant is currently participating in it, or how difficult an investigation would be. Despite Applicant’s claims to the contrary, the PUCO cannot and should not address the “merits”[[27]](#footnote-28) of the application unless and until a review of the pilot program is undertaken as the PUCO ordered.[[28]](#footnote-29)

As OCC pointed out in its Objections,[[29]](#footnote-30) Rider NMB is a pilot program intended to be studied and used as a learning experience for regulatory policymaking. The PUCO directed FirstEnergy and the PUCO Staff to “continuously review the actual results of the Rider NMB pilot program and periodically report their findings to the Commission.”[[30]](#footnote-31) The review was to “include, at a minimum: whether there is an aggregate savings in transmission costs for all of the Companies’ customers, whether and how much in transmission costs are being shifted to customers not participating in the pilot program, whether the benefits of the pilot program outweigh any costs, and whether Rider NMB results in an overall costs savings to customers.”[[31]](#footnote-32)

Before the PUCO considers expanding the pilot program, the PUCO should first follow through with its 2016 Order. Before more customers are added to the pilot, it should be thoroughly examined by its Staff as directed by the PUCO and the results publicly reported.

### 2. The Rider NMB pilot program review should include whether and how much transmission costs are being shifted to non-participating customers.

In its response to OCC’s third objection, the Applicant asserts that “its proposed reasonable arrangement will not result in any unfair cost-shifting to other customers.”[[32]](#footnote-33) But it also alleges that “the pros and cons of the Rider NMB Pilot Program as a whole cannot be determined by the Application in this case.”[[33]](#footnote-34) The Applicant appears to want it both ways.

Despite Applicant’s claims, the PUCO cannot determine whether or not there has been unfair cost-shifting to other customers unless and until the pilot program has been evaluated. A detailed analysis of whether and how much transmission costs are being shifted to non-participating customers is a critical issue for residential consumers who cannot opt out of paying Rider NMB.

The review required by the PUCO five years ago is needed to determine if it is just and reasonable to expand the program or even continue it. The PUCO determined “that Rider NMB pilot program is a pilot program which bears further study to determine if the *actual results* of the pilot program, rather than projected results, are in the public interest.”[[34]](#footnote-35) The PUCO’s desire for the pilot was to determine “whether the benefits of the pilot program outweigh any costs.”[[35]](#footnote-36) This review has not occurred, but it should occur before any other customers, including the Applicant, are added to the program.

OCC fully understands how these unique arrangements typically work. Large industrial consumers looking to save money want their costs to be reduced. But reduced costs for the large industrial consumers usually means increased costs to other consumers (including residential consumers). It may be that the Applicant is unaware of or does not understand the cost shifting that is likely to occur under this unique arrangement.

The Applicant is seeking to opt-out of Rider NMB in an effort to reduce its costs. Rider NMB costs are pass-through costs for transmission services. If the Applicant opts out and pays lower costs, but the overall costs FirstEnergy is paying are not reduced at an equal rate, then there will be additional costs spread out to those that are still paying Rider NMB.[[36]](#footnote-37)

OCC is asking that a study be done to determine if there is any cost shifting that is occurring under the pilot, consistent with the PUCO’s interest in knowing “whether and how much in transmission costs are being shifted to customers not participating in the program.”[[37]](#footnote-38) Simply put, OCC is asking that the PUCO Staff and FirstEnergy do what was ordered by the PUCO when this pilot program was initiated.

 Applicant further claims that “OCC is not an affected party to this case,” and that “its objections are unrelated to the Application filed in this case.”[[38]](#footnote-39) This argument is misplaced. The Applicant is asking for approval to participate in a pilot program that could decrease the transmission costs it pays yet could potentially cause the remaining customers who pay the rider to bear more costs. If the application is approved by the PUCO, any cost savings to the Applicant could result in more costs being charged to other consumers by FirstEnergy. As the statutory representative of FirstEnergy’s residential consumers[[39]](#footnote-40) who may be adversely affected by cost shifting associated with the Applicant participating in the pilot program, OCC is indeed an affected party to this case. Thus, the Applicant’s Motion to Strike OCC’s objections should be denied.

# III. CONCLUSION

For the reasons described herein and in OCC’s motion to intervene, the PUCO should grant OCC’s intervention. Furthermore, the Applicant’s Motion to Strike should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

 I hereby certify that a copy of this Reply in Support of Motion to Intervene and Memorandum Contra Motion to Strike Objections and Comments was served on the persons stated below via electronic transmission, this 11th day of January 2022.

 */s/ Maureen R. Willis*\_\_\_\_\_\_\_

 Maureen R. Willis

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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. R.C. 4903.221. [↑](#footnote-ref-2)
2. R.C. 4903.221. [↑](#footnote-ref-3)
3. Memo Contra at 6-8. [↑](#footnote-ref-4)
4. Memo Contra at 8. [↑](#footnote-ref-5)
5. *Id.* at 6. [↑](#footnote-ref-6)
6. *Id.* at 7. [↑](#footnote-ref-7)
7. *Id.* [↑](#footnote-ref-8)
8. OCC Objections at 6-7. [↑](#footnote-ref-9)
9. *In re Application of FirstEnergy for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing at ¶310 (Oct. 12, 2016). [↑](#footnote-ref-10)
10. *Id.* [↑](#footnote-ref-11)
11. *Id.* [↑](#footnote-ref-12)
12. Application at 11. [↑](#footnote-ref-13)
13. Memo Contra at 8. [↑](#footnote-ref-14)
14. *Id.* [↑](#footnote-ref-15)
15. Memo Contra at 9. [↑](#footnote-ref-16)
16. *Id.* [↑](#footnote-ref-17)
17. *Id*. [↑](#footnote-ref-18)
18. *Id.* [↑](#footnote-ref-19)
19. *Id.* at 9-11. [↑](#footnote-ref-20)
20. Applicant’s insistence that OCC show it has a “direct” interest in the proceeding has no tether to law or rule. Use of that standard is inappropriate and unfounded. [↑](#footnote-ref-21)
21. *Id.* at 10. [↑](#footnote-ref-22)
22. Application at 11. [↑](#footnote-ref-23)
23. Memo Contra at 10. [↑](#footnote-ref-24)
24. *Id.* [↑](#footnote-ref-25)
25. *Id*. [↑](#footnote-ref-26)
26. *Id.* [↑](#footnote-ref-27)
27. *Id.* [↑](#footnote-ref-28)
28. *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing ¶ 310 (Oct. 12, 2016). [↑](#footnote-ref-29)
29. Motion to Intervene and Objections by Office of the Ohio Consumers’ Counsel at 3-5 (Dec. 20, 2021). [↑](#footnote-ref-30)
30. *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing ¶ 310 (Oct. 12, 2016). [↑](#footnote-ref-31)
31. *Id.* [↑](#footnote-ref-32)
32. Memo Contra at 10. [↑](#footnote-ref-33)
33. *Id.* [↑](#footnote-ref-34)
34. *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing ¶ 310 (Oct. 12, 2016) (emphasis added). [↑](#footnote-ref-35)
35. *Id.* [↑](#footnote-ref-36)
36. *See, e.g*., Case No. 12-1497-EL-SSO, Tr. XXXVI at 7656 (Mikkelsen). [↑](#footnote-ref-37)
37. *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing ¶ 310 (Oct. 12, 2016). [↑](#footnote-ref-38)
38. Memo Contra at 11. [↑](#footnote-ref-39)
39. *See* R.C. Chapter 4911, R.C. 4903.221 and Ohio Adm. Code 4901-1-11. [↑](#footnote-ref-40)