**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Review of the Non-Market-Based Services Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company. | )))))) | Case No. 24-22-EL-RDR |

**MOTION FOR FIRSTENERGY TO COLLECT Rider nmb SUBJECT TO REFUND**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

 FirstEnergy[[1]](#footnote-2) has filed tariffs to charge customers for transmission related charges (including millions of dollars for investment in supplemental transmission projects) under its Rider NMB. OCC, on behalf of FirstEnergy’s 1.9 million residential consumers, files this motion to protect FirstEnergy’s consumers from paying Rider NMB without additional consumer protections written into FirstEnergy’s tariff. Specifically, the PUCO should order that Rider NMB charges be collected subject to refund, pending the outcome of OCC’s complaint before the Federal Energy Regulatory Commission (“FERC”) involving supplemental transmission projects.[[2]](#footnote-3) This will prevent injury to the interests of the public and will prevent irreparable harm to consumers.

The reasons for granting these motions are further set forth in the attached Memorandum in Support.

Respectfully submitted,

Maureen R. Willis (0020847)

Ohio Consumers’ Counsel

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**MEMORANDUM IN SUPPORT**

# I. Introduction

Ohio utility consumers face an immediate risk of substantial harm. OCC has long warned of the harm to consumers from supplemental transmission projects.[[3]](#footnote-4) There is little to no regulatory oversight of the necessity or prudence of supplemental transmission projects at the state or federal level. The PUCO recently acknowledged this “regulatory gap” in FirstEnergy’s annual Rider NMB update case.[[4]](#footnote-5)

To protect consumers, OCC in September 2023 filed a complaint regarding supplemental transmission projects at FERC.[[5]](#footnote-6) In response to the complaint, the PUCO’s Office of the Federal Energy Advocate agreed that there is a “regulatory gap” regarding supplemental transmission projects.[[6]](#footnote-7) The PUCO should protect consumers in this case by ordering that Rider NMB be collected subject to refund if FERC determines because of OCC’s complaint that consumers are improperly paying for supplemental transmission projects.

# II. To protect consumers, the PUCO should order that Rider NMB be collected subject to refund

 To prevent injury to the public and avoid irreparable harm to consumers, OCC requests the PUCO to exercise its discretionary power under Ohio law to protect the consumers of FirstEnergy. The PUCO’s authority can be found under various statutes (including R.C. 4905.04 and R.C. 4905.06) and case precedent.[[7]](#footnote-8) If the PUCO approves the Rider NMB tariffs, FirstEnergy’s consumers may be required to pay for supplemental projects that are neither necessary nor prudent. As the PUCO’s Office of the Federal Energy Advocate has said, “a serious and escalating number of transmission projects are not receiving sufficient regulatory scrutiny to ensure regulators and the public that – at least with regard to supplemental projects – regional transmission systems are being built in a cost-effective manner.”[[8]](#footnote-9) And it will be difficult if not impossible to get a refund if the charges or the process for review are found to be unlawful by FERC.

Indeed, the Ohio Supreme Court recognized there is an apparent unfairness when a decision is determined to be unlawful, yet consumers get no refund of charges that were unlawful from the get-go.[[9]](#footnote-10) However, if the PUCO directs that the Rider NMB be collected subject to refund, the PUCO can avoid these unfair and unjust results.

The PUCO has acted to prevent harm from occurring by ordering utilities to collect an existing rate increase subject to refund and subject to appropriate interest charges. The PUCO has used this approach to permit it to explore the reasonableness of rates in light of events that occurred after the issuance of its orders. For instance, the PUCO granted rehearing and ordered rates to be collected subject to refund in a rate case filed by the Columbus & Southern Ohio Electric Company.[[10]](#footnote-11) In that rate case, one week after the issuance of the PUCO’s rate order, the Nuclear Regulatory Commission issued an Order that suspended construction at the Zimmer Nuclear Power Plant (“Zimmer”). The original Opinion and Order included a rate base allowance for construction work in progress (“CWIP”) for Zimmer.[[11]](#footnote-12)

In its order setting the rehearing, the PUCO approved the utility’s filed tariffs but expressly found the portion of the increase granted attributable to Zimmer CWIP “should be made subject to refund, pending a rehearing on the CWIP issue.”[[12]](#footnote-13) A rehearing was held, and the PUCO ordered that all of the Zimmer costs should be excluded from CWIP. The PUCO ordered the utility to file tariffs reducing the total revenue requirements by approximately $13 million.[[13]](#footnote-14)

The utility appealed and sought a stay of the PUCO’s Order on Rehearing from the Supreme Court of Ohio. The Court granted the stay but subsequently affirmed the PUCO’s denial of a CWIP allowance.[[14]](#footnote-15) After the PUCO’s action was upheld on appeal,[[15]](#footnote-16) the PUCO ordered the utility to refund approximately $4.5 million to its customers.[[16]](#footnote-17) The PUCO ordered the collection, subject to refund to protect customers in the event of a later decision that the utility was collecting more from customers than warranted by law, rule, or reason.

Another example where the PUCO has collected rates subject to refund involved the Ohio Utilities Company.[[17]](#footnote-18) After a rate order was issued,[[18]](#footnote-19) legislation was enacted that changed Ohio’s ratemaking formula. The PUCO opened an investigation to determine if the previously-established rates were still reasonable in light of the new law.[[19]](#footnote-20) The PUCO determined that the rates were excessive, taking into account the new law, and ordered the utility to withdraw its tariffs and file new lower rates consistent with the PUCO’s findings.[[20]](#footnote-21) The utility sought a stay of the PUCO’s order, pending further review, which was granted with the condition that the utility was required to collect rates subject to refund.[[21]](#footnote-22)

In cases involving AEP and Dayton Power & Light, the PUCO also protected consumers by making charges subject to refund. In the case involving AEP’s Rate Stability Rider (“RSR”), the PUCO ordered that the RSR be collected subject to refund after the case was remanded by the Court.[[22]](#footnote-23) The PUCO “direct[ed] AEP Ohio to file revised tariffs that provide that the RSR is being collected subject to refund” in order to protect consumers from irreparable harm – continuing to pay the RSR without the potential of getting a refund.[[23]](#footnote-24) In the case involving Dayton Power & Light’s Rate Stability Charge (“RSC”), the PUCO said that it did “not seek to evade Supreme Court review of [its] decisions” and made collection from consumers of charges under the RSC subject to refund.[[24]](#footnote-25)

The PUCO can act now to prevent harm to consumers from supplemental transmission projects. It should do so. The PUCO should order that Rider NMB charges

be collected subject to refund if FERC determines that consumers are improperly paying for unreviewed supplemental transmission projects.

# Iii. CONCLUSION

To protect customers from unnecessary and unlawful charges, the PUCO should order that Rider NMB charges be collected subject to refund if FERC determines that consumers are improperly paying for supplemental transmission projects.

Respectfully submitted,

Maureen R. Willis (0020847)

Ohio Consumers’ Counsel

*/s/ William J. Michael*William J. Michael (0070921)
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(willing to accept service by e-mail)

**CERTIFICATE OF SERVICE**

 I hereby certify that a copy of the foregoing Motion for FirstEnergy to Collect Rider NMB Subject to Refund was served on the persons stated below via electronic transmission, this 5th day of April 2024.

*/s/ William J. Michael*

 William J. Michael

 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. FirstEnergy refers to Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company. [↑](#footnote-ref-2)
2. The PUCO’s Office of the Federal Energy Advocate asserted in comments in response to the complaint that FERC “must exercise that authority to ensure efficient, reasonably priced regional transmission systems, including the local supplemental project dimension of those regional systems.” Docket No. EL23-105-000, Comments of the Public Utilities Commission of Ohio’s Office of the Federal Energy Advocate (November 17, 2023) at 6. [↑](#footnote-ref-3)
3. *See, e.g., In the Matter of the Review of the Non-Market-Based Services Rider Pilot Program Established by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 22-391-EL-RDR, OCC’s Comments (August 17, 2023). [↑](#footnote-ref-4)
4. *See In the Matter of the Review of the Non-Market-Based Services Rider Contained in the Tariffs of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co*., Case No. 23-51-EL-RDR, Finding and Order at ¶ 14 (March 22, 2023). [↑](#footnote-ref-5)
5. Docket No. EL23-105-000. [↑](#footnote-ref-6)
6. *Id.*, Comments of the Public Utilities Commission of Ohio’s Office of the Federal Energy Advocate (November 17, 2023) at 3-5. [↑](#footnote-ref-7)
7. *See, e.g.*, *In re Columbus & Southern Ohio Electric Co.*, Case No. 83-1058-EL-AIR, Entry (November 17, 1982); *Cinnamon Lake Utilities Co. v. Pub. Util. Comm*., 42 Ohio St.2d 259 (1975), where the Ohio Supreme Court noted that R.C. 4909.16 exists to protect the public interest as well as the interests of the public utility. [↑](#footnote-ref-8)
8. Comments of the Public Utilities Commission of Ohio’s Office of the Federal Energy Advocate (November 17, 2023) at 3. [↑](#footnote-ref-9)
9. *See* *In re: Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 ¶¶ 15-21. [↑](#footnote-ref-10)
10. *In re Columbus & Southern Ohio Electric Co*., Case No. 83-1058-EL-AIR, Entry (November 17, 1982). [↑](#footnote-ref-11)
11. *Id*., Opinion and Order at 8-14 (November 5, 1982). [↑](#footnote-ref-12)
12. *Id*., Entry at 1 (November 17, 1982). [↑](#footnote-ref-13)
13. *Id*., Order on Rehearing (March 16, 1983). [↑](#footnote-ref-14)
14. *Columbus & Southern Ohio Electric Co. v. Pub. Util. Comm*. (1984), 10 Ohio St.3d 12. [↑](#footnote-ref-15)
15. *Id.* [↑](#footnote-ref-16)
16. *In re Columbus & Southern Ohio Electric Co.*, Case No. 81-1058-EL-AIR, Order on Rehearing (May 1, 1984). [↑](#footnote-ref-17)
17. *In the Matter of the Commission’s Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry at 2 (June 7, 1978). [↑](#footnote-ref-18)
18. *In the Matter of the Ohio Utilities Co. Application for an Increase in Rates*, Case No. 79-529-WS-AIR, Opinion and Order (January 18, 1977). [↑](#footnote-ref-19)
19. *In the Matter of the Commission’s Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry (September 7, 1977). [↑](#footnote-ref-20)
20. *In the Matter of the Commission’s Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Opinion and Order (May 18, 1978). [↑](#footnote-ref-21)
21. *In the Matter of the Commission’s Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry (June 7, 1978). The utility was also required to file an “undertaking” consisting of a promise to refund any amount collected for service rendered after the date of the Entry by a method later determined by the Commission (either cash refund or as a credit to future bills). The undertaking was required to be under oath by an officer of the company and was to include a promise to include interest. The amount ordered for refund was the amount collected for service in excess of those rates ultimately determined to be lawful. *Id*. [↑](#footnote-ref-22)
22. *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, et al. (May 18, 2016). [↑](#footnote-ref-23)
23. *Id.* at 4. [↑](#footnote-ref-24)
24. *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Off in the Form of an Electric Security Plan,* Case No. 08-1094-EL-SSO, Fifth Entry on Rehearing (June 16, 2021) at ¶ 64. [↑](#footnote-ref-25)