**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 |

**APPLICATION FOR REHEARING**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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April 19, 2024 (willing to accept service by e-mail)

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**APPLICATION FOR REHEARING**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The Office of the Ohio Consumers’ Counsel (“OCC”) files this Application for Rehearing (“Application”) to protect residential consumers from having costs shifted to them under FirstEnergy’s[[1]](#footnote-2) Non-Market-Based (“NMB”) Rider. The rider, which certain non-residential consumers can opt out of paying, is shifting costs to residential consumers who can’t avoid the charge.

The Finding and Order harms consumers and is unreasonable and unlawful in the following respects:

**ASSIGNMENT OF ERROR 1:** The PUCO**’**s Finding and Order is unlawful and unreasonable because it approved the Application that enables the shifting of costs from pilot participants to others, including residential consumers, in violation of the important regulatory principle of cost-causation.

**ASSIGNMENT OF ERROR 2:** The PUCO’s Finding and Order is unlawful and unreasonable because it approved the Application that enables the shifting of costs from pilot participants to others, including residential consumers, and was made without record evidence in violation of R.C. 4903.09.

**ASSIGNMENT OF ERROR 3:** The PUCO’s Finding and Order is unlawful and unreasonable because it results in charges to consumers that are unjust, unreasonable, preferential, and discriminatory and result from cost-shifting under the Rider NMB pilot program, in violation of R.C. 4905.22 and R.C. 4905.33-35.

**ASSIGNMENT OF ERROR 4:** The PUCO’s Finding and Order is unlawful and unreasonable because the PUCO should have protected consumers by ordering Rider NMB to be collected subject to refund. Such a ruling would have protected consumers and allowed for refunds if FERC rules favorably on OCC’s complaint related to supplemental transmission projects.

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 its Finding and Order as requested by OCC.[[2]](#footnote-3)

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

# I. INTRODUCTION

In its Finding and Order, the PUCO approved FirstEnergy’s application to revise its transmission charge rider, Rider NMB, subject to the PUCO Staff’s recommendations.[[3]](#footnote-4) The revised transmission rider will increase transmission charges to consumers who are unable to participate in the pilot program. The increase under Rider NMB is in part caused by cost shifting from the pilot participants to the non-pilot participants, who include residential consumers. Residential consumers cannot participate in the pilot program, which purports to provide a benefit to the participants.[[4]](#footnote-5) The PUCO should end the cost-shifting under the seven-year pilot by ending the pilot altogether, as recommended by the PUCO-approved auditor.[[5]](#footnote-6) Alternatively, the PUCO should require all revenue shortfalls from the program to be picked up by the customer classes that have consumers that participate in the pilot.

Notably, the PUCO-approved auditor in Case No. 22-391-EL-RDR determined that FirstEnergy’s pilot program shifts over a million dollars per year to residential consumers who have no choice but to pay Rider NMB charges.[[6]](#footnote-7) That is unjust and unreasonable, preferential and discriminatory, under Ohio law. Rider NMB should end. Alternatively, the PUCO should prohibit any cost shifting to those consumers who cannot participate in the pilot, with any needed cost recovery coming from the customer classes whose consumers are eligible to participate in the pilot.

# ii. ASSIGNMENTS OF ERROR

## ASSIGNMENT OF ERROR 1: The PUCO’s Finding and Order is unlawful and unreasonable because it approved the Application that enables the shifting of costs from pilot participants to others, including residential consumers, in violation of the important regulatory principle of cost-causation.

The PUCO approved FirstEnergy’s application to revise Rider NMB charges, subject to the PUCO Staff’s recommendations.[[7]](#footnote-8) The PUCO Staff recommended adjusted charges to certain non-residential consumers to limit rate shock.[[8]](#footnote-9) The PUCO Staff also recommended that any reduction in revenue caused by the adjusted rates (approximately $40.1 million, according to PUCO Staff) should be collected, if ever, “from only the classes that are subject to the reduced rates.”[[9]](#footnote-10)

But the revised transmission rider charges still include costs shifted to residential consumers under the pilot program.[[10]](#footnote-11) Neither the PUCO Staff nor the PUCO addressed this cost-shifting. The PUCO should extend the principle articulated by its Staff to the pilot -- any reduction in revenue due to the pilot should be collected, if ever, only from the customer classes eligible to participate in the pilot and *not* residential consumers.

This would be consistent with the principle of cost-causation. “The principle of cost-causation is an important regulatory principle that requires the electric utility to recover costs from those customers who caused the cost to be incurred on the electric utility.”[[11]](#footnote-12) Commercial and industrial customers that opt out of Rider NMB under the pilot cause the costs – not residential consumers. Those classes of customers should pay any associated costs, under the principle of cost-causation. This is consistent with, and supported by, the PUCO’s 2018 decision regarding AEP’s transmission charge.[[12]](#footnote-13)

The PUCO should end the cost-shifting under the seven-year pilot by terminating the pilot. Alternatively, the PUCO should require revenue shortfalls from the program to be picked up by those customer classes whose consumers can participate in the pilot.

## ASSIGNMENT OF ERROR 2: The PUCO’s Finding and Order is unlawful and unreasonable because it approved the Application that enables the shifting of costs from pilot participants to others, including residential consumers, and was made without record evidence in violation of R.C. 4903.09.

The PUCO approved FirstEnergy’s application to revise Rider NMB charges, subject to the PUCO Staff’s recommendations.[[13]](#footnote-14) The PUCO Staff recommended adjusted charges to non-residential consumers to limit rate shock.[[14]](#footnote-15) But the revised transmission charges still include costs shifted to residential consumers under the pilot program.[[15]](#footnote-16) The PUCO’s Staff did not address this issue. The Finding and Order violates R.C. 4903.09 because the record evidence does not support the conclusion.[[16]](#footnote-17)

In response to OCC’s argument that the Rider NMB pilot results in cost-shifting, the PUCO said that the audit of Rider NMB found “that the Pilot program resulted in an overall cost savings for customers, creating a $231.1 million revenue requirement reduction for all customers from March 2017 through February 2023.”[[17]](#footnote-18) And the PUCO asserted that “the auditor found that non-participating commercial and industrial customers absorb over 75 percent of the cost shift.”[[18]](#footnote-19)

The PUCO only gave half the story (and even that is not supported by the PUCO’s Staff report). The other half of the story is that $107 million of the savings to the pilot participants came at the expense of consumers not participating in the pilot. According to the auditor “[o]ut of the difference in revenue, $107.7 million are additional cost assigned to non-Pilot participants.”[[19]](#footnote-20) Additionally, the PUCO failed to point out that the auditor quantified that the benefits to all consumers of the pilot over the seven-year period amounted to a scant $9 million, not considering the $107 million cost shift.[[20]](#footnote-21)

In short, the full story from the audit report confirms that notwithstanding the revenue reduction relied on by the PUCO in its Finding and Order, *the evidence in the audit report demonstrates that there is still cost-shifting to residential consumers.* This may be why the auditor’s preferred recommendation was to eliminate Rider NMB for all customers.[[21]](#footnote-22)

The Finding and Order violates R.C. 4903.09 because the record evidence does not support the PUCO’s conclusion.[[22]](#footnote-23) The revenue reduction relied on by the PUCO in its Finding and Order is not the whole story because *the evidence in the audit report demonstrates that there is still cost-shifting to residential consumers.* The PUCO thus violated R.C. 4903.09, which requires the PUCO to base its findings on facts in the record.[[23]](#footnote-24) The PUCO should end the cost-shifting under the seven-year pilot by terminating the pilot. Alternatively, the PUCO should require revenue shortfalls from the program to be picked up by those customer classes whose consumers can participate in the pilot program.

## ASSIGNMENT OF ERROR 3: The PUCO’s Finding and Order is unlawful and unreasonable because it results in charges to consumers that are unjust, unreasonable, preferential, and discriminatory and result from cost-shifting under the Rider NMB pilot program, in violation of R.C. 4905.22 and R.C. 4905.33-35.

FirstEnergy’s application sought to revise (increase) Rider NMB charges.[[24]](#footnote-25) In response to OCC’s argument that the Rider NMB pilot results in cost-shifting, the PUCO said that the pilot program resulted in a decreased revenue requirement and that shifted costs are primarily absorbed by commercial and industrial customers.[[25]](#footnote-26)

But the so-called revenue requirement reduction does not alleviate the cost-shifting to residential consumers under the Rider NMB pilot. As explained above, *it still occurs irrespective of the revenue requirement reduction ordered by the PUCO.* Cost-shifting to residential consumers who cannot avoid the charge is unjust and unreasonable, in violation of R.C. 4905.22, and results in preferential and discriminatory charges, in violation of R.C. 4905.33-35. R.C. 4905.22 requires that all rates for utility services be just and reasonable. R.C. 4905.33-35 prohibits preferential and undue discriminatory charges.

When the Rider NMB pilot program was approved as part of FirstEnergy’s fourth electric security plan in 2016, the PUCO ordered its Staff to conduct a review of the program to determine if the program imposes unreasonable charges on residential consumers.[[26]](#footnote-27) After nearly seven years with no review and other delays, the initial audit of FirstEnergy’s Rider NMB pilot program was finally completed. As OCC feared and warned of,[[27]](#footnote-28) the opt out of Rider NMB caused cost shifting to residential and other consumers.

The audit report confirmed cost shifting burdens to consumers who do not participate in the Rider NMB pilot program. The auditor found that “[t]he existence of the Pilot reveals the shortcomings of Rider NMB in allocating certain PJM costs to nonparticipating customers based on the principle of cost causation.”[[28]](#footnote-29) The auditor identified cost shifts as occurring due to the structure of Rider NMB. According to the auditor, “[s]ome, but not all, of the avoided transmission costs for the Pilot Program . . . are shifted to the Companies’ non-participating customers under Rider NMB. The remainder of the transmission cost shift is borne by other loads in the ATSI zone that are not customers of the Companies.”[[29]](#footnote-30)

The auditor further concluded that “signals from the Pilot are too small and inconsistent to induce the [] long-term impact” by deferring or eliminating transmission expansion needs in order to reduce transmission revenue requirements.[[30]](#footnote-31) The auditor also concluded that the pilot program is “unlikely to provide direct reliability benefits” and that the pilot program “does not resolve the typical causes of grid stress.”[[31]](#footnote-32)

Because the Rider NMB pilot results in cost-shifting to residential consumers, *irrespective of the supposed revenue requirement reduction to other nonparticipating consumers*, the Finding and Order results in unjust and unreasonable charges to residential consumers in violation of R.C. 4905.22. The cost-shifting also gives preferential treatment to pilot participants, and unduly discriminates against non-participants (including residential consumers), by allowing participants to avoid costs and shift those costs onto non-participants.

The PUCO should end the cost-shifting under the seven-year pilot by terminating the pilot. Alternatively, the PUCO should require revenue shortfalls from the program to be picked up by those customer classes whose consumers can participate in the pilot.

## ASSIGNMENT OF ERROR 4: The PUCO’s Finding and Order is unlawful and unreasonable because the PUCO should have protected consumers by ordering Rider NMB to be collected subject to refund. Such a ruling would have protected consumers and allowed for refunds if FERC rules favorably on OCC’s complaint related to supplemental transmission projects.

OCC has long warned of the harm to consumers from supplemental transmission projects.[[32]](#footnote-33) There is little to no regulatory oversight of the necessity or prudence of supplemental transmission project investment costs at the state or federal level.

The PUCO recently acknowledged this “regulatory gap” problem in First Energy’s annual Rider NMB update case.[[33]](#footnote-34) To protect consumers, OCC filed a complaint regarding supplemental transmission projects at the Federal Energy Regulatory Commission.[[34]](#footnote-35) The PUCO should protect consumers in this case by ordering that Rider NMB be collected subject to refund if FERC determines as a result of OCC’s complaint that consumers are improperly paying for supplemental transmission projects. PUCO Chair French, in remarks before the General Assembly, testified that to the extent the law allows, the PUCO can and has allowed for consumer refunds.[[35]](#footnote-36) And she testified she intends to continue that practice.

The PUCO has acted to prevent harm from occurring by ordering utilities, on an ongoing basis, 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 Commission granted rehearing and ordered rates to be collected subject to refund in a rate case filed by the Columbus & Southern Ohio Electric Company.[[36]](#footnote-37) 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.[[37]](#footnote-38)

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.”[[38]](#footnote-39) 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.[[39]](#footnote-40) 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.[[40]](#footnote-41) After the PUCO’s action was upheld on appeal,[[41]](#footnote-42) the PUCO ordered the utility to refund approximately $4.5 million to its customers.[[42]](#footnote-43) 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.[[43]](#footnote-44) After a rate order was issued,[[44]](#footnote-45) 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.[[45]](#footnote-46) 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.[[46]](#footnote-47) 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.[[47]](#footnote-48)

In a case involving AEP’s Rate Stability Rider, the PUCO ordered that the RSR be collected subject to refund after the case was remanded by the Court.[[48]](#footnote-49) 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.[[49]](#footnote-50) And in a 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.[[50]](#footnote-51)

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 as a result of OCC’s complaint that consumers are improperly paying for supplemental transmission projects.

# iII. CONCLUSION

The PUCO should end the cost-shifting under the seven-year pilot by terminating the pilot. Alternatively, the PUCO should require revenue shortfalls from the program to be picked up by those customer classes whose consumers can participate in the pilot program. If the PUCO does not end the pilot program as the PUCO-appointed auditor recommended, the PUCO should order that Rider NMB charges be collected subject to refund.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission, this 19th 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” collectively refers to Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company. [↑](#footnote-ref-2)
2. Case No. 24-22-EL-RDR, Finding and Order (March 20, 2024). [↑](#footnote-ref-3)
3. Finding and Order (March 20, 2024). [↑](#footnote-ref-4)
4. The pilot program allows certain customers to opt-out of Rider NMB. *See id.* at ¶ 7. [↑](#footnote-ref-5)
5. Audit Report at 50. [↑](#footnote-ref-6)
6. Audit Report at 20. [↑](#footnote-ref-7)
7. Finding and Order (March 20, 2024). [↑](#footnote-ref-8)
8. PUCO Staff’s Review and Recommendations (March 13, 2024). [↑](#footnote-ref-9)
9. *Id.* [↑](#footnote-ref-10)
10. The pilot program allows certain customers to opt-out of Rider NMB. *See id.* at ¶ 7. [↑](#footnote-ref-11)
11. *In the Matter of the Application of Ohio Power Company for Approval of an Advanced Meter Opt-Out Service Tariff*, Case No. 14-1158-EL-ATA, Opinion and Order (April 27, 2016) at 11. [↑](#footnote-ref-12)
12. *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 16-1852-EL-SSO, Opinion and Order (April 25, 2018) at ¶¶ 41-47. [↑](#footnote-ref-13)
13. Finding and Order (March 20, 2024). [↑](#footnote-ref-14)
14. PUCO Staff’s Review and Recommendations (March 13, 2024). [↑](#footnote-ref-15)
15. The pilot program allows certain customers to opt-out of Rider NMB. *See id.* at ¶ 7. [↑](#footnote-ref-16)
16. *See* *Ohio Consumers’ Counsel v. Pub. Util. Comm*., 111 Ohio St.3d 300 (2006). [↑](#footnote-ref-17)
17. Finding and Order at ¶ 15 (citation omitted). [↑](#footnote-ref-18)
18. *Id.* [↑](#footnote-ref-19)
19. Audit Report at 2. [↑](#footnote-ref-20)
20. *Id.* at 43. [↑](#footnote-ref-21)
21. *Id.* at 50. [↑](#footnote-ref-22)
22. *See* *Ohio Consumers’ Counsel v. Pub. Util. Comm*., 111 Ohio St.3d 300 (2006). [↑](#footnote-ref-23)
23. *Id*. [↑](#footnote-ref-24)
24. Application (January 16, 2024). [↑](#footnote-ref-25)
25. Finding and Order at ¶ 15 (citation omitted). [↑](#footnote-ref-26)
26. *See In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co*., Case No. 14-1297-EL-SSO (“ESP IV Case”), Fifth Entry on Rehearing, at ¶ 310 (Oct. 12, 2016). [↑](#footnote-ref-27)
27. Audit Report at 3. [↑](#footnote-ref-28)
28. *Id.* [↑](#footnote-ref-29)
29. *Id.* [↑](#footnote-ref-30)
30. *Id.* at 36. [↑](#footnote-ref-31)
31. *Id.* at 39. [↑](#footnote-ref-32)
32. *See, e.g., In the Matter of the Review of the 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 (Aug. 17, 2023). [↑](#footnote-ref-33)
33. *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 ¶ 14 (March 22, 2023). [↑](#footnote-ref-34)
34. Docket No. EL23-105-000. [↑](#footnote-ref-35)
35. Confirmation Hearing, Ohio Senate Energy and Public Utilities Committee (April 9, 2024), <https://ohiochannel.org/video/ohio-senate-energy-and-public-utilities-committee-4-9-2024>. [↑](#footnote-ref-36)
36. *In re Columbus & Southern Ohio Electric Co*., Case No. 83-1058-EL-AIR, Entry (Nov. 17, 1982). [↑](#footnote-ref-37)
37. *Id*., Opinion and Order at 8-14 (Nov. 5, 1982). [↑](#footnote-ref-38)
38. *Id*., Entry at 1 (Nov. 17, 1982). [↑](#footnote-ref-39)
39. *Id*., Order on Rehearing (March 16, 1983). [↑](#footnote-ref-40)
40. *Columbus & Southern Ohio Electric Co. v. Pub. Util. Comm*., (1984) 10 Ohio St.3d 12. [↑](#footnote-ref-41)
41. *Id.* [↑](#footnote-ref-42)
42. *In re Columbus & Southern Ohio Electric Co.*, Case No. 81-1058-EL-AIR, Order on Rehearing (May 1, 1984). [↑](#footnote-ref-43)
43. *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-44)
44. *In the Matter of The Ohio Utilities Co. Application for an Increase in Rates*, Case No. 79-529-WS-AIR, Opinion and Order (Jan. 18, 1977). [↑](#footnote-ref-45)
45. *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 (Sept. 7, 1977). [↑](#footnote-ref-46)
46. *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-47)
47. *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-48)
48. *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-49)
49. *Id.* at 4. [↑](#footnote-ref-50)
50. *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan,* Case No. 08-1094-EL-SSO, Fifth Entry on Rehearing at ¶ 64 (June 16, 2021). [↑](#footnote-ref-51)