**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. 22-391-EL-RDR |

**MEMORANDUM CONTRA THE PUCO STAFF’S MOTION FOR EXTENSION OF THE DEADLINE FOR FILING ITS AUDIT REPORT**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

# I. INTRODUCTION

FirstEnergy has operated a program for years that offers discounts to larger business customers (such as members of the formerly named Industrial Energy Users), potentially at the expense of residential consumers. The program is called the Non-Market-Based Services Rider (“Rider NMB”) pilot program.

Consumers were supposed to be protected by the conducting of a review by the PUCO Staff, as to whether the program results in unreasonable charges to residential consumers.[[1]](#footnote-2) But that review didn’t happen. After OCC complained to the PUCO, on behalf of residential consumers, the PUCO belatedly required the review.[[2]](#footnote-3)

But the review for consumer protection has been happening in slow motion. The belated review was to be completed by February 10, 2023, which itself reflected the substantial delay that OCC complained about when a report wasn’t happening. Now the auditor’s report is currently extended to April 10, 2023. But on March 31, 2023, the PUCO Staff filed a motion to extend the due date for the audit report until July 17, 2023. The motion is unreasonable and should be denied.

The PUCO Staff states that the extension is necessary because “[d]ue to complex issues in this case, data requests have taken longer than expected to be responded to.”[[3]](#footnote-4) However, nine months ago the PUCO ordered that FirstEnergy shall not “refuse or delay” information to the auditor.[[4]](#footnote-5) Even that order should have been unnecessary because R.C. Title 49 establishes the PUCO as in charge of utilities, not vice versa.

FirstEnergy is the last utility in Ohio, if not the United States, that should be indulged by regulators. In the applicable U.S. Deferred Prosecution Agreement, FirstEnergy Corp. admitted that it could be found guilty of a federal corruption crime.

The PUCO should not tolerate any stalling tactics by FirstEnergy against its two million consumers. The PUCO should take legal action against FirstEnergy. That is allowed by such statutes as R.C. 4905.54. Consumers already have waited far too long to find out if they have been harmed by FirstEnergy’s pilot program.

# II. ARGUMENT

 The Rider NMB pilot program allows certain large nonresidential consumers (like those represented by original intervenors Ohio Energy Group (“OEG”), Industrial Energy Users (“IEU”),[[5]](#footnote-6) and Ohio Manufacturers’ Association Energy Group (“OMAEG”)) to opt-out of paying transmission charges through FirstEnergy’s Rider NMB. But residential consumers are not eligible to participate in the pilot and must pay what FirstEnergy charges under Rider NMB.

The auditor here will evaluate whether the pilot shifts charges to residential and other non-participating consumers. That’s a polite way of saying whether residential consumers are being forced by FirstEnergy to subsidize big business customers.

In addition, FirstEnergy charges consumers millions of dollars for supplemental transmission project costs that are not reviewed for prudency by state or federal regulators. In its recent order regarding FirstEnergy’s Rider NMB update for 2023, the PUCO acknowledged that supplemental transmission project costs charged through Rider NMB “warrant[] further attention.”[[6]](#footnote-7)

The Rider NMB pilot program was approved by the PUCO over *six* *years ago* in FirstEnergy’s last electric security plan proceeding (Case No. 14-1297-EL-SSO).[[7]](#footnote-8) When the pilot program was first proposed, FirstEnergy claimed that the “pilot” nature of the program would allow it to “study the administrative burden and costs of allowing customers the option to have their [marketer] providers pay the NMB charges, as well as whether such a program would result in benefits to both the participating and non-participating customers.”[[8]](#footnote-9) The FirstEnergy/House Bill 6 scandal (and FirstEnergy/Ex-PUCO Chair scandal) teach that no one should be first in line to believe FirstEnergy. And at this point no regulatory authority should be tolerating any obstruction of regulatory scrutiny by FirstEnergy. A PUCO study is long overdue, and the audit report should not be further delayed.

But now, the PUCO Staff has filed a *second* motion to extend the due date for the audit report.[[9]](#footnote-10) The audit report was initially due to be filed on February 10, 2023.[[10]](#footnote-11) The PUCO Staff claims that “[d]ue to complex issues in this case, data requests have taken longer than expected to be responded to.”[[11]](#footnote-12) The PUCO Staff further states that the auditor “Exeter is still missing information that they need to proceed” and that FirstEnergy and Exeter “are working together to resolve any issues with these data requests.”[[12]](#footnote-13) It is unclear why FirstEnergy has not provided the information requested by the auditor who was hired by the state regulator, the PUCO.

Consumers should not be prejudiced by FirstEnergy’s apparent failure to timely provide information to the auditor. The Request for Proposal approved by the PUCO in this case expressly states that:

[FirstEnergy] ***shall provide any and all documents or information requested by the auditor selected and Staff.*** [FirstEnergy] may conspicuously mark such documents or information as being “confidential.” ***In no event, however, shall [FirstEnergy] refuse or delay providing such documents or information.***[[13]](#footnote-14)

Thus, there is no justification for FirstEnergy to delay providing information requested by the auditor. FirstEnergy’s apparent delay is unacceptable and defies the PUCO’s directives. And it defies the law that requires FirstEnergy to obey the PUCO’s directives. The PUCO should assess forfeitures against FirstEnergy, per R.C. 4905.54 and 4905.56. R.C. 4905.54 authorizes the PUCO to assess a forfeiture of up to $10,000 for each day FirstEnergy fails to comply with a PUCO order.

 Moreover, by coincidence, there is proposed legislation pending with the General Assembly that could make transmission cost recovery riders like Rider NMB and opt-out programs like the Rider NMB pilot permanent features of a utility’s electric security plan.[[14]](#footnote-15) So delays in the audit could coincidentally work to avoid the PUCO’s intended (but delayed) accountability for FirstEnergy to its consumers, given the potential impact of the bill if it becomes law. That coincidence should not be furthered by allowing delay by FirstEnergy.

# III. CONCLUSION

The PUCO should protect consumers by denying the PUCO Staff’s request to again delay the audit for FirstEnergy’s program, this time until July 17, 2023. The PUCO should take legal action, including forfeitures, against FirstEnergy for any stall tactics, not essentially penalize residential consumers by delaying the report about their rates.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

### I hereby certify that a copy of the foregoing Memorandum Contra the PUCO Staff’s Motion for Extension of the Deadline for Filing the Audit Report was served via electronic transmission upon the parties this 4th day of April 2023.

 */s/ Angela D. O’Brien*

 Angela D. O’Brien

 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 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 (October 12, 2016), at ¶ 310. [↑](#footnote-ref-2)
2. Case No. 22-391-EL-RDR, PUCO Entry (April 20, 2022). [↑](#footnote-ref-3)
3. PUCO Staff Motion at 3. [↑](#footnote-ref-4)
4. Request for Proposal No. RFP RA22-TR-1 (Reissued by PUCO Entry (June 15, 2022)), at 4. [↑](#footnote-ref-5)
5. IEU has renamed itself as OELC. [↑](#footnote-ref-6)
6. *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. 23-51-EL-RDR, Finding and Order (March 22, 2023), at ¶ 14; *see also In the Matter of the Application of Ohio Power Company to Update its Basic Transmission Cost Rider*, Case No. 23-57-EL-RDR, Finding and Order (March 22, 2023), at ¶ 14. [↑](#footnote-ref-7)
7. *In re Ohio Edison Co., the Cleveland Elec. Illum. Co., and the Toledo Edison Co.*, Case No. 14-1297-EL-SSO (“ESP IV Case”), Opinion and Order (March 31, 2016), Fifth Entry on Rehearing (October 12, 2016). [↑](#footnote-ref-8)
8. ESP IV Case, Opinion & Order (March 31, 2016), at 73; Fifth Entry on Rehearing (October 12, 2016), at ¶ 310. [↑](#footnote-ref-9)
9. PUCO Staff Motion at 3. [↑](#footnote-ref-10)
10. *Id.* [↑](#footnote-ref-11)
11. *Id.* [↑](#footnote-ref-12)
12. *Id.*  [↑](#footnote-ref-13)
13. Request for Proposal No. RFP RA22-TR-1 (Reissued by PUCO Entry (June 15, 2022)), at 4. (Emphasis added.) [↑](#footnote-ref-14)
14. *See* Senate Bill 102 (by Rep. Wilkin), 135th General Assembly (proposed amendments to R.C. 4928.143). [↑](#footnote-ref-15)