**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 |

**REPLY TO MEMORANDUM CONTRA**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

# INTRODUCTION

The FirstEnergy utilities seek to charge consumers for millions of dollars for transmission investment in supplemental transmission projects under Rider NMB. OCC asked the PUCO to protect FirstEnergy’s 1.9 million consumers by requiring the transmission charges to be collected subject to refund. FirstEnergy’s opposed this protection for its consumers.

FirstEnergy arguments are fundamentally flawed. They presume that OCC is asking the PUCO to perform its own investigation into supplemental transmission projects. Not true. OCC simply asks the PUCO to approve tariff language that will enable refunds to consumers if FERC rules favorably on OCC’s supplemental transmission projects complaint.[[1]](#footnote-2) Ordering refund language in FirstEnergy’s tariff is consistent with Chair French’s commitment to enable refunds to consumers whenever the law allows.[[2]](#footnote-3)

The PUCO should grant OCC’s request.

# ARGUMENT

## FirstEnergy’s arguments are misplaced because OCC’s motion seeks to further Federal objectives and purposes.

First Energy would have the PUCO believe that OCC asks the PUCO to impose tariffs in conflict with rates set by FERC.[[3]](#footnote-4) FirstEnergy proceeds to argue that under *Mississippi Power & Light Co. v. Mississippi ex rel. Moore* this violates the federal filed rates doctrine.[[4]](#footnote-5) But OCC does not ask the PUCO to conduct its own independent review of these costs or otherwise interfere with FERC’s ruling. Instead, we ask the PUCO to require tariff language that will carry out FERC’s ruling and protect consumers.[[5]](#footnote-6)

FirstEnergy’s argument demonstrates the need for the PUCO to take the very consumer protection action advocated for by OCC. “*Mississippi Power* is best read as a conflict pre-emption case . . .”[[6]](#footnote-7) In conflict pre-emption, “compliance with both state and federal law is impossible,” or “the state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”[[7]](#footnote-8) In *Mississippi Power*, the state’s prudence review was at odds with FERC’s determination of reasonably incurred operating costs,[[8]](#footnote-9) “*Mississippi’s* inquiry into the reasonableness of FERC-approved purchases was effectively an attempt to “regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates.”[[9]](#footnote-10)

Making Rider NMB subject to refund if FERC determines that consumers are improperly paying for supplemental transmission projects does not hinder compliance with federal law. Nor does it make compliance with both state and federal law impossible. OCC asks only for tariff language allowing consumers to receive refunds for overpayments subject to (and in furtherance of) a determination by FERC.

Because there is currently no mechanism to allow for such refunds,[[10]](#footnote-11) state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”[[11]](#footnote-12) This is because state law may prevent a refund if one is due.[[12]](#footnote-13) But the PUCO has authority to prevent such a result, in consumers’ interest. That authority rests with the PUCO ordering tariff language that allows for refunds.

Ohio Supreme Court Justice Kennedy explained the issue succinctly.[[13]](#footnote-14) Justice Kennedy, in a concurring opinion, was addressing a $285 million windfall for DP&L that resulted after the Court found DP&L’s stability charge unlawful, but did not order consumer refunds.[[14]](#footnote-15) Justice Kennedy noted that such “unfairness and windfalls are [not] inevitable.”[[15]](#footnote-16) This is because “[t]he legislature gave the commission the discretionary authority to order a refund. All the commission had to do was require a refund clause to be part of the tariff pursuant to R.C. 4905.32.”[[16]](#footnote-17) Justice Kennedy was right. The PUCO could have protected consumers but did not, over OCC objections. It can, however, do the right thing now for FirstEnergy consumers. It should require the transmission charges to be collected subject to refund.

FirstEnergy’s argument should fail. It demonstrates the opposite—there is *need* to make its transmission rider subject to refund as requested by OCC. The PUCO should order refund language placed into FirstEnergy’s tariffs to protect consumers.

## PUCO precedent supports protecting consumers from unlawful charges by ordering utilities to collect an existing rate subject to refund.

FirstEnergy argues that FERC must rule on OCC’s complaint before the PUCO may order that Rider NMB be collected subject to refund.[[17]](#footnote-18) It asserts that supplemental transmission projects are subject to recovery under R.C. 4928.05(A)(2).[[18]](#footnote-19) FirstEnergy’s assertions are misplaced.

OCC requests that Rider NMB be collected subject to refund “if the charges or the process for review are found to be unlawful by FERC.”[[19]](#footnote-20) Supplemental transmission projects are discretionary spending, planned and undertaken by transmission companies and comprised of transmission expansion or enhancements not necessary to support baseline upgrade needs.[[20]](#footnote-21) They are approved under a limited “do no harm” review by PJM.[[21]](#footnote-22)

Granting OCC’s request allows the PUCO to protect consumers from the unlawful charges if FERC determines that this review process was unlawful or unreasonable. PUCO precedent supports ordering utilities to collect an existing rate subject to refund for consumer protection, as fully explained in OCC’s Memorandum in support.[[22]](#footnote-23)

## The PUCO has declined to independently review supplemental transmission projects but has not ruled on the subject matter of OCC’s motion.

FirstEnergy cites multiple cases to support its argument that the PUCO has denied OCC’s requests to review supplemental transmission project costs.[[23]](#footnote-24) Again, FirstEnergy misses the mark. First, OCC is not asking the PUCO to review supplemental transmission projects, as explained above.

Second, the finding and orders in the cases cited by FirstEnergy were issued by the PUCO before September 28, 2023 when OCC filed a complaint regarding supplemental transmission projects at FERC.[[24]](#footnote-25) The remedy sought by OCC in those cases was fundamentally different than the remedy sought here. FirstEnergy argues that “[i]n each of these instances, the Commission declined to adopt OCC’s recommendations and instead committed to ‘continue to thoroughly engage with FERC . . . and keep parties and the public apprised of any developments.’”[[25]](#footnote-26) OCC’s Motion does not justify changing this approach.”[[26]](#footnote-27)

OCC asks the PUCO to allow tariff language that will facilitate any FERC order that is issued on OCC’s complaint. FirstEnergy’s tariffs should not create an obstacle to carrying out FERC’s order.

# CONCLUSION

FirstEnergy’s arguments in its Memo Contra are fundamentally flawed. To protect consumers from unnecessary and unlawful charges, the PUCO should order Rider NMB charges to be collected subject to refund. The PUCO has authority and legal grounds to do so. Ordering the tariffs to be collected subject to refund would be consistent with Chair French’s recent remarks committing to allowing refunds to consumers whenever legally possible.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Reply to Memorandum Contra was served on the persons stated below via electronic transmission, this 29th 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. Docket No. EL23-105-000, Comments of the Public Utilities Commission of Ohio’s Office of the Federal Energy Advocate (November 17, 2023). [↑](#footnote-ref-2)
2. 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-3)
3. FirstEnergy Memo Contra OCC’s Motion to Collect Rider NMB Subject to Refund (“FirstEnergy Memo Contra”), at 4 (April 22, 2024). [↑](#footnote-ref-4)
4. *Id.* [↑](#footnote-ref-5)
5. *See, e.g.,* OCC Memo in Support (April 5, 2024). [↑](#footnote-ref-6)
6. *Oneok, Inc. v. Learjet, Inc*., 575 U.S. 373, 374. [↑](#footnote-ref-7)
7. *California v. ARC America Corp*., 490 U. S. 93, 100, at 101 (1989). [↑](#footnote-ref-8)
8. *See* *Miss. Power & Light Co. v. Miss.*, 487 U.S. 354, 356 (1988). [↑](#footnote-ref-9)
9. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 389 (2015), *citing Miss. Power & Light Co. v. Miss.*, 487 U.S. 354 (1988). [↑](#footnote-ref-10)
10. *See* Revised Tariff Pages (March 21, 2024). [↑](#footnote-ref-11)
11. *California v. ARC America Corp.*, 490 U. S. 93, 100, 101 (1989). [↑](#footnote-ref-12)
12. *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 254 (1957). [↑](#footnote-ref-13)
13. *In re Dayton Power & Light Co.*, 154 Ohio St.3d 237, 242-46 (2017) (Kenndy J., concurring in judgment only). [↑](#footnote-ref-14)
14. *See id.* at 244. [↑](#footnote-ref-15)
15. *Id.* at 245. [↑](#footnote-ref-16)
16. *Id.* at 246. [↑](#footnote-ref-17)
17. FirstEnergy Memo Contra, at 5. [↑](#footnote-ref-18)
18. FirstEnergy Memo Contra, at 5. [↑](#footnote-ref-19)
19. OCC Memo in Support, at 2. [↑](#footnote-ref-20)
20. Executive Summary and Rider NMB Pilot Audit Report, Review of FirstEnergy’s NMB Rider (“Exeter Audit”), Case No. 22-391-EL-RDR, at 14 (July 17, 2023). [↑](#footnote-ref-21)
21. *Id.* [↑](#footnote-ref-22)
22. OCC Memo in Support, at 3-5. [↑](#footnote-ref-23)
23. *See e.g.*, *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 (“Companies’ 2023 Annual NMB Order”), ¶ 10 (March 22, 2023); *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 (“AEP Ohio’s 2023 Annual BTCR Order”), ¶ 9 (March 22, 2023); *In the Matter of the Application of the Dayton Power and Light Company D/B/A AES Ohio to Update Its Transmission Cost Recovery Rider-Nonbypassable,* Case No. 23-130-EL-RDR, Finding and Order (“AES Ohio’s 2023 Annual TCRR-N Order”), ¶ 10 (May 17, 2023); *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust and Set Its Base Transmission Rate Rider,* Case No. 23-457-EL-RDR, Finding and Order (“Duke’s 2023 Annual BTR Order”), ¶ 10 (September 20, 2023). [↑](#footnote-ref-24)
24. Docket No. EL23-105-000. [↑](#footnote-ref-25)
25. Companies’ 2023 Annual NMB Order at ¶ 14; AEP Ohio’s 2023 Annual BTCR Order at ¶ 14; AES Ohio’s 2023 Annual TCRR-N Order at ¶ 14; Duke’s 2023 Annual BTR Order at ¶ 14. [↑](#footnote-ref-26)
26. FirstEnergy Memo Contra, at 6 (April 22, 2024). [↑](#footnote-ref-27)