**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| --- |
| In the Matter of the Application of Ohio )  Edison Company , The Cleveland Electric )  Illuminating Company and The Toledo ) Case 14-1297-EL-SSO  Edison Company for Authority to Provide )  a Standard Service Offer Pursuant to R.C. )  §4928.143 in the Form of an Electric )  Security Plan. ) |

# APPLICATION FOR REHEARING

# BY

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

**AND**

**NORTHWEST OHIO AGGREGATION COALITION**

The Office of the Ohio Consumers’ Counsel (“OCC”) files this application for rehearing to protect 1.9 million consumers from paying increased rates under FirstEnergy's electric security plan that is premised upon charging customers above-market prices to bailout power plants. New electric security plan rates are days away from being implemented, after the PUCO approved FirstEnergy's tariffs to charge customers higher ESP rates beginning June 1, 2016.

Under the approved tariffs, FirstEnergy will collect increased rates from customers for the electric security plan term that does not end until June 1, 2024. The PUCO's Finding and Order of May 25, 2016, approving the tariffs implementing FirstEnergy’s ESP rates were unreasonable and unlawful in the following respects:

A. The PUCO unreasonably found the tariff rates proposed by FirstEnergy to be consistent with its Opinion and Order.

FirstEnergy's tariffs failed to implement Rider RRS as approved by the PUCO. [[1]](#footnote-1)

B. The PUCO erred in unlawfully approving the tariff rates for an Electric Security plan that contained a Retail Stability Rider that did not satisfy the requirements of R.C. 4928.143(B)(2)(d).

C. The PUCO erred in approving rates to implement an electric security plan when that plan was not authorized by it, in compliance with R.C. 4928.141(B).

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 or modify its Opinion and Order as requested by OCC and NOAC.

Respectfully submitted,

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# MEMORANDUM IN SUPPORT

**I. INTRODUCTION**

The PUCO still has an opportunity to protect Ohioans from paying higher electric rates premised upon a plan that would allow FirstEnergy to charge customers billions of dollars to subsidize old, inefficient, affiliate-owned, coal-fired and nuclear power plants. To protect consumers and the public interest, the PUCO should reconsider its recent approval of FirstEnergy's tariffs consistent with this application for rehearing.

# II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute permits “any party who has entered an appearance in person or by counsel in the proceeding" to apply for rehearing in respect to "any matters determined in the proceeding.” Applications for rehearing must be filed within thirty days of the PUCO's orders.

OCC filed a motion to intervene in this proceeding on August 14, 2014, which was granted by Entry dated December 1, 2014. OCC also filed testimony

regarding FirstEnergy's electric security plan (“ESP”). OCC was an active participant in the evidentiary hearings.

R.C. 4903.10 requires that an application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” Additionally, Ohio Adm. Code 4901-1-35(A) states: “An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing.”

In considering an application for rehearing, R.C. 4903.10 provides that “the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.” The statute also provides: “[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be

changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.”

The statutory standard for abrogating some portions of the Finding and Order are met here. The PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Finding and Order of May 25, 2016.

# ERRORS

## A. The PUCO unreasonably found the tariff rates proposed by FirstEnergy to be consistent with its Opinion and Order. FirstEnergy’s tariffs failed to implement Rider RRS as approved by the PUCO. [[2]](#footnote-2)

FirstEnergy’s ESP application was centered around what it called an "Economic Stability Program." Under the Economic Stability Program, customers were allegedly protected against the risk of increasing and volatile energy prices. A key to the Economic Stability program was FirstEnergy's Retail Rate Stability Rider (“Rider RRS”).

Rider RRS was intended to function through a Power Purchase Agreement (“PPA”) between FirstEnergy and its unregulated affiliate, FES. Under the PPA, FES would sell to FirstEnergy all of the capacity, energy and ancillary services, from FES' Sammis, Davis-Besse and its OVEC entitlements (“PPA Plants”). In return, FirstEnergy's customers would pay FES for all of the PPA Plant’s costs, plus a guaranteed rate-of-return. FirstEnergy or its agent would sell the capacity, energy and ancillary services, on the PJM markets, but not to its customers. Nonetheless, FirstEnergy would charge all customers the difference between the revenue generated from the sale of the PPA Plants’ capacity, energy and ancillary services and the PPA Plants’ costs (including FES’s guaranteed rate-of-return). This would generate either credits or charges to customers, depending in large part upon the market price paid for the sale of energy, capacity and ancillary services. Rider RRS was pitched to the PUCO as a hedge for customers against the risk of increasing and volatile energy prices.

The PUCO in its March 31, 2016 Opinion and Order modified and approved Rider RRS as part of a package of ESP rates. The PUCO ruled that, when pricing and all other terms and conditions of the ESP plan were considered, the ESP was more favorable in the aggregate than a market rate offer.[[3]](#footnote-3) In reaching this conclusion, it relied in large part upon its finding that Rider RRS would generate $256 million in credits for customers over the eight year term of the electric security plan.[[4]](#footnote-4)

The PUCO also found that approving Rider RRS was in the public interest, which allowed the stipulations to pass the second prong of the three prong stipulation standard. The PUCO ruled that passing Rider RRS costs onto consumers would prevent Sammis and Davis-Besse from closing, thus avoiding substantial transmission investments that would be required to maintain system reliability.[[5]](#footnote-5) The PUCO also found that passing costs onto customers for Rider RRS would encourage resource diversity. The PUCO ruled that Rider RRS will support continued operation of Sammis and Davis-Besse. [[6]](#footnote-6) And the PUCO found that passing PPA costs onto consumers through Rider RRS will preserve Sammis and Davis-Besse’s positive economic impact on Ohio.

The PUCO's Order approving Rider RRS assumed that the hedge associated with Rider RRS was premised upon FirstEnergy and FES executing a PPA agreement.[[7]](#footnote-7) But after the PUCO's Order was issued, FERC issued a ruling that made it much more difficult for FirstEnergy to execute its PPA agreement.[[8]](#footnote-8) FERC's ruling required

FirstEnergy's affiliate PPA to be reviewed by it, subject to the *Edgar* and *Alleghany* standards.[[9]](#footnote-9)

FirstEnergy now appears to have abandoned efforts to execute a PPA with FES or any other affiliate. FirstEnergy noted in its May 2, 2016 application for rehearing that review of a purchase power agreement "would likely require a much more lengthy time period to come to conclusion."[[10]](#footnote-10) Consequently, First Energy proposed on rehearing to modify its Rider RRS without reliance on or the existence of a PPA or any other contractual arrangement with FES.[[11]](#footnote-11) FirstEnergy's "modified Rider RRS" proposal fundamentally changes how Rider RRS will function.

Nonetheless, on May 13, 2016, FirstEnergy filed its ESP tariffs and included a tariff called "Rider RRS." Under its filed tariffs, Rider RRS has no credits or charges associated with it. And there is no PUCO-approved underlying mechanism (PPA or otherwise)[[12]](#footnote-12) to enable FirstEnergy to set the charges or credits under Rider RRS. The underlying mechanism to set the charges and credits under Rider RRS is being proposed through FirstEnergy's Application for Rehearing and the Rehearing Testimony of Witness Mikkelsen.

FirstEnergy's filing rejected what the PUCO has approved and modified. FirstEnergy chose to change Rider RRS so as to not run afoul of the FERC April 27, 2016 Order. By changing the very nature of Rider RRS, the Companies rejected the PUCO's modifications to its electric security plan. That should have meant that FirstEnergy was obligated to withdraw its application from consideration and file a new application.

And yet the PUCO forged ahead and approved FirstEnergy's tariffs as "consistent" with its March 31, 2016 Opinion and Order. The PUCO was wrong.

FirstEnergy's tariffs lack the credits and charges that the PUCO approved in its March 31, 2016 Opinion and Order--credits and charges which were the basis for concluding that the ESP met the statutory test under R.C. 4928.143(C). And FirstEnergy's tariffs have no mechanism in place to set the Rider. The mechanism that the PUCO relied upon in approving Rider RRS - an affiliate PPA between FirstEnergy and FES - is gone. The substitute mechanism, proposed in Ms. Mikkelsen's Rehearing testimony, has yet to be approved by the PUCO. The Companies filed its retail tariff "temporarily" pending the PUCO's approval of its modified Rider RRS.[[13]](#footnote-13) In other words, the Rider RRS tariff acts as a placeholder until the PUCO approves its modified rider RRS. But a placeholder, temporary Rider RRS is clearly not what was authorized and approved by the PUCO.

The PUCO's error in approving FirstEnergy's ESP tariffs will harm FirstEnergy customers, despite the fact that Rider RRS contains no charges or credits. The PUCO approved FirstEnergy’s ESP rates as a package. The ESP rate package only passed muster because of the alleged benefits of Rider RRS. Those alleged benefits are missing now with the fundamental changes FirstEnergy has made to Rider RRS. Rider RRS is no longer a charge or a credit. There is no mechanism in place to set the rider. The rider is not linked to a PPA. The PUCO erred in approving FirstEnergy's new ESP rates and finding the tariffs to be consistent with its March 31, 2016 Opinion and Order.

## B. The PUCO erred in unlawfully approving the tariff rates for an Electric Security Plan that contained a Retail Stability Rider that did not satisfy the requirements of R.C. 4928.143(B)(2)(d).

In its Opinion and Order approving the Retail Stability rider, the PUCO found that the retail stability rider complied with R.C. 4928.143(B)(2)(d).[[14]](#footnote-14) The PUCO first found Rider RRS was a "charge" even under the Companies' estimates for the first two years of ESP IV. Second the PUCO found Rider RRS relates to bypassability and served as a financial limitation on shopping. Third, the PUCO found that Rider RRS would have the effect of stabilizing or providing certainty regarding retail electric service.[[15]](#footnote-15)

But that Rider RRS approved by the PUCO is vastly different from the Rider RRS presented in the FirstEnergy tariff filing approved by the PUCO. First, as acknowledged by the PUCO,[[16]](#footnote-16) the tariffs contain no charge (or credit) to customers for Rider RRS. Second, the PUCO's finding that the Rider relates to "bypassability" or "default service" may no longer apply. With no mechanism identified to determine charges or credits, the record is void of evidence on how the new Rider would function. Third, the PUCO finding that Rider RRS will stabilize or provide certainty does not apply to the filed Rider RRS, because how the Rider works and what retail mechanism will be used for determining charges or credits is not known.

Rider RRS as contained in FirstEnergy's tariffs is inconsistent with what was approved by the PUCO. The rider, as filed in FirstEnergy's tariffs, fails to meet R.C. 4928.143(B)(2)(d). The Commission lacks authority to approve it. Therefore, rehearing should be granted.

## C. The PUCO erred in approving tariffs to implement an electric security plan when that plan was not authorized by it, in compliance with R.C. 4928.141(B).

The changes made by FirstEnergy to Rider RRS were inconsistent with the electric security plan that the PUCO modified and approved in its March 31, 2016 Opinion and Order. FirstEnergy’s tariff filing disregards a part of its standard service offer the PUCO had modified. FirstEnergy instead should have rejected its ESP, as modified and approved by the PUCO, and filed a new ESP plan.

The PUCO approved FirstEnergy’s ESP IV that included, as its centerpiece, a power purchase agreement between FirstEnergy and its unregulated affiliate, FES. That PPA, subsequent to the PUCO’s approval, required FERC review and approval before it could be used as a mechanism to charge or credit customers. FirstEnergy has maintained a Rider RRS in its May 13, 2016 tariff filing. But that Rider is fundamentally different than the Rider RRS approved by the PUCO in its Opinion and Order. The PUCO erred by approving the Rider RRS tariff filed by FirstEnergy on May 13, 2016.

The law does not permit the PUCO to approve tariffs that permit unauthorized ESP rates to be charged to customers. FirstEnergy's tariffs were inconsistent with the PUCO's Order, and thus must be considered a rejection of the PUCO's modified and approved ESP. For example, the PUCO modified the Stipulation in the following manner: “FirstEnergy, rather than ratepayers, will bear the burden for any capacity performance penalties incurred by the generation units. Under no circumstances will capacity performance penalties be considered recoverable under Rider RRS.”[[17]](#footnote-17) FirstEnergy’s failure to proceed with its PPA makes it impossible for FirstEnergy to accept this PUCO modification to the ESP IV plan, and therefore must reject it.

Another PUCO modification to the Stipulation involved the recovery of costs associated with an extended PPA Plant outage. The PUCO’s Order stated: “Additionally, the Commission reserves the right to prohibit recovery of any costs related to any unit for any period exceeding 90 days for any forced outage during the term of ESP IV, unless otherwise recommended by Staff and approved by the Commission.”[[18]](#footnote-18) Once again, absent a PPA, it is impossible for FirstEnergy to accept this modification to its ESP IV proposal, and therefore, must be rejected.

Finally, the PUCO included in its Order a clarification intended to limit costs collected from consumers through Rider RRS. The PUCO stated: “We will modify the Stipulations to clarify that no [PPA] Plant retirement costs may be recovered through Rider RRS.”[[19]](#footnote-19) Without pursuit of the PPA, FirstEnergy cannot accept this clarification to the ESP IV proposal, and must instead reject it.

After rejecting the PUCO's modified and approved ESP, FirstEnergy must withdraw its application and file a new application for a standard service offer. That process is prescribed under R.C. 4928.141(B). The PUCO must set the time for hearing on the application, send notice of the hearing to the utility, and publish notice of the application in a newspaper of general circulation in each county of the utility's certified territory. (R.C. 4928.141(B). In the meantime, FirstEnergy's existing rates must continue. The PUCO's acted outside its jurisdiction in approving tariffs that implement a new ESP without complying with the process set forth in R.C. 4928.141(B). Therefore, rehearing on this issue should be granted.

# IV. CONCLUSION

The PUCO should grant rehearing on OCC’s claims of error and modify or abrogate its May 25, 2016 Finding and Order. Granting rehearing as requested by OCC is necessary to ensure that FE customers are not subject to unreasonable and unjust charges.

Respectfully submitted,

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# CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing by the Office of the Ohio Consumers’ Counsel and NOAC was served via electronic transmission, to the persons listed below, on this 31st day of May 2016.

*/s/ Larry S. Sauer*

Larry S. Sauer

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1. FirstEnergy admits that Rider RRS "does not currently have a mechanism in place to set the charge." FirstEnergy Memorandum Contra Joint Motion for Interlocutory Appeal at 6 (May 23, 2016). [↑](#footnote-ref-1)
2. FirstEnergy admits that Rider RRS "does not currently have a mechanism in place to set the charge." FirstEnergy Memorandum Contra Joint Motion for Interlocutory Appeal at 6 (May 23, 2016). [↑](#footnote-ref-2)
3. Opinion and Order at 118. [↑](#footnote-ref-3)
4. Id. at 85. [↑](#footnote-ref-4)
5. Id. at 87. [↑](#footnote-ref-5)
6. Id. [↑](#footnote-ref-6)
7. See, e.g., Opinion and Order at 88 -91. [↑](#footnote-ref-7)
8. *Electric Power Supply Assoc. et al v. FirstEnergy Solutions et al.,* FERC Docket No. EL 16-34-000, Order Granting Complaint (Apr. 27, 2016). [↑](#footnote-ref-8)
9. Id. at ¶62. [↑](#footnote-ref-9)
10. Application for Rehearing at 14 (May 2, 2016). [↑](#footnote-ref-10)
11. Id. [↑](#footnote-ref-11)
12. See Memo Contra FirstEnergy admits that Rider RRS "does not currently have a mechanism in place to set the charge." FirstEnergy Memorandum Contra Joint Motion for Interlocutory Appeal at 6 (May 23, 2016). [↑](#footnote-ref-12)
13. See Memo Contra Joint Application for Interlocutory Appeal at 6. [↑](#footnote-ref-13)
14. Opinion and Order at 108-109. [↑](#footnote-ref-14)
15. Opinion and Order at 108-109. [↑](#footnote-ref-15)
16. Finding and Order at 4 (May 25, 2016). [↑](#footnote-ref-16)
17. Opinion and Order at 92. [↑](#footnote-ref-17)
18. Id. [↑](#footnote-ref-18)
19. Id. [↑](#footnote-ref-19)