**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Campbell Soup Supply Company L.L.C. for the Approval of a Reasonable Arrangement for its Napoleon, Ohio Plant. | ))))) | Case No. 21-1047-EL-AEC |

**REPLY BRIEF FOR CONSUMER PROTECTION**

**BY**

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# I. INTRODUCTION

The PUCO should reject the Settlement[[1]](#footnote-2) proposed by Campbell Supply (“Applicant”) and the Staff of the Public Utilities Commission of Ohio (“PUCO”). The Applicant and the PUCO Staff are misusing the PUCO’s settlement process to obtain the litigation advantage afforded by the PUCO’s settlement standards. The PUCO Staff’s Settlement is not a compromise. It merely adopts the Applicant’s litigation position. The PUCO Staff’s Settlement serves no purpose but to lower the bar for the Applicant to obtain the PUCO’s approval of reduced charges – at the expense of other FirstEnergy consumers.

It is not in the public interest to exempt the Applicant from paying transmission charges to Toledo Edison (“FirstEnergy”). The Settlement allows the Applicant to participate in a so-called “pilot” program designed to waive large corporate-customer payments of FirstEnergy’s Non-Market-Based (NMB) Services Rider. (While the program was characterized as a pilot, the expected PUCO analysis of the program has yet to occur now over five years later. And it’s beginning to look a lot like a permanent program for reducing transmission charges to large corporate customers at the expense of other consumers such as residential and smaller businesses.) Under this FirstEnergy pilot program the Applicant will pay for its transmission service through none other than Energy Harbor, the Applicant’s generation supplier (and a former FirstEnergy affiliate).

As stated, the pilot program has been in effect for over five years without the comprehensive review that the PUCO promised.[[2]](#footnote-3) That includes the lack of the PUCO’s intended review of what other customers are having to pay to make FirstEnergy whole for the revenues it loses from pilot program participants. There should be no more corporate customers accepted for the pilot program until the PUCO’s review is completed, discussed by parties and resolved by PUCO ruling.

Even so, the Settlement fails the PUCO’s three-prong test for evaluating settlements as discussed in OCC’s Post-Hearing Brief.[[3]](#footnote-4) Despite the claims of the Applicant[[4]](#footnote-5) and the PUCO Staff,[[5]](#footnote-6) the Settlement is not in the public interest. As stated, their Settlement simply adopts the Applicant’s proposal contained in its application, exactly as filed.[[6]](#footnote-7)

The arrangement allows the Applicant to pay less for electric transmission.[[7]](#footnote-8) But FirstEnergy will expect others to make it whole for the loss of revenue from the Applicant that is no longer paying transmission charges through Rider NMB.[[8]](#footnote-9) FirstEnergy will expect other customers, including residential consumers, to make it whole by paying more for transmission, through Rider NMB, if the Applicant participates in the pilot program.[[9]](#footnote-10)

Despite the Applicant’s claims,[[10]](#footnote-11) costs that the Applicant will be avoiding will be shifted to other non-participating customers (including residential consumers) who pay the Non-Market Based Rider charge.[[11]](#footnote-12) Moreover, despite the Applicant’s claims to the contrary,[[12]](#footnote-13) there is no evidence of any commitment by the Applicant to promote economic development or increase employment as a result of participating in the pilot program.[[13]](#footnote-14)

The Settlement proposed by the PUCO Staff and the Applicant should not be approved. It fails the PUCO’s three-part test for settlements. It also is insufficient under the standards the PUCO articulated when it approved FirstEnergy’s pilot program for this Rider.[[14]](#footnote-15)

Further, on February 23, 2022, the PUCO’s Finding and Order in FirstEnergy’s most recent Non-Market Based Services Rider Review case[[15]](#footnote-16) specifically ordered a review of the pilot program. The PUCO found that “Staff acknowledged the prior Commission directive for Staff to review the actual results of the NMB Pilot Program and to report its findings to the Commission. Staff specifically notes in its review and recommendation that this Commission-ordered review will be initiated by the end of 2022.”[[16]](#footnote-17) However, a completion date for the review was not announced. To protect consumers from unnecessary cost-shifting to make FirstEnergy whole, no new participants should be added to the pilot program until this review is undertaken and completed. [[17]](#footnote-18)

# II. THE PUCO SHOULD REJECT THE PROPOSED SETTLEMENT BECAUSE IT DOES NOT MEET THE THREE-PRONG TEST AND IS CONTRARY TO THE PUCO’S OWN GUIDELINES FOR APPROVAL OF THE PILOT PROGRAM

## A. The Applicant/PUCO Settlement does not benefit consumers or the public interest and should be rejected.

The Applicant claims that the Settlement will benefit the public interest by enabling or “incentivizing” the Applicant to manage its transmission costs.[[18]](#footnote-19) Clearly, by joining the Rider NMB opt-out pilot program, the Applicant’s own transmission payments will be reduced.[[19]](#footnote-20) But FirstEnergy’s non-market-based transmission costs will persist and other customers will have to pay more to make FirstEnergy whole.[[20]](#footnote-21)

The Applicant claims that the “proposed reasonable arrangement will not have any significant impact on other Toledo Edison customers.”[[21]](#footnote-22) The Applicant argues that the “proposed reasonable arrangement will not result in cost-shifting.”[[22]](#footnote-23) The Applicant then qualifies this assertion by claiming that even if “there is impact on other customers, that potential impact would be de minimus.”[[23]](#footnote-24)

But on cross-examination, Applicant’s witness Seryak admitted that transmission rates charged to other customers would increase if Applicant’s unique arrangement were approved.[[24]](#footnote-25) The Applicant argues that it has “overpaid its transmission costs” by about $280,000 per year.[[25]](#footnote-26) Applicant’s witness testified that charges of approximately $280,000 per year may be shifted for other customers to pay.[[26]](#footnote-27)

The Applicant’s argument – that there is no impact on other customers, and even if there is an impact, it is de minimus – is disingenuous. First, on cross-examination, Applicant’s witness admitted that costs would shift to other customers as a result of the reasonable arrangement allowed in the Settlement.[[27]](#footnote-28) Applicant’s bills for transmission services will be $280,000 less as a result of the Settlement.[[28]](#footnote-29) FirstEnergy will expect other customers, including residential consumers, to make it whole for the shortfall to FirstEnergy/Toledo Edison.[[29]](#footnote-30) Second, the “de minimus” argument is perhaps understandable if this arrangement is being looked at *only* from Applicant’s perspective. But with the growing number of participants in the pilot program the amount no longer becomes a “de minimus” impact.”

Despite the Applicant’s[[30]](#footnote-31) and PUCO Staff’s[[31]](#footnote-32) claims to the contrary, the Settlement does not benefit consumers or the public interest. It thus fails the second prong of the settlement standard because of the cost shifting that it will create. As OCC witness Haugh testified, “costs will be shifted once the Applicant enters the opt-out pilot program…there will be a shortfall of revenue for FirstEnergy and this shortfall will need to be collected from other customers.”[[32]](#footnote-33)

Moreover, the Settlement offers very little benefit to consumers. The Applicant argues that it has made investments in and paid taxes to the community.[[33]](#footnote-34) And says that it is “working to add” additional employees.[[34]](#footnote-35) But there is no commitment to continue any of this if the Applicant participates in the pilot program. Nor are Applicant’s “investments” contingent on approval of the Settlement.

The Applicant’s witness testified on cross-examination that it is not committing to a specific level of capital investment in Ohio.[[35]](#footnote-36) And it is not guaranteeing a specific employee level[[36]](#footnote-37) as a result of approval of the unique arrangement presented in the Settlement. The benefits that the Applicant touts as being provided from the unique arrangement will be available whether the PUCO approves the Settlement or not.[[37]](#footnote-38)

In authorizing the pilot opt-out program, the PUCO ruled that customer participation in the Rider NMB pilot program must be “appropriate” and “in the public interest.”[[38]](#footnote-39) The purpose of the pilot program was to study “whether such a program would result in benefits to both participating and non-participating customers.”[[39]](#footnote-40) The PUCO similarly described the pilot as providing an “opportunity to determine if industrial customers can obtain substantial savings by obtaining certain transmission services outside of Rider NMB without imposing significant costs on other customers*.*”[[40]](#footnote-41)

In this case the Settlement uniquely benefits only the Applicant. The Settlement offers very little (if any) benefits to other consumers. To the contrary, the Settlement shifts costs from Applicant to other customers. Because the Settlement does not benefit consumers or the public interest, the Settlement fails the second prong of the PUCO’s settlement standard. The PUCO should reject the Settlement.

## B. The Applicant/PUCO Settlement violates regulatory principles and practices and should be rejected.

The PUCO directed FirstEnergy and the PUCO Staff “to continuously review the actual results of the Rider NMB pilot program and periodically report their findings to the Commission.”[[41]](#footnote-42) The Applicant claims that PUCO Staff has “continuously reviewed” the pilot program as directed by the PUCO.”[[42]](#footnote-43) But, as the PUCO recognized in its Order, this review has not occurred but “will be initiated by the end of 2022.”[[43]](#footnote-44) *The lack of reviewing and reporting violated a settlement standard, the settlement standard that regulatory principles and practices were followed.*

It is true that in various rider proceedings in the last five years, the PUCO Staff has filed reports mentioning the Rider NMB Pilot Program.[[44]](#footnote-45) But none of the Staff Reports, including the one most recently filed,[[45]](#footnote-46) has information about cost data and do not address what the PUCO directed in authorizing the pilot program.[[46]](#footnote-47)

*Neither Applicant nor Staff addresses the fact that none of these reports provide the PUCO’s expected review. Again, those standards involve:* (i) whether there is an aggregate savings in transmission costs for all customers, (ii) whether and how much transmission costs are being shifted to non-participating customers (which would include residential consumers, who cannot participate), (iii) whether the benefits of the pilot program outweigh any costs, and (iv) whether Rider NMB results in an overall cost savings to customers.[[47]](#footnote-48)

The six Staff Reports filed on the NMB rider pilot program touch on general data, but not the criteria. For example, the Staff Report, filed in Case No. 20-1768, identifies that “75 customers are expected to be participating in the Pilot as of March 1, 2021.”[[48]](#footnote-49) That’s up from approximately 40 customers “expected to be participating in the Pilot as of March 1, 2017” according to the first Staff Report issued on Rider NMB.[[49]](#footnote-50) Each of these two-page Reports briefly describe the number of customers and function of the rider. Additional analyses on the PUCO’s enumerated criteria are not provided.

In any event, the cost-shifting impacts upon residential consumers have been increasing over the five years without the intended PUCO review. The Applicant claims that what others (such as residential consumers) pay for its rate reductions is “de minimus.”[[50]](#footnote-51) That is the wrong perspective. The PUCO’s standards for settlements – and the public interest and regulatory principles that are part of those standards – do not support making other customers subsidize these corporate rate reductions so that FirstEnergy is made whole for the Applicant’s (and others’) benefits.

The PUCO in its February 23, 2022 Finding and Order[[51]](#footnote-52) acknowledged that the review of Rider NMB called for under FirstEnergy’s electric security plan had not been done. It directed the Staff to conduct the long-overdue review.[[52]](#footnote-53) The Settlement should not be approved until the PUCO-ordered Staff review of the pilot program is completed, debated by parties, and resolved by the PUCO (including as to its impact on residential consumers).

Given this situation and in any event, the PUCO should require a consumer protection if it approves the Settlement (which it should not approve). The PUCO should order that any delta revenue or other such charges that FirstEnergy is allowed to collect *will be paid by customers in the Applicant’s own customer class* – and not paid by smaller business and residential customers.[[53]](#footnote-54) That approach would avoid the unreasonable shifting of charges to the residential and other consumer classes.

## C. The PUCO should reject the Settlement because it lacks both diversity of those who signed it and serious bargaining among parties and is a misuse of the settlement standards.

The Settlement lacks serious bargaining as it adopts the application exactly as it was filed. Essentially, the Settlement was adopted not to compromise but to gain a litigation advantage from the PUCO’s Settlement standards that favor stipulators. Under the PUCO’s settlement standards the PUCO reviews the stipulators’ proposal as a “package.” That means parties recommending rejection of the Settlement have to meet the more difficult standard of rejecting the package (all the terms) as compared to arguing against discrete proposals in litigation without a settlement. This is an unfair scheme that harms consumers that oppose a settlement. But it is a great benefit to those that seek a lower burden to present their case. Given the misuse of the standards, the Settlement is not entitled to be considered as a package.

The Applicant asserts that “no single party is afforded veto power under the first part of the three-part test.”[[54]](#footnote-55) A settlement signed merely by the utility and employees (Staff) of the PUCO itself, in a case with opposition to it by the party (OCC) providing broad representation of FirstEnergy’s 1.9 million residential consumers, should be a non-starter and unfeasible for adoption by the PUCO Commissioners. Giving the Applicant the benefit of the PUCO’s favorable settlement standards to the detriment of consumers, for a settlement that is so lacking in diversity of interests, should not be allowed.

# III. CONCLUSION

The Settlement does not pass the PUCO’s three-part test for evaluating settlements. The Settlement lacks diversity of interests (by virtue of no consumer advocate signing it) and was not the product of serious bargaining (as it simply adopted the application). The Settlement is a misuse of the PUCO’s settlement standards for the Stipulators to obtain the litigation advantage afforded by those standards, without any real compromise. The Settlement does not benefit customers and it disserves the public interest (because of the cost shifting that occurs due to the Applicant’s participation in the pilot program).

And the Settlement violates regulatory principles. The PUCO’s promised review of the pilot program, including cost-shifting to other customers, has recently been ordered to be done (by the end of 2022) but has yet to be completed. Before determining if more large corporate customers of FirstEnergy should be allowed into FirstEnergy’s corporate rate reduction program (which others pay), the PUCO Staff’s review *should be completed, made public, put out for public comment, and resolved by the PUCO.*

In any event, the PUCO should limit the payment to FirstEnergy for the cost-shifting of large corporate customers. Any payments instituted to make FirstEnergy whole should be paid by the customers of the Applicant’s own rate class, and not by residential and other customers.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

 I hereby certify that a copy of this Reply Brief for Consumer Protection was served on the persons stated below via electronic transmission, this 24th day of February 2022.

 */s/ Maureen R. Willis*

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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. Joint Ex. 1 (Joint Stipulation and Recommendation, Dec. 9, 2021). [↑](#footnote-ref-2)
2. *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing ¶ ¶ 309, 310 (Oct. 12, 2016). [↑](#footnote-ref-3)
3. Post-Hearing Brief by Office of the Ohio Consumers’ Counsel (“OCC Brief”) (Feb. 10, 2022). [↑](#footnote-ref-4)
4. Post-Hearing Brief, Campbell Soup Supple Company, LLC (“Applicant Brief”) (Feb. 10, 2022). [↑](#footnote-ref-5)
5. Initial Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (“Staff Brief”) (Feb. 10, 2022). [↑](#footnote-ref-6)
6. OCC Brief at 1-2, 4-6; *See* OCC Ex. 2 (Supplemental Testimony of Michael P. Haugh, Dec. 22, 2021) at 5; Tr. at 156, 215. [↑](#footnote-ref-7)
7. Campbell Supply Ex. 2 (Monnin) at 6. [↑](#footnote-ref-8)
8. OCC Brief at 9; Tr. at 141-143; 147 (cross examination of Mr. Seryak). [↑](#footnote-ref-9)
9. OCC Brief at 9; OCC Ex. 2 (Haugh Supplemental Testimony) at 7-8. [↑](#footnote-ref-10)
10. Applicant Brief at 15. [↑](#footnote-ref-11)
11. OCC Brief at 8-9; OCC Ex. 2 (Haugh) at 7 (“costs will be shifted once the Applicant enters the opt-out pilot program…there will be a shortfall of revenue for FirstEnergy and this shortfall will need to be collected from other customers.”). [↑](#footnote-ref-12)
12. Applicant Brief at 13. [↑](#footnote-ref-13)
13. OCC Brief at 9-10; Tr. at 60; 56-57 (cross examination of Mr. Monnin). [↑](#footnote-ref-14)
14. *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing ¶ ¶ 309, 310 (Oct. 12, 2016). [↑](#footnote-ref-15)
15. *In the Matter of the Review of the Non-Market Based Services Rider contained in the Tariffs of Ohio Edison, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, Case No. 21-1225-EL-RDR, Finding and Order (Feb. 23, 2022). [↑](#footnote-ref-16)
16. *Id.* at 8. [↑](#footnote-ref-17)
17. *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing ¶ ¶ 309, 310 (Oct. 12, 2016). [↑](#footnote-ref-18)
18. Applicant Brief at 26-27. [↑](#footnote-ref-19)
19. Campbell Supply Ex. 2 (Monnin) at 6. [↑](#footnote-ref-20)
20. OCC Brief at 3, 8-10; OCC Ex. 2 (Haugh) at 8; Tr. at 261 (cross examination of Mr. Haugh). [↑](#footnote-ref-21)
21. Applicant Brief at 15-16. [↑](#footnote-ref-22)
22. *Id*. [↑](#footnote-ref-23)
23. *Id*. [↑](#footnote-ref-24)
24. OCC Brief at 9; Tr. at 141-143; 147 (cross examination of Mr. Seryak). [↑](#footnote-ref-25)
25. Applicant Brief at 15-16. [↑](#footnote-ref-26)
26. OCC Brief at 9; Tr. at 156-157 (cross examination of Mr. Seryak); 260-262 (cross examination of Mr. Haugh). [↑](#footnote-ref-27)
27. Tr. at 141-143; 147 (cross examination of Mr. Seryak). [↑](#footnote-ref-28)
28. *Id*.; *see also*, Tr. at 156-157 (cross examination of Mr. Seryak); 260-262 (cross examination of Mr. Haugh). [↑](#footnote-ref-29)
29. OCC Brief at 8-9; OCC Ex. 2 (Haugh Supplemental Testimony) at 7. [↑](#footnote-ref-30)
30. Applicant Brief at 13; 26-27. [↑](#footnote-ref-31)
31. Staff Brief at 4-5. [↑](#footnote-ref-32)
32. OCC Brief at 8-9; OCC Ex. 2 (Haugh Supplemental Testimony) at 7. [↑](#footnote-ref-33)
33. Applicant Brief at 13-14. [↑](#footnote-ref-34)
34. *Id*. [↑](#footnote-ref-35)
35. OCC Brief at 9-10; Tr. at 60 (cross examination of Mr. Monnin) (“we are not committing to a specific level of capital investments”). [↑](#footnote-ref-36)
36. OCC Brief at 9-10; Tr. at 56-57 (cross examination of Mr. Monnin) (“We’re not guaranteeing a specific employee level”). [↑](#footnote-ref-37)
37. OCC Brief at 9-10; Tr. at 55-59; 132 (cross examination of Mr. Monnin). [↑](#footnote-ref-38)
38. *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing ¶ ¶ 309, 310 (Oct. 12, 2016); OCC Brief at 11-12. [↑](#footnote-ref-39)
39. *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO, Opinion & Order at 73 (Mar. 31, 2016); OCC Brief at 11-12. [↑](#footnote-ref-40)
40. Case No. 14-1297-EL-SSO at 94; OCC Brief at 10-12. [↑](#footnote-ref-41)
41. *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing ¶ 310 (Oct. 12, 2016). [↑](#footnote-ref-42)
42. Applicant Brief at 30. [↑](#footnote-ref-43)
43. *In the Matter of the Review of the Non-Market Based Services Rider contained in the Tariffs of Ohio Edison, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, Case No. 21-1225-EL-RDR, Finding and Order at 8 (Feb. 23, 2022). [↑](#footnote-ref-44)
44. OCC Brief at 13; *See* Case No. 16-2043-EL-RDR, Staff Report (Feb. 7, 2017); Case No. 17-2378-EL-RDR, Staff Report (Feb. 9, 2018); Case No. 18-1818-EL-RDR, Staff Report (Feb. 21, 2019); Case No. 19-2120-EL-RDR, Staff Report (Feb. 20, 2020); Case No. 20-1768-EL-RDR, Staff Report (Feb. 16, 2021); Case No. 21-695-EL-RDR, Staff Report (Aug. 11, 2021); Case No. 21-1225-EL-ORD (Feb. 14, 2022). *See*, Tr. at 257-258. [↑](#footnote-ref-45)
45. *In the Matter of the Review of the Non-Market Based Services Rider contained in the Tariffs of Ohio Edison, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, Case No. 21-1225-EL-RDR, Staff Review and Recommendation (Feb. 14, 2022); OCC Brief at 12-14. [↑](#footnote-ref-46)
46. *See*, OCC Brief at 10-14. [↑](#footnote-ref-47)
47. *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing ¶ 310 (Oct. 12, 2016). [↑](#footnote-ref-48)
48. OCC Brief at 13. *In the Matter of the Review of the Non-Market Based Services Rider contained in the Tariffs of Ohio Edison, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, Case No. 20-1768-EL-RDR, Staff Review and Recommendations (Feb. 16, 2021). [↑](#footnote-ref-49)
49. OCC Brief at 13; *In the Matter of the Review of the Non-Market Based Services Rider contained in the Tariffs of Ohio Edison, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, Case No. 16-2043-EL-RDR, Staff Review and Recommendations (Feb. 7, 2017). [↑](#footnote-ref-50)
50. Applicant Brief at 16. [↑](#footnote-ref-51)
51. Case No. 21-1225-EL-RDR, Finding and Order at ¶ 13, at 5. [↑](#footnote-ref-52)
52. *Id*. at ¶ 17, at 8. [↑](#footnote-ref-53)
53. OCC Ex. 2 (Haugh Supplemental Testimony) at 10; OCC Brief at 14. [↑](#footnote-ref-54)
54. Applicant Brief at 24. [↑](#footnote-ref-55)