

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric) Case No. 14-1297-EL-SSO
Illuminating Company and The Toledo)
Edison Company for Authority to Provide)
for a Standard Service Offer Pursuant)
R.C. 4928.143 in the Form of an Electric)
Security Plan.)

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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January 6, 2017

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APPLICATION FOR REHEARING

The Office of the Ohio Consumers' Counsel ("OCC") files this application for rehearing¹ to protect 1.9 million consumers from being charged hundreds of millions of dollars to support FirstEnergy's financially challenged parent, FirstEnergy Corp., and/or its unregulated generation affiliate, FirstEnergy Solutions. This Public Utilities Commission of Ohio ("PUCO")-approved customer-funded support, in the form of a "distribution modernization rider" (aka credit support rider), provides credit support that is akin to the bail-out proposal that was halted in April by the Federal Energy Regulatory Commission ("FERC"). Consumers will pay at least \$612 million dollars (and perhaps up to more than \$1 billion)² but not for the electricity that they use.

The Credit Support Rider was approved by the PUCO in its Fifth Entry on Rehearing, issued October 12, 2016. There, the PUCO approved, with modifications, the Third Supplemental Stipulation establishing an eight year electric security plan ("ESP") for FirstEnergy. Under the PUCO-modified ESP IV FirstEnergy will collect \$204 million per

¹ This application for rehearing is authorized under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

² Fifth Entry on Rehearing, Concurring Opinion of Asim Haque at ¶9 (October 12, 2016).

year from customers for three years (plus potentially two more years) through the Credit Support Rider starting January 1, 2017.

The OCC filed an application for rehearing from the PUCO's Fifth Entry on Rehearing on November 14, 2016. On December 7, 2016, the PUCO issued a Sixth Entry on Rehearing. In that Sixth Entry on Rehearing, the PUCO granted rehearing "for further consideration of the matters specified in the applications for rehearing."³ The PUCO's Sixth Entry on Rehearing of December 7, 2016 was unreasonable or unlawful in the following respects:

Assignment of Error 1: The PUCO erred by not granting and holding rehearing on the matters specified in OCC's November 14, 2016 application for rehearing.

Assignment of Error 2: The PUCO erred by granting rehearing to allow itself more time to issue a final appealable order. By doing so, the PUCO fails to fulfill its duty to hear matters pending before it without unreasonable delay and with due regard to the rights and interests of all litigants before it. The PUCO's Order permits it to evade a timely judicial review of its order and precludes parties from exercising their rights to appeal a PUCO order to the Ohio Supreme Court -- a right that is established under R.C. 4903.10, 4903.11 and 4903.13.

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 Sixth Entry on Rehearing as requested by OCC.

³ Sixth Entry on Rehearing at ¶14 (December 7, 2016).

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Public Utilities Commission of Ohio (“PUCO”) still has the ability in this proceeding to protect 1.9 million Ohioans from paying massive subsidies to FirstEnergy (“FirstEnergy” or “Utilities”)⁴ in the name of credit support. The credit support will require consumers to pay \$612 million over the next three years or more than \$1 billion over five years.⁵ It is not for the electricity that they use. Instead the customer-supplied subsidy can be used to bailout FirstEnergy Corp. or its unregulated generation affiliate in any way they see fit.

In 1999, the Ohio General Assembly approved Senate Bill 3 (“S.B. 3”) that replaced cost-based regulation for generation with competitive markets. The fundamental premise behind S.B. 3 is that retail customers should not now be asked to protect Ohio electric utilities from competitive generation market risks or losses. FirstEnergy is now wholly responsible for whether it is in a competitive position in the generation market so their generation should not be subsidized by consumers. Subsidies are harmful to a

⁴ FirstEnergy refers to Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company.

⁵ Fifth Entry on Rehearing, Concurring Opinion of Asim Haque at ¶9 (October 12, 2016).

competitive market. Instead, consumers should receive the benefits of historically low competitive market pricing as the Ohio General Assembly intended when it required the separation of generation and distribution in 1999.

The OCC, on behalf of Ohio's residential energy consumers, submits this application for rehearing on the PUCO's Sixth Entry on Rehearing. Because the PUCO's decision violated Ohio law and the policy underlying the law, OCC seeks rehearing.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." OCC filed a motion to intervene in this proceeding on August 14, 2014, which was granted. OCC also filed testimony regarding the application and participated in the evidentiary hearing on the application.

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." In addition, 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 Order and modifying other portions is met here. The PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Sixth Entry on Rehearing of December 7, 2016. The PUCO’s ruling was unreasonable or unlawful in the following respects.

III. ERRORS

Assignment of Error 1: The PUCO erred in not granting and holding rehearing on the matters specified in OCC's application for rehearing.

The PUCO ruled that rehearing should be granted for further consideration of the matters specified in the applications for rehearing.⁶ The PUCO was wrong in doing so because it should have granted OCC rehearing on the matters specified in its Application for Rehearing.

OCC requested rehearing alleging that the PUCO violated the law (R.C. 4903.38 and 4928.143), which permitted FirstEnergy to collect from customers \$204 million per year under the guise of providing credit support to the electric distribution utilities (“EDU”) for grid modernization. The fallacy in the PUCO’s logic is that there was no requirement that a single dollar of the revenues collected through the credit support rider had to be used for grid modernization. The credit support rider funds could be used to

⁶ Sixth Entry on Rehearing at ¶14.

bailout the EDU's parent or unregulated generation affiliate – FirstEnergy Solutions or any of a number of scenarios which have nothing to do with grid modernization.

It was not reasonable or lawful for the PUCO to approve FirstEnergy's electric security plan ("ESP") that included a credit support provision charged to customers who may see no tangible benefit from the charge. The PUCO's approval of the credit support rider constituted an unlawful subsidy that may benefit FirstEnergy's parent or unregulated generation affiliate. The error was clear. The PUCO should have granted rehearing.

Assignment of Error 2: The PUCO erred by granting rehearing to allow itself more time to issue a final appealable order. By doing so, the PUCO fails to fulfill its duty to hear matters pending before it without unreasonable delay and with due regard to the rights and interests of all litigants before it. The PUCO's Order permits it to evade a timely review and reconsideration of its order by the Ohio Supreme Court and precludes parties from exercising their rights to appeal a PUCO order to the Ohio Supreme Court -- a right that is established under R.C. 4903.10 and 4903.11 and 4903.13.

The Ohio Supreme Court ("Court") has held that "[i]t is the duty of the commission to hear matters pending before the commission without unreasonable delay and with due regard to the rights and interests of all litigants before that tribunal."⁷ This duty is described, with defined parameters, under R.C. 4903.10.

Under R.C. 4903.10, the General Assembly established a thirty day process for the PUCO to either grant or deny rehearing. Under the statute, if the PUCO does not grant or deny the applications within thirty days, the applications are denied by operation of law. This provision was meant to ensure that the PUCO resolved applications in a

⁷ *State ex rel. Columbus Gas & Fuel Col. v. Pub. Util. Comm.* (1930), 122 Ohio St. 473, 475.

timely manner--thirty days under the statute. The statute is designed to enforce the axiom that "justice delayed is justice denied." ⁸

The timely resolution of applications for rehearing (within 30 days) is important because an order of the PUCO cannot be appealed as a "final order" until the PUCO has ruled on all rehearing applications or the rehearing has been denied by operation of law.⁹ Yet the Sixth Entry on Rehearing upon which rehearing is being sought is "effective," with customers being charged rates that are challenged on rehearing.¹⁰ That means FirstEnergy can charge customers rates that include an annual \$204 million credit support rider charge, regardless of the fact that OCC is challenging that charge before the PUCO. This happens because under Ohio law the PUCO has authority to implement its Order, regardless of challenges to the order made through the rehearing process. The law (R.C. 4903.10) makes clear that the filing of an application for rehearing does not excuse compliance with the order or operate to stay or postpone enforcement of the order.

The PUCO, however, has recently been side-stepping the thirty-day review by instead employing a process under which rehearing has been extended by months, and in

⁸ See, e.g., *Moeller v. Moeller* (C.A. 9th Dist.), 1993 Ohio App. LEXIS 50 (finding that a similar statute, R.C. 2701.02, setting forth the time limit in which courts must render decisions on certain matters, was designed to enforce the axiom that "justice delayed is justice denied."

⁹ See R.C. 4903.11.

¹⁰ There are few exceptions to this. The exceptions provide that through a special order of the PUCO, the filing of an application may stay the order. Also if parties file an application prior to the effective date of the order the order is stayed, "unless otherwise ordered by the commission."

some cases, even years.¹¹ And while the Court has ruled that the PUCO may grant applications for rehearing for the limited purpose of allowing additional time to consider them,¹² the Court's ruling is being unreasonably applied in a manner that disrupts timely judicial review of PUCO rulings, prejudicing would-be appellants. The PUCO can thwart (and evade) judicial review by granting itself more time to consider the applications and issuing a final order months or years down the road, while at the same time subsidies are being collected from Ohioans.¹³

Delaying judicial review matters to Ohioans because of Court precedent¹⁴ that generally precludes refunds to customers for rates already collected. Each day that the PUCO delays issuing a final order, is a day that rates are charged to customers without an opportunity to stop these collections and without a likely recourse to a refund of the collections from customers.

¹¹ See, e.g., *In the Matter of the Application of Ohio Power Company*, Case No. 13-2385, Third Entry on Rehearing (July 27, 2015)(granting rehearing allowing PUCO more time to consider OCC and others' application for rehearing). A substantive Entry on Rehearing was finally issued on November 3, 2016, more than a year later. *In re: Duke Energy Ohio*, Case No. 14-841-EL-SSO, Entry on Rehearing (May 28, 2015) (granting rehearing allowing PUCO more time to consider OCC and others' application for rehearing). No substantive Entry on Rehearing has been issued. *In the Matter of the Application of The Dayton Power and Light Company for Authority to Issue and Sell and Amount Not to Exceed \$490 Million of First Mortgage Bonds, Debentures, Notes, or Other Evidences of Indebtedness or Unsecured Note*, Case No. 13-0893-EL-AIS, Entry on rehearing (Sept. 4, 2013) (Granting application for rehearing filed by OCC for the limited purpose of further consideration) No final entry. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013-2015*, Case Nos. 12-2190-EL-POR, 12-2191-EL-POR, and 12-2192-EL-POR, Entry on rehearing (Jan. 14, 2015)(Granting the application for rehearing by FirstEnergy, OCC, OMAEG, and Environmental Groups be granted for further consideration) No final entry. *In the Matter of the Application of Ohio Power Company to Adopt a Final Implementation Plan for the Retail Stability Rider*, Case No. 14-1186-EL-RDR, Entry on Rehearing (May 28, 2015)(Granting application for rehearing by The Kroger Company and Joint Applicants, including OCC, for further consideration) No Final Entry.

¹² See, *State ex rel. Consumers' Counsel v. Pub. Util. Comm.*, (2004), 102 Ohio St.3d 301, 304.

¹³ A factor that contributes to harm to customers is that the PUCO as a matter of course denies requests to stay rates or collect rates subject to refund. A ruling granting a stay of rates, or collecting rates subject to refund would potentially limit the harm to customers that is occurring when the PUCO delays issuing a final order. Typically the PUCO has not ordered such relief.

¹⁴ *Keco Industries v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 3d 254, 257, 141 N.E.2d 445 (1957).

The delay in ruling upon OCC's application for rehearing harms customers because customers must pay increased rates that are not paid subject to refund or not stayed. This is prejudicial, and manifestly unjust.¹⁵ The delay in ruling on the application for rehearing forecloses OCC from seeking relief from the Ohio Supreme Court, including relief (non-payment of disputed rates) by staying the collection of rates. While OCC may pursue extraordinary relief¹⁶ from the Court, even without a ruling on rehearing, that relief is generally beyond OCC's grasp. This is because it is likely, based on past experience,¹⁷ that the Court will deny such relief as OCC has a so-called "adequate remedy at law": an appeal from the eventual PUCO final order.

Rehearing should be granted (or denied) and a final order should be issued. Granting more time to consider issues raised on rehearing unreasonably delays the issuance of a final order all while customers are paying higher rates. Under the PUCO's practice, there is no denial of the application for rehearing, either by law or by entry. Thus, there is no final order. This makes it impossible for parties to exercise their rights under R.C. 4903.11 and 4903.13 to appeal PUCO decisions to the Court. And because the PUCO has not ordered a stay of the rates, or ordered rates be collected subject to refund, its dilatory rulings unduly delay any relief customers can seek, providing immediate and material harm to customers.

¹⁵ See, e.g., *Knox v. Knox*, (C.A. 5th Dist), 26 Ohio App. 3d 236, where the appellate court held that the trial court's delay in rendering a judgment was an abuse of discretion considering that the delay foreclosed the relief that appellant otherwise would have been afforded .

¹⁶ Through a writ of procedendo or prohibition.

¹⁷ See, e.g., *State of Ohio ex rel. OCC et al. v. Alan R. Schriber et al.*, Case No. 2009-0710, Entry (June 17, 2009) (denying the writ of prohibition because the issues raised in the complaint could be resolved on appeal)

The PUCO should not be able to evade judicial review of its decisions by failing to issue a timely final appealable order. Rehearing should be granted, with a final appealable order being issued. This will allow parties to exercise their statutory rights to appeal the PUCO's decisions.

IV. CONCLUSION

To protect customers, the PUCO should grant rehearing and abrogate or modify its Sixth Entry on Rehearing. This would ensure that parties, including OCC, can exercise their statutory right to appeal the PUCO decisions in a timely manner and helps protect the interests of the residential customers that OCC represents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was electronically served via electric transmission on the persons stated below this 6th day of January 2017.

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Summary: App for Rehearing Application for Rehearing by the Office of the Ohio Consumer's Counsel electronically filed by Ms. Deb J. Bingham on behalf of Sauer, Larry S.