

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric)
Illuminating Company and The Toledo) Case No. 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.)

**MEMORANDUM CONTRA
FIRSTENERGY'S APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,
THE NORTHWEST OHIO AGGREGATION COALITION
AND
NOAC COMMUNITIES INDIVIDUALLY**

I. INTRODUCTION

Not satisfied with the massive subsidy it received from customers (over \$200 million per year for at least three years), FirstEnergy¹ is back asking for more. This time FirstEnergy seeks to reinstate a provision of its electric security plan that would give it more profits ("profit adder") if it modernizes its distribution grid.

But the PUCO nearly a year ago decided that a profit adder is not necessary or appropriate.² FirstEnergy first filed against that PUCO finding in its November 14, 2016 Application for Rehearing.³ Wisely, the PUCO rejected FirstEnergy's rehearing request

¹ FirstEnergy refers to Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company.

² Fifth Entry on Rehearing at ¶234 (Oct. 12, 2016).

³ See FirstEnergy Application for Rehearing, Assignment of Error 5, Memorandum in Support at 31-34 (Nov. 14, 2016).

in its most recent (eighth) Entry on Rehearing.⁴ That Eighth Entry on Rehearing provides no new findings related to the profit adder. Therefore, the PUCO should reject FirstEnergy's repackaged arguments (and new arguments that could have been made earlier) that would allow it a second bite at the apple.

And the PUCO should also deny rehearing on FirstEnergy's request that there be no third-party monitoring of how it spends the more than \$200 million per year credit support subsidy from customers.⁵ The modest monitoring proposed by the PUCO is reasonable and not unduly burdensome. It should be required in order to possibly afford some minimal amount of protection for customers.

II. RECOMMENDATIONS

A. The PUCO's rejection of a profit adder for grid modernization should stand, despite FirstEnergy's second attempt seeking rehearing on this very issue.

In its Fifth Entry on Rehearing the PUCO granted rehearing on OCC/NOAC's claim that the proposed return on equity for Rider AMI was not just and reasonable because of the 50 basis point adder approved by the PUCO.⁶ OCC/NOAC had argued against the profit adder as part of its larger argument that the grid modernization rider is not in the public interest.

The PUCO, though granting OCC/NOAC's request for rehearing in this regard, came up with additional reasons why the profit adder should be eliminated. The PUCO found that it had approved Rider DMR "which was designed to provide the Companies

⁴ Eighth Entry on Rehearing at ¶¶143-145 (Aug. 16, 2017).

⁵ See FirstEnergy Application for Rehearing, Assignment of Error 1, Memorandum in Support at 3-8.

⁶ OCC Application for Rehearing at 25-27 (May 2, 2016).

with an incentive to invest in grid modernization." And it found because the purpose of the adder "has been supplanted by Rider DMR," the adder "is no longer necessary or appropriate."⁷

FirstEnergy then sought rehearing on these PUCO's findings.⁸ FirstEnergy's arguments focused solely on the PUCO's finding that the purpose of the adder had been supplanted by Rider DMR. FirstEnergy claimed the PUCO was "wrong" because the adder serves a different purpose from Rider DMR. The adder, according to FirstEnergy, ensures that grid modernization projects earn a more favorable return than other competing investments.⁹ According to FirstEnergy, this will serve to incentivize it to use cash collected from customers for grid modernization. FirstEnergy also argued that the PUCO withdrew the profit adder without supporting evidence.¹⁰

But the PUCO, in its Eight Entry on Rehearing, denied FirstEnergy's application on rehearing seeking to reinstate the profit adder.¹¹ In doing so the PUCO made no new findings but rather expanded on and confirmed its finding in its Fifth Entry on Rehearing. That should have been the end of that discussion. Rehearing on these issues was denied.

FirstEnergy now, however, seeks a second bite at the apple. It argues that the PUCO's rationale for removing the adder misstates the link between Rider RRS and the 50 basis point adder. Additionally, FirstEnergy argues that the PUCO ruling fails to take into account the PUCO's PowerForward initiative. And FirstEnergy argues that the

⁷ Fifth Entry on Rehearing at ¶234.

⁸ FirstEnergy Application for Rehearing, Assignment of Error 5, Memorandum in Support at 31-34 (Nov. 14, 2016).

⁹ Id. at 32.

¹⁰ Id. at 34.

¹¹ Eighth Entry on Rehearing at ¶115.

PUCO improperly rejected the profit adder in advance of developing ratemaking policies for the PowerForward initiative. These grounds for rehearing lack merit.

Linkage between Rider RRS and the profit adder is not relevant to the PUCO's findings in its latest Entry on Rehearing. Rider RRS is not at issue. It has been replaced by the credit support rider (the "Distribution Modernization Rider" or "DMR"). Any statements the PUCO made regarding Rider RRS¹² were not findings but pure dicta. Rehearing on dicta is not appropriate or necessary as it does not amount to a holding on the merits.¹³

FirstEnergy's other claims of error related to the profit adder and the PowerForward initiative are also improper, but for other reasons. The Eighth Entry on Rehearing did not make any new findings on the credit support rider. Dragging the PowerForward initiative into the discussion, which is not even a formal PUCO proceeding, is something that FirstEnergy could have done in response to the PUCO's Fifth Entry on Rehearing. If FirstEnergy wanted to preserve this issue it should in fact have done so by seeking rehearing in response to the earlier Fifth Entry on Rehearing. It did not. It is too late now to raise these issues. Having squandered its earlier opportunity to seek rehearing, it does not get another chance to raise these issues regarding the profit

¹² The PUCO stated that there was linkage between Rider RRS and smart grid modernization provisions. Fifth Entry on Rehearing at 67.

¹³ See, e.g., *In the Matter of the Application of the Ohio Bell Telephone Company for Authority to Amend Certain of its Intrastate Tariffs to Increase and Adjust its Rates and Charges and to Change its Regulations and Practices Affecting the Same*, Case No. 84-1435-TP-AIR, Rehearing Entry (Feb. 4, 1986) (holding that the fact that a statement was dicta by definition means that rehearing does not lie); *In the Matter of the Complaint of Ruth L. Wellman, Complainant, v AT&T Communications of Ohio, Inc., Respondent*, Case No. 98-0516-TP-CSS, Entry on Rehearing (Apr. 8, 1999).

add. Nothing in the PUCO's Eighth Entry on Rehearing gives rise to the issues FirstEnergy now seeks to pursue. Rehearing should be denied.

The PUCO's earlier ruling rejecting the 50 basis point adder should stand. There is no justification for providing FirstEnergy added profits for grid modernization.

B. The third-party monitoring process for the credit support rider is just and reasonable and may provide a modicum of protection for customers. Rehearing should be denied.

In its Eighth Entry on Rehearing the PUCO directed its Staff to prepare a request for proposal for a third-party "monitor" to assist its Staff and work with FirstEnergy and FirstEnergy Corp. to ensure that the Credit Support Rider funds are expended appropriately.¹⁴ Under the PUCO's Order utility customers will pay about \$200 million per year for at least three years for expenses that are unrelated to any aspect of serving customers. The credit support rider will be used to support the credit ratings of FirstEnergy and its parent FirstEnergy Corporation. FirstEnergy was given great latitude in using the credit support rider funds, with no requirement that the funds be used for grid modernization. The PUCO and customers have a strong interest in ensuring that the funds are used in a proper manner that may benefit Ohio customers.

The monitoring plan adopted by the PUCO is intended to provide some oversight on the use of these funds. The monitoring is a modest condition to impose on FirstEnergy, given the generous and supportive treatment the PUCO has given under the credit support rider and the financial burden that customers are required to accept in this regard.

¹⁴ Eighth Entry on Rehearing at ¶113.

FirstEnergy, however, argues that this is "wrong" because the PUCO can make the assessment on its own; Rider DMR revenues cannot be tracked in "real time;" the PUCO has ample processes available to ensure no affiliate cross-subsidization will occur; quarterly reviews are impractical and unnecessary; and "real time " monitoring could restrict the use of Rider DMR funds.¹⁵

Frankly it is astonishing (and appalling) that FirstEnergy should object to such modest conditions in return for the award of over \$600 million dollars in credit support. The monitoring conditions are neither "wrong" as FirstEnergy argues nor are they unjust or unreasonable. Rehearing on this issue should be denied.

The purpose of the monitoring is to ensure that the credit support rider revenues are being used to address credit quality and related goals that the PUCO accepted. Focusing on the tracking of funds is not the objective of the monitoring, contrary to FirstEnergy's assertions otherwise.

FirstEnergy's assertion that it can "self-report"¹⁶ is nothing more than a "trust us" argument, akin to the fox guarding the hen house. While existing financial and other reporting is useful, it cannot substitute for the investigation and ongoing review of an independent monitor focusing on the specifics of the credit support rider. Self-reporting is not an adequate substitute for the independent monitoring program contemplated by the PUCO.

Existing regulatory mechanisms dealing with affiliate transactions are, of course, necessary and helpful, but they are not directed specifically to the stated objectives of the

¹⁵ FirstEnergy Application for Rehearing, Assignment of Error 1, Memorandum in Support at 3-8.

¹⁶ Id. at 4, 6.

credit support rider. The monitoring process ordered by the PUCO therefore supplements existing mechanisms and is needed due to the unusual nature of the credit support rider and the immense burden it places on customers who are being asked to fund it (beginning January 1, 2017).

And FirstEnergy inaccurately argues that the independent monitoring plan would both reduce financial flexibility and improperly intrude on utility management discretion. This is hyperbole at best. The PUCO Staff consultant providing the independent monitoring will conduct the necessary investigation and reporting to the PUCO to ensure the funds collected under the rider are being used as the PUCO envisions. The third-party consultant will not have the authority to operate the utility, preempt utility management decisions or restrict financial flexibility. FirstEnergy Utilities' assertions in this regard are over-stated and unfounded.

FirstEnergy has set forth specious arguments in order to avoid the scrutiny and regulatory oversight of an independent monitoring program for the credit support rider. If FirstEnergy finds such scrutiny and regulatory oversight so objectionable, then it can avoid the independent monitoring program by simply agreeing to forgo collecting \$600 million from its customers. That is a result that OCC/NOAC would support.

C. The PUCO should expeditiously deny FirstEnergy's application for rehearing.

FirstEnergy has presented to the PUCO two assignments of error. The first assignment should not detain the PUCO long because it is improper. FirstEnergy's claims pertaining to the profit adder are not related to any new findings in the PUCO's Eighth Entry on Rehearing, and some of the claims could have been previously

addressed. There should not be two bites at the apple for any intervenor, including the utility.

The second assignment of error is simple to address: the conditions the PUCO has imposed are not unjust or unreasonable. The PUCO has discretion to independently monitor how funds collected from captive electric distribution customers are being used. That is part of its responsibilities to carry out the policies of the state enumerated in R.C.4928.02. Included in those policies are ensuring reasonably priced retail electric service is available to Ohioans and avoiding anti-competitive subsidies.

FirstEnergy's application for rehearing can be summarily denied. There is no need to dwell on the issues that have been heard and reheard numerous times since the PUCO's original order in this case, which was issued over a year and a half ago. Enough is enough. A final order should be issued without delay--meaning within the thirty-day period provided under R.C. 4903.09.

III. CONCLUSION

FirstEnergy's Application for Rehearing should be rejected as explained above. Denying the application for rehearing will allow consumers to be protected from paying millions of dollars more than that ordered by the PUCO.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra FirstEnergy's Application for Rehearing by the Office of the Ohio Consumers' Counsel, Northwest Ohio Aggregation Coalition and NOAC Communities Individually was served via electronic transmission, to the persons listed below, on this 25th day of September, 2017.

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