

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2017 Review of the Delivery)
Capital Recovery Rider of Ohio Edison Company,) Case No. 17-2009-EL-RDR
The Cleveland Electric Illuminating Company, and)
The Toledo Edison Company.)

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

In this case Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, “FirstEnergy”) are collecting charges from customers through the Delivery Capital Recovery (“DCR”) Rider, which allows for accelerated collection of certain distribution related investment from customers.¹ The DCR Rider was first approved as a single issue ratemaking provision in the FirstEnergy utilities' second electric security plan proceeding.² This rider charge is one of a myriad of other add-on charges called "riders" that are paid for by FirstEnergy customers.³ This proceeding is an annual audit to determine whether the 2017 charges that have been collected by FirstEnergy are reasonable.⁴

¹ See *In the Matter of the 2016 Review of the Delivery Capital Recovery Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Compliance Audit of the 2016 Delivery Capital Recovery Riders at 7 (May 1, 2017).

² *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Opinion and Order (August 25, 2010).

³ The FirstEnergy companies each have the following number of riders, respectively: Cleveland Electric Illuminating Co.: up to 32, Ohio Edison Co.: up to 30, Toledo Edison Co.: up to 30. See Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, Sheet 80.

⁴ *Id.*

The Office of the Ohio Consumers' Counsel ("OCC") files this application for rehearing to bring clarity and transparency to the audit process so that the OCC, and any other intervening parties, can review the forthcoming draft audit report in this proceeding as well as any prior drafts of the audit report and related communications. Specifically, the OCC seeks rehearing of the Public Utilities Commission of Ohio's ("PUCO") November 1, 2017, Entry that ordered the PUCO Staff to issue a request for proposal ("RFP"), but failed to explicitly state that the draft audit report(s) should be provided to all parties at the same time, and that comments on the draft report(s) provided by any party are discoverable.

The November 1, 2017, Entry was unreasonable and unlawful in the following respects:

ASSIGNMENT OF ERROR NO. 1: The PUCO erred when it unreasonably and unlawfully failed to explicitly state in the November 1, 2017, Entry that the draft audit report(s) shall be provided to all parties at the same time and that comments on the draft report(s) provided by any party are discoverable.

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 its Entry as requested by OCC.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In its November 1, 2017 Entry, the PUCO ordered its Staff to issue a request for proposal for a third party to audit FirstEnergy's DCR Rider. The PUCO ordered the third-party auditor to provide to the PUCO Staff both a draft audit report and final audit report. The Entry failed to explicitly state that the draft audit report(s) shall be provided to all intervening parties and that comments on the draft audit report(s) are discoverable evidence. Not allowing parties access to the draft audit report is unreasonable and contrary to legal precedent. Further, the OCC, who has the statutory authority to represent the residential customers of FirstEnergy who are being charged through the DCR, should be entitled to review the draft audit report(s).

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The PUCO erred when it unreasonably and unlawfully failed to explicitly state in the November 1, 2017, Entry that the draft audit report(s) shall be provided to all parties at the same time and that comments on the draft report provided by any party are discoverable

The November 1, 2017 Entry is unreasonable and unlawful because it failed to explicitly confirm that the draft audit report(s) shall be provided to all intervening parties

and that comments on the draft audit report(s) is/are evidence that is subject to discovery by intervening parties.

The PUCO has held in the past that intervening parties are permitted access to draft audit reports and related communications.⁵ Nevertheless, in conflict with this legal precedent, another Ohio utility recently denied OCC access to draft audit reports, and any related communications, that was requested by OCC from the utility through a timely and proper discovery request. The utility objected to OCC's discovery request on the grounds that the RFP in the PUCO Entry does not explicitly state that draft audit reports, and related communications/comments, are discoverable documents. While, OCC has received the draft audit report through a public records request, it has still not received any other drafts of the audit report nor any related communications. On October 31, 2017, OCC filed a motion to compel the discovery responses, which, at the time this pleading was filed, is still pending.⁶

⁵ See *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case Nos. 11-5906-EL-FAC, et al., Entry (February 3, 2016).

⁶ See *In the Matter of the Application of the Dayton Power and Light Company for an Increase in Electric Distribution Rates*, Case No. 15-1830-EL-AIR, OCC Motion to Compel Discovery Responses (October 31, 2017).

Given the nature of a draft audit report and the liberal discovery rules⁷ and laws⁸ in Ohio, there can be no doubt that the draft audit report, prior versions of the draft audit report, and related communications in this proceeding are relevant and reasonably calculated to lead to the discovery of admissible evidence. This proceeding involves the amount that FirstEnergy's customers pay for electric distribution service through the DCR Rider. The proceeding is intended for an independent auditor to analyze and attest to the accuracy and reasonableness of FirstEnergy's DCR Rider and memorialize its findings in an audit report. The audit will also analyze whether the DCR Rider is in compliance with the PUCO's Opinion and Order that authorized the latest version of the DCR Rider.⁹ Thus, the audit report is essential and relevant to the PUCO's determination in this case.

Examining the draft audit report(s) will enable intervenors to determine whether and how any conclusions, results, or recommendations have changed between the issuance of any drafts and the final report. In particular, intervenors should be aware of

⁷ See Ohio Admin. Code 4901-1-17(A) (stating that "discovery may begin immediately after a proceeding is commenced."); Ohio Admin. Code 4901-1-16(B) (stating that "any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.").

⁸ See R.C. 4903.082 (stating that "[a]ll parties and intervenors shall be granted ample rights of discovery" and that the PUCO should ensure that all parties are allowed "full and reasonable discovery"); Ohio Civ. R. 26(B) (this rule has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding. See *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300, P83, citing to *Moskovitz v. ML Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661 and *Disciplinary Counsel v. O'Neill* (1996), 75 Ohio St. 3d 1479).

⁹ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order (March 31, 2016).

any conclusions, results, or recommendations that were in the draft report but not in the final report so the reasons why they were excluded can be examined. This information will enable intervenors to assess the justness and reasonableness of the auditor's conclusions in its final report. And it will inform intervenors as to whether the audit process is truly an independent process, as the PUCO intended. This is especially needed where the auditor is not subject to discovery that is otherwise permitted between and among parties to a PUCO proceeding. Further, allowing parties access to the draft audit report(s) will produce more informed comments from the intervenors, which will only help to develop a more complete and informed record for the PUCO.

Thus, the draft audit report(s) and related communications in this case are relevant evidence and denying parties access to the evidence would be unreasonable and contrary to legal precedent. Accordingly, OCC's request for rehearing should be granted.

III. CONCLUSION

The PUCO should grant rehearing as requested by the OCC and order that the draft audit report(s) shall be provided to every intervening party and comments on the draft audit report(s) may be released to any intervening party that properly and timely requests the comments through discovery. This will ensure a transparent process for consumers who are paying millions of dollars in charges under the FirstEnergy DCR Rider.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission, this 1st day of December 2017.

/s/ Kevin F. Moore

Kevin F. Moore

Assistant Consumers' Counsel

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Summary: App for Rehearing Application for Rehearing by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Moore, Kevin F. Mr.