

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
Ohio Power Company to Update Its) Case No. 17-1156-EL-RDR
gridSMART Phase 2 Rider Rates.)

**COMMENTS ON AEP OHIO’S JANUARY 29, 2018 TARIFF REVISION
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

This case involves the charges that consumers pay (or the amounts credited to them) as a result of Phase 2 of Ohio Power Company’s (“AEP Ohio”) gridSMART project. Under a settlement in AEP Ohio’s gridSMART Phase 2 rider case, AEP Ohio is allowed to make quarterly tariff filings to adjust the rider.¹ Each quarterly filing is approved automatically 30 days after being filed, unless the PUCO orders otherwise.² The quarterly filings are subject to an annual audit for prudence.³ The PUCO approved the settlement in an Opinion and Order issued on February 1, 2017.

On January 29, 2018, AEP Ohio filed a quarterly update to its gridSMART Phase 2 rider. This update adopts a customer credit of 63 cents for residential customers and \$2.17 for nonresidential customers. Under the 30-day automatic approval process adopted by the PUCO,⁴ the new rate and tariff language will go into effect March 1, 2018 unless the PUCO orders otherwise.

¹ *In the Matter of the Application of Ohio Power Company to Initiate Phase 2 of Its gridSMART Project and to Establish the gridSMART Phase 2 Rider*, Case No. 13-1939-EL-RDR, Stipulation and Recommendation (April 7, 2016) at 9.

² *See id.*

³ *See id.*

⁴ *See id.*

The Office of the Ohio Consumers' Counsel ("OCC") was a party in the gridSMART Phase 2 rider case.⁵ OCC represents residential consumers who pay the charges, or receive the customer credits, that become effective through the process approved in the gridSMART Phase 2 rider case. OCC files these comments to direct the PUCO's attention to a recent decision by the Supreme Court of Ohio that could affect all utility company riders – and the consumers who pay the riders – that are subject to quarterly updates and annual prudency reviews. This includes the gridSMART Phase 2 rider at issue in this case. The PUCO should take action to ensure that the settlement in the gridSMART Phase 2 rider case functions as the PUCO intended and to protect consumers.

II. RECOMMENDATIONS

On January 24, 2018, the Court issued a decision in an appeal of the PUCO's Order in FirstEnergy's alternative energy rider case.⁶ Like the rider in this case, FirstEnergy's alternative energy rider was updated quarterly and new rates automatically went into effect in 30 days unless the PUCO ruled otherwise.⁷ The PUCO subsequently audited FirstEnergy's rider, and based on the audit, ordered FirstEnergy to return more than \$43 million in imprudently incurred charges to customers.⁸

⁵ OCC initially opposed the settlement, but later withdrew its opposition because of changes made to the settlement in another case. *See* Case No. 13-1939, Request to Withdraw Application for Rehearing (April 4, 2017). The withdrawal of OCC's opposition was contingent upon the annual prudency audit of the gridSMART Phase 2 rider. *See In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC et al., Joint Stipulation and Recommendation (December 21, 2016) at 14.

⁶ *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229 ("*FirstEnergy*").

⁷ *See id.*, ¶18.

⁸ *See id.*, ¶10.

On appeal, the Court determined that the automatic approval of FirstEnergy's quarterly filings constituted PUCO approval of new rates.⁹ The Court also emphasized that the alternative energy rider tariff did not state that the rates were subject to refund.¹⁰ Thus, even though the order approving FirstEnergy's alternative energy rider stated that the utility could only collect prudently incurred costs,¹¹ the Court held that the PUCO's order that FirstEnergy refund the overcharges to customers involved unlawful retroactive ratemaking.¹²

In reaching this decision, the Court relied on the "filed rate doctrine" of R.C. 4905.32. The Court stated that because FirstEnergy had collected costs from customers under a "filed" rate schedule, the PUCO was prohibited from later ordering a disallowance or refund of those costs.¹³ The Court noted that although FirstEnergy was entitled to collect only prudently incurred costs from customers," there can be no remedy in this case because the costs were already recovered."¹⁴

The Court's decision has far-reaching ramifications for consumers who pay utility charges that include riders that are updated quarterly and automatically approved. Numerous riders have quarterly updates that are subject to automatic approval. Unless the PUCO takes action to conform these riders to the Court's decision, the prudence review of the riders could be rendered meaningless.¹⁵ Consumers could be overcharged

⁹ *See id.*, ¶18.

¹⁰ *Id.*, ¶19.

¹¹ *See id.*, ¶8.

¹² *Id.*, ¶20.

¹³ *Id.*, ¶18.

¹⁴ *Id.*

¹⁵ *See id.*, ¶85 (dissent of Justice French).

for utility service without any way to be reimbursed,¹⁶ resulting in an unfair windfall for utility companies.¹⁷

The gridSMART Phase 2 rider is updated quarterly and is subject to an annual prudence review. Thus, it could be affected by the Court's *FirstEnergy* decision. Unless the PUCO conforms the gridSMART Phase 2 rider to the Court's decision, each quarterly update that is automatically approved could become a "filed" rate that cannot be adjusted for consumers based on an annual prudence review. This should not happen as it would thwart the intent of the PUCO in approving the rider and the intent of the parties in agreeing to (or not opposing) the settlement. Consumers could be harmed.

To protect consumers the PUCO should take the following actions regarding riders that are subject to prudence reviews:

First, the PUCO should not allow quarterly rider updates to be automatically approved. Under the Court's decision, automatic approval would make the rate a "filed" rate that is not subject to refund through an annual prudence review.

Second, the PUCO may approve a rider but only with the condition expressed in the tariff that it is subject to refund. This would help ensure that the rate may be adjusted as a result of the annual prudence review.

And third, the PUCO should order that tariffs for riders that are subject to prudence reviews include language that the approved rate is subject to refund. In rejecting the PUCO's order that FirstEnergy refund \$43 million to customers, the Court

¹⁶ Even though the gridSMART Phase 2 rider currently provides a credit to consumers (see Quarterly Update, Attachment 2), a prudence review could show that consumers may be entitled to a larger credit.

¹⁷ See *FirstEnergy*, ¶18.

emphasized that FirstEnergy's tariff did not state that the alternative energy rider was subject to refund.

As a general matter, the PUCO should investigate the riders of Ohio utilities that are affected by the Court's *FirstEnergy* decision. Any rider that involves a true-up based on a prudence review (whether or not it involves quarterly updates) could be affected by the Court's decision. Most such riders result from settlements, and prudence reviews are an important element in parties agreeing to the settlement. The PUCO should ensure that the intent of its orders approving such riders – and the intent of the parties agreeing to the riders – is carried out. An investigation would help protect the consumers who pay charges through the riders.

Regarding AEP Ohio's January 29 quarterly update of the gridSMART Phase 2 rider, the PUCO should take action to protect consumers before the update becomes effective on March 1, 2018. The PUCO should promptly issue an order approving the rate, but making the approval subject to refund. The PUCO should also make the following change to the tariff language proposed by AEP Ohio¹⁸: “Effective with the first billing cycle of March 2017~~7~~8, all customer bills subject to the provisions of this Rider, including any bills rendered under special contract, shall be adjusted by the monthly gridSMART Phase 2 charge. This rider shall be adjusted periodically to recover amounts authorized by the Commission [and is subject to refund based on the results of the annual prudence review ordered by the Commission in Case No. 13-1939-EL-RDR](#).” This language should be permanent in the rider's tariff.

¹⁸ Quarterly Update, Attachment 2.

III. CONCLUSION

Riders that are subject to prudency reviews cater to utilities that want consumer funding in advance of the PUCO's review of whether the charges are appropriate to bill to consumers. The riders allow for refunds to consumers as a consumer protection related to allowing utilities to charge consumers in advance of the prudency review. The Court's *FirstEnergy* decision threatens to upset this arrangement, to the great detriment of Ohio consumers.

The PUCO should protect Ohioans by not allowing automatic approval of the quarterly rider update filed by AEP Ohio in this case on January 29, 2018. Instead, the PUCO should approve the rider with the condition that it is subject to refund based on the annual prudency review required by the settlement and the PUCO's Order in Case No 13-1939 – or not approve the rider for collection from consumers until the prudency review is completed. The PUCO should also require that the rider's tariff language contain the revisions recommended by OCC. The PUCO must act in this case before March 1, 2018. The protection of consumers requires these changes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments was served via electronic transmission upon the parties this 5th day of February 2018.

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Summary: Comments Comments on AEP Ohio's January 29, 2018 Tariff Revision by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Etter, Terry Mr.