

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Update to the Distribution	)	
Modernization Rider Contained in the Tariffs of	)	Case No. 17-2280-EL-RDR
Ohio Edison, The Cleveland Electric	)	
Illuminating Company and The Toledo Edison	)	
Company.	)	

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**OBJECTIONS TO THE PUCO STAFF’S RECOMMENDATIONS ON  
FIRSTENERGY’S PROPOSED REVISION TO ITS TARIFF FOR CHARGING  
CONSUMERS THE DISTRIBUTION MODERNIZATION RIDER  
BY  
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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**I. INTRODUCTION**

This case involves the charges that consumers pay (or any amounts that may be potentially credited to them) as a result of FirstEnergy’s<sup>1</sup> so-called Distribution Modernization Rider (“DMR Rider”). (We note the unfortunate irony that the authorization of the Distribution Modernization Rider does not require FirstEnergy to spend the funds it collects from consumers on actual distribution modernization.) Our consumer concerns include that FirstEnergy is not proposing to give its 1.9 million consumers the savings of the lowered federal corporate tax rate for January and February of 2018 – over \$6 million. And our concerns include that FirstEnergy’s rider should be made explicitly subject to refund to consumers, given FirstEnergy’s recent success in avoiding a \$43 million refund of renewable energy overcharges to consumers as a result of its appeal to the Ohio Supreme Court.

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<sup>1</sup> The Cleveland Electric Illuminating Company, The Toledo Edison Company, and The Ohio Edison Company.

Under the decision of the Public Utilities Commission of Ohio (“PUCO”) in FirstEnergy’s most recent electric security plan (“ESP”) case,<sup>2</sup> FirstEnergy must update the DMR Rider annually.<sup>3</sup> Further, the DMR Rider is subject to continuous review and assessment by Staff with the assistance of an independent, third-party monitor.<sup>4</sup> And the PUCO allowed FirstEnergy to charge consumers for the taxes it pays on its collection of revenues from consumers; hence, there is now the issue about lowering the charges commensurate with the federal corporate tax cuts. On January 12, 2018, FirstEnergy filed updates to its DMR Rider tariffs to, among other things, reflect lower federal corporate tax rates.<sup>5</sup>

The Office of the Ohio Consumers’ Counsel (“OCC”) was a party in the ESP case in which the DMR Rider was approved. It has moved to intervene in this case. OCC represents residential consumers who pay the DMR Rider charges, or who might receive any potential customer credits under it, that became effective January 1, 2018. OCC files these objections to direct the PUCO’s attention to two matters important to consumers:

1) the modified rates proposed here by FirstEnergy are effective beginning March 1, 2018, so they do not pass along the benefits of the lowered federal corporate tax rate, which became effective January 1, 2018, to consumers for January and February 2018 – over \$6 million;<sup>6</sup> 2) FirstEnergy’s proposed tariffs do not account for a recent decision by

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<sup>2</sup> *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (October 12, 2016).

<sup>3</sup> See, e.g., Staff’s Review and Recommendations (February 1, 2018).

<sup>4</sup> *In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 17-2474-EL-RDR.

<sup>5</sup> See Tariff Updates (January 12, 2018).

<sup>6</sup> \$6,020,772.67, to be precise.

the Ohio Supreme Court that could affect all utility company riders – and the consumers who pay the riders – including the DMR Rider at issue in this case. The PUCO should take action to ensure that the DMR Rider functions as it intended and to protect consumers.

## **II. RECOMMENDATIONS**

### **A. The Modified Rates Proposed Here By FirstEnergy Should Include The Lower Federal Corporate Tax Rates, Which Became Effective January 1, 2018, For January And February 2018.**

The Tax Cuts and Jobs Act of 2017 lowered the corporate income tax rate from 35% to 21%.<sup>7</sup> The lower tax rates became effective January 1, 2018.<sup>8</sup> But FirstEnergy's proposed tariffs here, purportedly meant to account for the lowered tax, are effective from March 1, 2018.<sup>9</sup> Because the tax cuts were effective January 1, 2018, the proposed tariffs fail to fully account for the lowered corporate tax rates that were effective January 1, 2018. As proposed, FirstEnergy's tariffs deprive consumers of an over \$6 million benefit flowing from the reduced taxes. FirstEnergy would wrongfully retain that benefit. That is unfair and would harm consumers.

The PUCO should reject FirstEnergy's tariffs and order it to file tariffs that fully reflect the lowered taxes under the Tax Cuts and Jobs Act that was effective January 1, 2018.

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<sup>7</sup> See Tax Cuts and Jobs Act of 2017, Public Law No. 115-97; Staff's Review and Recommendations.

<sup>8</sup> See Tax Cuts and Jobs Act of 2017, Public Law No. 115-97.

<sup>9</sup> See Staff's Review and Recommendations.

**B. The DMR Rider Tariffs Should Include An Explicit Provision That The Rider Is Charged Subject To Refund.**

On January 24, 2018, the Ohio Supreme Court issued a decision in an appeal of the PUCO's Order in FirstEnergy's alternative energy rider case.<sup>10</sup> The PUCO audited FirstEnergy's rider and, based on the audit, ordered it to return more than \$43 million in imprudently incurred charges to customers.<sup>11</sup>

On appeal, the Court determined that the automatic approval of FirstEnergy's quarterly filings constituted PUCO approval of new rates.<sup>12</sup> The Court also emphasized that the alternative energy rider tariff did not state that the rates were subject to refund.<sup>13</sup> Thus, even though the order approving FirstEnergy's alternative energy rider stated that it could only collect prudently incurred costs,<sup>14</sup> the Court held that the PUCO's order that FirstEnergy refund the overcharges to customers involved unlawful retroactive ratemaking.<sup>15</sup>

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.<sup>16</sup> The Court noted that although FirstEnergy was

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<sup>10</sup> *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229 ("FirstEnergy").

<sup>11</sup> *See id.*, ¶10.

<sup>12</sup> *See id.*, ¶18.

<sup>13</sup> *Id.*, ¶19.

<sup>14</sup> *See id.*, ¶8.

<sup>15</sup> *Id.*, ¶20.

<sup>16</sup> *Id.*, ¶18.

entitled to collect only prudently incurred costs from customers, “there can be no remedy in this case because the costs were already recovered.”<sup>17</sup>

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, any subsequently conducted prudence review of the riders could be rendered meaningless.<sup>18</sup> Consumers could be overcharged for utility service without any way to be reimbursed,<sup>19</sup> resulting in an unfair windfall for utility companies.<sup>20</sup>

The DMR Rider is updated annually and is subject to continuous review and assessment. Thus, it could be affected by the Court’s *FirstEnergy* decision. Unless the PUCO conforms the DMR Rider to the Court’s decision, it could be argued by FirstEnergy that each update to the Rider could become a “filed” rate that cannot be adjusted for consumers’ protection based on the PUCO’s review. This should not happen, as it would thwart the intent of the PUCO in approving the DMR Rider and subjecting it to continuous review. Consumers could be harmed.

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

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<sup>17</sup> *Id.*

<sup>18</sup> *See id.*, ¶85 (dissent of Justice French).

<sup>19</sup> 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.

<sup>20</sup> *See FirstEnergy*, ¶18.

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 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 all 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. The PUCO should ensure that the intent of its orders approving such riders – and the intent of the parties agreeing to the riders, if there is a settlement – is carried out. An investigation would help protect the consumers who pay charges through the riders.

Regarding FirstEnergy's update to the DMR Rider, the PUCO should take action to protect consumers before the update becomes effective on March 1, 2018. The PUCO should explicitly make charges under the proposed tariffs subject to refund. The PUCO should also make the following change to the tariff language proposed here by

FirstEnergy: “All charges under this Rider are subject to refund.” This language should be permanent in the DMR Rider’s tariffs.

### **III. CONCLUSION**

The PUCO should order that FirstEnergy’s updated tariffs pass along the benefits of the lower corporate tax rates – over \$6 million – to consumers. The law leading to those lower corporate tax rates was effective January 1, 2018. In fairness to consumers, the tariffs meant to reflect the lower corporate tax rates should include DMR rates that capture the lower taxes that were effective January 1, 2018.

Riders that are subject to reviews include a quid pro quo between the utility and its customers. The single-issue ratemaking provided by the rider caters to utilities that want consumer funding in advance of the PUCO’s determination of whether the charges are appropriate to bill to consumers. The rider’s subsequent prudence review protects consumers by allowing for refunds to consumers as a consumer protection related to allowing utilities to charge consumers in advance of the prudence review. The Court’s *FirstEnergy* decision threatens to upset this arrangement, to the great detriment of Ohio consumers. Accordingly, the PUCO should reject FirstEnergy’s tariffs proposed here and order FirstEnergy to file tariffs that 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 Objections to the Staff Recommendations was served via electronic transmission upon the parties this 14th day of February 2018.

*/s/ William Michael*

William Michael

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Summary: Objection Objections to the PUCO Staff's Recommendations on FirstEnergy's Proposed Revision to its Tariff for Charging Consumers the Distribution Modernization Rider by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.