

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Columbia Gas     )  
of Ohio, Inc. for Approval of an Alternative Form     ) Case No. 16-2422-GA-ALT  
of Regulation.     )

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

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In this case the Public Utilities Commission of Ohio (“PUCO”) has approved a settlement reached between the Ohio Partners for Affordable Energy, the PUCO Staff, and Columbia Gas of Ohio, Inc. (“Columbia”). The Settlement authorizes Columbia to spend hundreds of millions of dollars per year over the next five years to, among other things, replace natural gas pipelines in its service territory.<sup>1</sup> The Order also permits Columbia to increase a single associated charge on Ohioans’ natural gas utility bills – the Infrastructure Replacement Program (“IRP”) Rider – from \$8.96 up to \$16.20 by 2023.<sup>2</sup> The IRP Rider allows Columbia to collect from customers a return on and of Columbia’s plant investment and related expenses under the IRP.<sup>3</sup>

OCC is the statutory representative of Columbia’s 1.3 million residential natural gas consumers.<sup>4</sup> To protect these consumers, OCC files this application for rehearing to address two issues. First, OCC is concerned that a recent decision by the Supreme Court of Ohio (“Court”) may prohibit consumer refunds from utility company riders, like the IRP Rider

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<sup>1</sup> See Columbia’s Application at 2 (February 27, 2017).

<sup>2</sup> See OCC Ex. 2 (O’Neill Direct at Attach. DEO-4); Joint Ex. 1 (Settlement) (\$8.96 is the current Rider IRP rate. \$16.20 is the approved Rider IRP rate cap for 2022 in the Settlement. The costs for investment years 2018 to 2022 will be charged to customers in years 2019 to 2023).

<sup>3</sup> See Columbia’s Application at 9 (February 27, 2017).

<sup>4</sup> See R.C. Chapter 4911.

approved in this proceeding, that are subject to regular updates, prudence reviews, and automatic adjustments. The PUCO Order in this proceeding should, but does not, address this new legal precedent. The PUCO Order failed to explicitly order and require tariff language identifying the IRP Rider as being collected, subject to refund, if charges are found to be imprudent and/or unlawful.

Second, the IRP Rider rate caps approved in this proceeding were not calculated with the new federal corporate income tax rate of 21% (effective Jan. 1, 2018) promulgated by the Tax Cuts and Jobs Act of 2017 (“Tax Cuts Act”).<sup>5</sup> Instead, the IRP Rider rate caps were calculated with the old tax rate of 35%. Thus, the rate caps are set too high.

Accordingly, the January 31, 2018 Opinion and Order was unlawful and unreasonable in the following respects:

ASSIGNMENT OF ERROR NO. 1: The PUCO erred when it failed to protect consumers by not explicitly ordering that Columbia’s IRP Rider Tariff be amended to state that the IRP Rider is subject to refund based on the results of the annual adjustment filing or pursuant to any Ohio Supreme Court decision.

ASSIGNMENT OF ERROR NO. 2: The PUCO erred when it failed to protect consumers by not calculating the IRP Rider rate caps with the Tax Cuts Act’s new federal corporate income tax rate of 21%.

Granting OCC’s application for rehearing will allow consumers to receive any refund for imprudent or unlawful charges under the IRP Rider that the PUCO Orders. It will also ensure that the IRP Rider rate caps are calculated using the correct federal corporate income tax rate of 21%. Denying OCC’s application for rehearing could result in consumers being

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<sup>5</sup> H.R. 1, 115th Cong. (2017) (hereinafter the "Tax Cuts Act").

denied the ability to ever receive a refund of imprudent and/or unlawful IRP Rider costs and implementing Rider IRP rate caps that were calculated with an overstated federal tax rate.

The reasons in support of this application for rehearing are further set forth in the accompanying memorandum in support. The PUCO should grant rehearing and abrogate its Order as requested by OCC.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

A recent decision by the Supreme Court of Ohio (“Court”) could affect all utility company riders – and the consumers who pay the riders—that are subject to regular true-ups, reviews, and automatic adjustments.<sup>6</sup> In *FirstEnergy*, the Court found that overcharges under a rider that is subject to a regular true-up and review, and is automatically approved, cannot be refunded to customers unless the utility’s tariff explicitly allows for such a refund. Columbia’s IRP Rider is subject to a regular true-up and review, will automatically “become effective with bills rendered on and after the first billing unit of May of each year,” and does not contain explicit tariff language allowing for a refund of excessive, unlawful, or imprudent charges. Thus, under the Court’s decision in *FirstEnergy*, the PUCO may not be able to order Columbia to refund money it has overcharged customers under its IRP Rider, and may not be able to prevent Columbia from charging customers for imprudent costs. And, while the *FirstEnergy* decision was rendered prior to the PUCO’s Opinion and Order in this case, the PUCO’s decision does not reflect this recent change in legal precedent.

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<sup>6</sup> In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co., Slip Opinion No. 2018-Ohio-229 (“*FirstEnergy*”).

The Tax Cuts Act reduced the federal corporate income tax rate from 35% to 21%, effective January 1, 2018. This reduction in the federal tax rate impacts utilities' rates, including the riders that they charge to consumers. In this case, the PUCO approved rate caps for Columbia's IRP rider on January 31, 2018—30 days after the Tax Cuts Act went into effect. Yet, the PUCO Order did not adjust the rate caps to reflect the corporate tax reduction. Instead, the PUCO Order approved the IRP Rider rate caps that were calculated with the old tax rate of 35%, instead of the new tax rate of 21%. Thus, the IRP Rider rate caps are overstated, allowing Columbia to avoid passing the benefits of the tax reduction back to customers.

The PUCO Order is, therefore, unlawful and unreasonable. The PUCO Order should be modified or abrogated so that the PUCO orders Columbia to reform its IRP Rider tariff to explicitly allow for refunds that result from Columbia's annual adjustment filing. Additionally, the PUCO should establish new caps for the IRP Rider that reflect the reduced corporate taxes the utility will pay under the Tax Cuts Act.

## **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 entered an appearance and filed testimony regarding Columbia's Application and the Settlement.

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." Additionally, 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 or modifying the Opinion and Order and is met here. The PUCO should grant rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Opinion and Order.

### **III. RECOMMENDATIONS**

**ASSIGNMENT OF ERROR NO. 1: The PUCO erred when it failed to protect consumers by not explicitly ordering Columbia’s IRP Rider Tariff be amended to state that the IRP Rider is subject to refund based on the results of the annual adjustment filing or any Ohio Supreme Court decision.**

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

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<sup>7</sup> In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co., Slip Opinion No. 2018-Ohio-229 (“FirstEnergy”).

<sup>8</sup> See *id.*, ¶18.

to customers.<sup>9</sup>

On appeal, the Court determined that the automatic approval of FirstEnergy's quarterly filings constituted PUCO approval of new rates.<sup>10</sup> The Court also emphasized that the alternative energy rider tariff did not state that the rates were subject to refund.<sup>11</sup> Thus, even though the order approving FirstEnergy's alternative energy rider stated that the utility could only collect prudently incurred costs,<sup>12</sup> the Court held that the PUCO's order that FirstEnergy refund the overcharges to customers involved unlawful retroactive ratemaking.<sup>13</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>14</sup> 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."<sup>15</sup>

The Court's decision has far-reaching ramifications for consumers who pay utility riders that involve an "update" or "true-up" based on a review or audit of costs. Numerous riders have regular (i.e., quarterly or annual) updates or reviews that are subject to automatic

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<sup>9</sup> See *id.*, ¶10.

<sup>10</sup> See *id.*, ¶18.

<sup>11</sup> *Id.*, ¶19.

<sup>12</sup> See *id.*, ¶8.

<sup>13</sup> *Id.*, ¶20.

<sup>14</sup> *Id.*, ¶18.

<sup>15</sup> *Id.*

approval or effect, including Columbia’s IRP Rider. Unless the PUCO takes action to conform these charges to the Court’s decision, the review of the riders could be rendered meaningless.<sup>16</sup> Consumers could be overcharged for utility service without any way to be reimbursed, resulting in an unfair windfall for utility companies.<sup>17</sup>

The IRP Rider could be affected by the Court’s decision in *FirstEnergy*. The IRP Rider is calculated on an annual basis, is subject to an annual true-up and review of costs, and, according to the tariff, is automatically adjusted as it “will become effective with bills rendered on and after the first billing unit of May of each year.”<sup>18</sup> Unless the PUCO conforms the IRP Rider tariff to address the Court’s decision, each annual update that is automatically approved could become a “filed” rate that may not be adjusted to benefit consumers based on an annual review. Consumers could be overcharged for utility service without any way to be reimbursed, resulting in an unfair windfall for utility companies.<sup>19</sup>

Accordingly, the PUCO should abrogate its Order to make the IRP Rider subject to refund. The PUCO should also make the following change to Columbia’s IRP Rider tariff language: “This Rider shall be calculated annually pursuant to a Notice filed no later than November 30 of each year based on nine months of actual data and three months of estimated data for the calendar year. The filing shall be updated by no later than February 28 of the following year to reflect the use of actual calendar year data. Such adjustments to the Rider will become effective with bills rendered on and after the first billing unit of May of each year. This Rider is being collected, subject to refund, based on the PUCO’s findings in

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<sup>16</sup> See *id.*, ¶85 (dissent of Justice French).

<sup>17</sup> See *FirstEnergy*, ¶18 (OCC’s proposed new language is underlined).

<sup>18</sup> See Columbia’s Tariff PUCO No. 2, Rider IRP – Infrastructure Replacement Program Rider, 14<sup>th</sup> Revised Sheet No. 27.

<sup>19</sup> See *FirstEnergy*, ¶18.



the annual filing or under any Supreme Court of Ohio decision.” This language should be permanent in the rider’s tariff. In addition, the PUCO’s future decision regarding this matter should include an ordering clause reflecting that “the IRP Rider is subject to refund if its charges are found to be either, unreasonable, imprudent, or unlawful by this Commission or the Supreme Court of Ohio.”

**ASSIGNMENT OF ERROR NO. 2: The PUCO erred when it failed to protect consumers by not calculating the IRP Rider rate caps with the Tax Cuts Act’s new federal corporate income tax rate of 21%.**

On December 22, 2017, the Tax Cuts Act was signed into law, effective January 1, 2018. The Tax Cuts Act reduced the federal corporate income tax rate from 35% to 21%. The federal corporate income tax rate is included in the calculation of Columbia’s IRP Rider rate caps, which were approved in this proceeding. When the IRP Rider rate caps were first proposed by Columbia in this case, the tax rate was 35%. However, before the PUCO Order in this case was issued, the tax rate had been changed to 21%. Thus, the IRP Rider rate caps should be calculated with the new tax rate, so that customers receive the full benefit of the reduced taxes. If the new tax rate is not used, then the IRP Rider rate caps would be overstated, which would allow Columbia to spend more under the IRP than contemplated by the PUCO.

In its initial comments in the PUCO’s Commission Ordered Investigation into the new tax rate (“Tax COI”), Columbia stated that it will make a proposal to reduce its IRP rates in its upcoming annual IRP Rider application in Case No. 17-2374-GA-RDR.<sup>20</sup> This reduction will reflect the change from 35% to 21%.<sup>21</sup> With respect to excess ADIT resulting

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<sup>20</sup> *In the Matter of The Commission’s Investigation of the Financial Impact of the Tax Cut’s and Jobs Act of 2017 on Regulated Ohio Companies*, Case No. 18-0047-AU-COI, Columbia’s Comments at 4-5 (February 15, 2018).

<sup>21</sup> *Id.*

from the IRP, Columbia proposes to pass these savings back to customers through its 2019 IRP rates.<sup>22</sup>

Columbia's recommendation in the Tax COI does not remedy the problem with the PUCO Order in this proceeding.<sup>23</sup> Adjusting the IRP Rider rate in the future will not change the IRP Rider rate caps that identify the maximum amount that Columbia is permitted to spend under the IRP for investment years 2018 through 2022 (for rates effective 2019 through 2023). Unless the PUCO Order is amended, and the IRP Rider rate caps are reduced to address the tax rate reduction, Columbia's spending under the IRP will be unlawfully high and higher than the PUCO contemplated when it approved the rate caps. The Order should be amended to recalculate the IRP Rider rate caps using the current federal corporate income tax rate of 21%.

#### **IV. CONCLUSION**

The PUCO should grant rehearing as requested by the OCC and order that (1) Columbia's IRP Rider Tariff be amended to state that the IRP Rider is being collected subject to refund based on the results of the annual adjustment filing; and (2) Columbia's IRP Rider rate caps be reduced to address the new federal corporate income tax rate of 21% resulting from the Tax Cuts Act. This will ensure that consumers who are being charged under the Columbia IRP Rider can receive refunds if the charge is found to be imprudent or unlawful. It will also ensure that the reduced tax benefits be flowed back to

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<sup>22</sup> *Id.*

<sup>23</sup> Columbia's proposed handling of the Tax Cuts Act is also improper. As OCC stated in its comments and reply comments in the Tax COI proceeding, all rider rate adjustments should include savings beginning January 1, 2018. Customers should not be forced to wait until 2019 to receive the rate decrease that the federal government ordered through the Tax Cuts Act.

customers and not diverted to allow Columbia to spend more than the PUCO contemplated and approved as just and reasonable.

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 2nd day of March 2018.

/s/ Kevin F. Moore

Kevin F. Moore

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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.