

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Tariff Update of Rider)
AER for Ohio Edison Company, The) Case No. 17-2275-EL-RDR
Cleveland Electric Illuminating Company,)
and The Toledo Edison Company.)

**COMMENTS ON FIRSTENERGY’S APPLICATION TO INCREASE CHARGES
TO CONSUMERS UNDER ITS ALTERNATIVE ENERGY RIDER
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

The Public Utilities Commission of Ohio (“PUCO”) should protect 1.9 million residential customers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, “FirstEnergy”) from paying too much for renewable energy. FirstEnergy proposes new tariff language that its alternative energy rider (“Rider AER”) will be subject to “reconciliation.” But the PUCO should modify this language to provide more certainty that Ohioans will get their money back if charges under this rider are later found unreasonable, imprudent, or unlawful.

This case involves the charges that consumers pay to FirstEnergy for renewable energy. FirstEnergy proposes to increase the amount it charges consumers for the costs FirstEnergy incurs to comply with Ohio’s alternative energy portfolio standards.¹

On March 1, 2018, FirstEnergy filed an application proposing to increase the amount that it charges customers for renewable energy under Rider AER. Thereafter, on March 19, 2018, FirstEnergy filed a revised application proposing to amend the tariff

¹ R.C. 4928.64.

language to indicate that Rider AER be subject to future reconciliation if FirstEnergy overcharges consumers. FirstEnergy proposed increases of over 100% for Ohio Edison Company, 85% for Cleveland Electric Illuminating Company, and 47% for Toledo Edison Company.² Under the 30-day automatic approval process adopted by the PUCO, the new rates and tariff language will become effective with the first billing cycle in April, unless the PUCO orders otherwise. In fairness to consumers, the tariffs for Rider AER should reflect the lower corporate tax rate effective January 1, 2018 resulting from the federal Tax Cuts and Jobs Act.³ As filed, it does not. Additionally, in the interest of fairness and to protect consumers, the PUCO should:

- 1) End the automatic approval process for riders that are updated quarterly, including Rider AER;
- 2) Modify FirstEnergy's proposed refund language in Rider AER to better protect customers if the PUCO or Supreme Court of Ohio later determines that charges under this rider were unreasonable, imprudent, or unlawful;
- 3) Ensure the tariff for Rider AER captures the lower corporate tax rate effective January 1, 2018.

Unless the PUCO adopts these recommendations, each quarterly update of Rider AER could be considered a "filed" rate that cannot be refunded to consumers even if the rider overcharges consumers.⁴ The PUCO should seek to prevent this, as it would

² *In re In the Matter of the Tariff Update of Rider AER for Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Revised Tariff Pages (Mar. 1, 2018) at Sheet 8.

³ Tax Cuts and Jobs Act of 2017, Public Law No. 115-97.

⁴ *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229, (holding that that the automatic approval of quarterly rate filings constituted PUCO approval of new rates).

contravene the PUCO's Order that the rider be audited annually and subject to refund so as not to overcharge consumers.⁵ Without action by the PUCO, FirstEnergy could overcharge consumers through Rider AER without recourse, which would be an unjust and unreasonable burden on consumers.

II. RECOMMENDATIONS

A. To protect consumers, the PUCO should end the automatic approval process for riders that are updated quarterly, including Rider AER.

The Supreme Court of Ohio ("Court") recently held that quarterly rider updates are "filed rates" authorized by the PUCO under the filed rate doctrine in R.C. 4905.32.⁶ Therefore, unless stated in the tariff, the PUCO is prohibited from later ordering a disallowance or refund of money collected, even if the annual audit determines that the utility overcharged consumers. To prevent consumers from being overcharged, the PUCO should end the automatic approval process for riders such as Rider AER, which are updated on a quarterly basis.

B. The PUCO should modify FirstEnergy's proposed tariff language to remove any potential ambiguity with regard to refunds to consumers for overcharges.

When the Court held that the PUCO could not order refunds to consumers even after the utility overcharged consumers, the Court emphasized that the tariff for the rider

⁵ *In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide a Standard Service Offer*, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016) at 97 ("the Commission notes that the application contains a provision regarding Rider AER, to limit refunds from out-of-period adjustments . . . we will modify the Stipulated ESP IV to strike that proposed provision.").

⁶ *Id.*, ¶18.

at issue did not state that the rates were subject to refund.⁷ Even though the PUCO's order approving the rider stated that the utility could only collect prudently incurred costs, the Court held that the PUCO's subsequent order directing a refund to consumers for overcharging consumers constituted unlawful retroactive ratemaking.

FirstEnergy's March 19 update to the tariff, by adding refund language, appears designed to address the *FirstEnergy* decision. And while OCC appreciates FirstEnergy's effort to include refund language in this rider, OCC is concerned with potential ambiguity in the language that FirstEnergy proposes. Its focus on these riders being subject to "reconciliation" is potentially vague and ambiguous. "Reconciliation" does not necessarily signify or require a refund. For example, it is unclear whether "reconciliation" would include the situation where a rider is audited and past charges are found imprudent, unreasonable, or otherwise unlawful.

To better protect customers from an unjust result like the one in *FirstEnergy*, OCC proposes the following language to remove any ambiguity in FirstEnergy's proposed tariff language: **"Any charge collected from customers under this tariff later determined to be unlawful, imprudent, or unreasonable by the PUCO or the Supreme Court of Ohio is refundable to customers."** This modification would make clearer the PUCO's intent to protect consumers from potential future rulings that utility charges under these riders were imprudent or otherwise unlawful or unreasonable. This language should be a permanent addition to the tariff for Rider AER, as well as all other FirstEnergy riders subject to quarterly updates and automatic approval, including the

⁷ *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229Id., ¶19.

Delta Revenue Recovery Rider, Distribution Uncollectible Rider, AMI/Modern Grid Rider, and the Delivery Capital Recovery Rider.

C. The PUCO should ensure Rider AER includes the lower federal corporate tax rates, which became effective January 1, 2018 to ensure consumers are not overcharged.

The Tax Cuts and Jobs Act of 2017 lowered the corporate income tax rate from 35 percent to 21 percent.⁸ The lower tax rates became effective January 1, 2018.⁹ In fairness to consumers, the tariffs for Rider AER should reflect the lower corporate tax rate effective January 1, 2018. Further, the PUCO should ensure that the annual audit or prudence review considers whether the tariff for Rider AER reflects the lower tax rates dating back to the effective date of the tax (January 1, 2018). Because the lower tax rate became effective on January 1, 2018, customers should receive the benefit of the lower charge beginning on January 1, 2018.

III. CONCLUSION

The PUCO should protect Ohio's residential utility consumers by not allowing automatic approval of quarterly updates to Rider AER. Further, the PUCO should protect consumers from overpaying FirstEnergy, by modifying FirstEnergy's proposed tariff language to clarify that Rider AER is subject to refund if such charges are found to be unreasonable, imprudent, or unlawful. Finally, the PUCO should ensure that consumers receive the full benefit of the lower corporate tax rate.

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

⁹ *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these Comments was served on the persons stated below via electronic transmission, this 21st day of March, 2018.

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Summary: Comments Comments on FirstEnergy's Application to Increase Charges to Consumers Under its Alternative Energy Rider by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of McKenney, Bryce