

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the Non-Market-       )  
Based Services Rider Contained in the Tariffs of       )  
Ohio Edison Company, The Cleveland Electric       ) Case No. 18-1818-EL-RDR  
Illuminating Company and The Toledo Edison       )  
Company.    )

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

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FirstEnergy wants to charge two million customers for \$94.8 million<sup>1</sup> of transmission costs despite promises made to customers to forgo collecting \$360 million for transmission. The costs were associated with FirstEnergy's decision to move from one regional transmission organization, MISO, to another, PJM. (It may be no coincidence that FirstEnergy's move held for it the potential for greater revenues, ultimately from customers, through the PJM capacity market compared to MISO.) And FirstEnergy wants customers to pay it carrying costs (similar to interest on the \$94.8).

FirstEnergy's promises to consumers were made as part of its settlement agreements in an electric security plan<sup>2</sup> and were one of the primary reasons that it obtained approval of its plan as being more favorable in the aggregate to customers than a

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<sup>1</sup> FirstEnergy's application treated this charge (and related charges from PJM) as confidential and did not publicly file it with the PUCO. Per agreement reached with FirstEnergy's Counsel on Mar. 29, 2019, FirstEnergy waived confidentiality of these numbers, allowing OCC to include them in this and other filings without redacting or filing the information under seal through a protective order.

<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 Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan ("ESP II")*, Case No. 10-0388-EL-SSO, Stipulation and Recommendation at 18-20 (Mar. 23, 2010); *see also* Second Supplemental Stipulation at 5, Case No. 10-0388 (July 10, 2010); Opinion and Order adopting the Combined Stipulation as modified by the Commission at 32 (Aug. 25, 2010).

market plan.<sup>3</sup> The PUCO should enforce the settlements that it approved and deny FirstEnergy's request to collect many more millions of dollars from customers in PJM transmission costs ("Legacy RTEP"). Doing so would give customers the benefit they are entitled to under the PUCO order. Additionally, the PUCO would be reinforcing an important policy that Ohio retail customers should not be double-charged for transmission projects as a result of FirstEnergy's unilateral decision to switch regional transmission organizations.<sup>4</sup>

In its February 27, 2019 Finding and Order ("Order") in this case, the PUCO correctly found that FirstEnergy's attempt to charge customers for Disputed Legacy RTEP costs "may be unjust and unreasonable."<sup>5</sup> It appropriately ordered FirstEnergy to file revised tariffs excluding the collection of those costs from customers.<sup>6</sup> At the same time, the PUCO invited interested parties to file comments on whether FirstEnergy should be allowed to collect the \$94.8 million of Disputed Legacy RTEP costs from its customers – costs that exceed the refund ATSI received from PJM.<sup>7</sup>

The PUCO in excluding the Disputed Legacy RTEP costs took the first step toward protecting customers. OCC agrees that FirstEnergy's proposed collection of

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<sup>3</sup> *Id.*, Opinion and Order at 42-45 (Aug. 25, 2010).

<sup>4</sup> See, e.g., *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan ("ESP II")*, Case No. 10-0388-EL-SSO, Testimony of Hisham Choueiki at 4-5 (Apr. 15, 2010) (noting that the PUCO filed comments at FERC in Docket No. ER09-1589, expressing concerns that assessing ATSI charges for legacy RTEP "could have a detrimental impact on the CEI, Ohio Edison, and Toledo Edison customers.").

<sup>5</sup> Order, ¶15.

<sup>6</sup> *Id.*

<sup>7</sup> Order, ¶16.

Legacy RTEP costs from customers may be unjust and unreasonable and welcomes the opportunity to file comments in this proceeding.

However, OCC respectfully seeks rehearing of the Order because the PUCO can and should do more to protect FirstEnergy's 1.9 million Ohio residential customers. It must do so to preserve the integrity of its Order approving FirstEnergy's absolute commitment to forgo collecting \$360 million of legacy RTEP charges from customers.

Specifically, the Order is unjust, unreasonable, and unlawful in the following respects:

- (1) The PUCO's Order is unjust, unreasonable, and unlawful because it does not require FirstEnergy to demonstrate that it has met its commitment to customers to forgo collecting \$360 million of Legacy RTEP costs billed to it by PJM.
- (2) The PUCO's Order is unjust, unreasonable and unlawful because the PUCO's comment process for this proceeding is insufficient to address the complex factual and legal issues presented by FirstEnergy's application.

The grounds for rehearing are explained in more detail in the attached memorandum in support.

Respectfully submitted,

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## I. INTRODUCTION

However, for purposes of OCC’s Application for Rehearing here, the primary focus must be on whether FirstEnergy has satisfied its commitment to customers to forgo collecting PJM transmission project costs associated with FirstEnergy’s move to PJM. In FirstEnergy’s electric security plan case, Case No. 10-388-EL-SSO, FirstEnergy committed to forgo collecting \$360 million of Legacy RTEP from its customers –a commitment made as part of stipulations that the PUCO approved in its Opinion and Order.

Beyond that threshold issue, Staff identified an additional issue, raised in its Review. That issue is whether FirstEnergy can charge customers to finance the Disputed

Legacy RTEP costs over a three-year period. These issues together involve many millions of dollars in charges to FirstEnergy customers.

## **II. STANDARD OF REVIEW**

Applications for rehearing are governed by R.C. 4903.10, which provides 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 through its Motion to Intervene in this case, and the PUCO granted OCC’s Motion.<sup>8</sup>

R.C. 4903.10(B) also requires that an application for rehearing be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” Further, 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(B) 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 some portions of the Order is met here. The PUCO should grant and hold rehearing on the matters specified in this

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<sup>8</sup> Order, ¶ 22.

Application for Rehearing and abrogate or modify the Order consistent with OCC's Recommendations herein.

### III. ASSIGNMENTS OF ERROR

- A. **The Order is unreasonable and unlawful because it does not require FirstEnergy to demonstrate that it has met its obligation to customers to forgo collecting \$360 million of Legacy RTEP costs billed to it by PJM.**

There is nothing about FirstEnergy's filing that affirmatively demonstrates that FirstEnergy has met its agreed-upon commitments to its customers. That commitment was made under the Second Supplemental Stipulation, and was adopted, in part, by the PUCO, as discussed at length in the PUCO's order.<sup>9</sup>

Under the electric security plan stipulations, FirstEnergy agreed not to collect in retail rates from Ohio retail customers the Legacy RTEP costs "for the longer of (1) the five year period from June 1, 2011 through May 31, 2016 or (2) when a total of \$360 million of *Legacy RTEP Costs have been paid for by the Companies* and has not been recovered by the Companies in the aggregate through retail rates from Ohio retail customers." *Id.* (emphasis added).

FirstEnergy has not produced evidence to show that it has honored its commitment to protect customers from bearing Legacy RTEP costs. Until and unless

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<sup>9</sup> See, Opinion and Order at 13 (summarizing the Combined Stipulation's commitment to not seek recovery of \$360 million of legacy RTEP from customers); *id.* at 26 (summarizing FirstEnergy's commitment not to seek recovery of \$360 million of RTEP costs from customers); *id.* at 32 (describing the additional benefits under the Second Supplemental Stipulation as including an agreement not to seek recovery of legacy RTEP costs from customers); *id.* at 36 (finding FirstEnergy's commitment to forgo recovery of a minimum of \$360 million of legacy RTEP charges advances the public interest); *id.* at 44 (finding that there are additional benefits contained in the Combined Stipulation that make the electric security plan more favorable in the aggregate than a market offer, including FirstEnergy's agreement to forgo recovery of "a minimum of \$360 million in RTEP charges" from customers).

\$360 million of Legacy RTEP costs have been paid for by the Companies and not recovered, its commitment remains unfulfilled. Under the PUCO order approving the Settlement on this issue (and others), FirstEnergy must show that it has forgone collection of \$360 million of Legacy RTEP costs from customers that PJM actually charged to FirstEnergy and that FirstEnergy actually paid.

But instead of making that showing, FirstEnergy attempts to pry out of customers hands \$94.8 million of Disputed Legacy RTEP charges. FirstEnergy's proposals to get customers to pay Disputed Legacy RTEP costs rests on the bald assertion that its obligations to forgo collection from customers of \$360 million in Legacy RTEP costs have been satisfied, thus allowing it to now begin charging customers the Disputed Legacy RTEP costs.

FirstEnergy appears to believe that because the FERC Settlement Order provides for approximately \$120 million in refunds to its transmission affiliate ATSI (that are much less than \$360 million), it has met its obligations under the Settlements in the ESP II case. FirstEnergy's contention is not supported by the PUCO's Order and would deprive customers of the benefits they are entitled to under the PUCO Order in FirstEnergy's electric security plan case.<sup>10</sup>

The PUCO should have required FirstEnergy to demonstrate (through the filing of sworn testimony or otherwise) that it met its commitment to customers. To do so, FirstEnergy would have to show that it has been charged by PJM for legacy transmission projects and actually paid a total of at least \$360 million to PJM and not sought to collect those costs from Ohio retail customers. FirstEnergy's flat assertion that it has met its

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<sup>10</sup> See OCC Comments filed contemporaneously with this Application for Rehearing.



obligation falls short of meeting its burden of proof. The PUCO's failure to require evidence on this threshold issue was unreasonable and unlawful.<sup>11</sup> The PUCO should grant rehearing on this issue.

**B. The Order is unjust and unreasonable because the PUCO's process for this proceeding is insufficient to address the complex factual and legal issues presented by FirstEnergy's application.**

OCC appreciates that the PUCO and its Staff did not allow FirstEnergy to force review of these complex and costly issues through a rider case with a 75 day auto-approval process. Instead, the Order established a comment period to determine whether FirstEnergy should be permitted to recover Disputed RTEP Legacy costs and carrying costs. While this is a step in the right direction, the PUCO should have gone further.

The Disputed RTEP Legacy costs and proposed charges to consumers are significant – over \$94 million. And the agreed-upon commitment to not collect \$360 million in RTEP legacy costs from customers was also very significant. FirstEnergy's commitment not to collect \$360 million of PJM transmission project costs was one of the primary reasons that its electric security plan was found to be more favorable in the aggregate to customers than a market plan.<sup>12</sup>

Given the significant dollars at issue, along with the complexity of the PJM billings, the PUCO should develop a full evidentiary record. Simply allowing comments and reply comments is not enough.

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<sup>11</sup> See, R.C. 4909.18.

<sup>12</sup> *Id.*, Opinion and Order at 42-45 (Aug. 25, 2010).

Accordingly, the PUCO should modify its Order in the following respects:

The PUCO should allow interested parties an opportunity to participate, by extending the intervention deadline in the proceeding. Along with the extended intervention deadline, the PUCO should extend the discovery period in this case to allow interested parties the opportunity to explore the issues presented by FirstEnergy's application. If the PUCO wishes to expeditiously resolve this case, it should order an expedited discovery schedule. The PUCO should also delay the comment period, consistent with the discovery schedule adopted. This would enable parties to file more informed comments that will assist the PUCO in resolving these important matters where millions of dollars in customer charges are at issue. Additionally, the PUCO should schedule this matter for hearing, after allowing for ample discovery. Parties should also have the opportunity to file written testimony.

These procedures are consistent with the process followed in other PUCO proceedings where the PUCO has found an application "may be unjust and reasonable."<sup>13</sup> And OCC's recommended process is consistent with procedures generally followed when utilities seek to increase rates to customers.<sup>14</sup>

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<sup>13</sup> See, 4905.26: "if it appears that reasonable grounds for a complaint are stated, the commission shall fix a time for hearing;" See also, OAC 4901:1-38-05 (A)(2): Upon the filing of an application for a unique arrangement, the commission may fix a time and place for a hearing if the application appears to be unjust or unreasonable (applies to utility seeking a unique arrangement), and (B)(3) (which applies to mercantile customers seeking a unique arrangement); See also, 4901-1-38-04 (B) "Upon the filing of an energy efficiency application, the commission may fix a timer and place for a hearing if the application appears to be unjust or unreasonable;" and 4901:1-38-03 (C) "upon the filing of an economic development application, the commission may fix a time and place for a hearing if the application appears to be unjust or unreasonable;" See also, 4901:1-10-10 (6)(e).

<sup>14</sup> See, R.C. 4909.18.

#### IV. CONCLUSION

The PUCO's ultimate decision regarding FirstEnergy's proposed transmission project charges is an important one. Charges of \$94.8 million to customers hang in the balance. Ohio's customers, and other interested parties, should be afforded a meaningful opportunity to challenge FirstEnergy's proposal. The procedural schedule the PUCO has adopted to date does not allow for parties to adequately address this proposed rate increase to customers. The PUCO should grant OCC's Application for Rehearing and modify the Order consistent with OCC's recommendations.

Respectfully submitted,

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(Both will accept service via email)

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Application for Rehearing of the Office of the Ohio Consumers' Counsel has been served electronically upon those persons listed below this 29th day of March 2019.

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Summary: App for Rehearing Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of O'Brien, Angela D.