

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In The Matter Of The Determination Of The)	
Existence Of Significantly Excessive Earnings For 2017)	
Under The Electric Security Plans Of Ohio Edison)	Case No. 18-857-EL-UNC
Company, The Cleveland Electric Illuminating)	
Company, And The Toledo Edison Company.)	
)	
In The Matter Of The Determination Of The)	
Existence Of Significantly Excessive Earnings For 2018)	
Under The Electric Security Plans Of Ohio Edison)	Case No. 19-1338-EL-UNC
Company, The Cleveland Electric Illuminating)	
Company, And The Toledo Edison Company.)	
)	
In The Matter Of The Determination Of The)	
Existence Of Significantly Excessive Earnings For 2019)	
Under The Electric Security Plans Of Ohio Edison)	Case No. 20-1034-EL-UNC
Company, The Cleveland Electric Illuminating)	
Company, And The Toledo Edison Company.)	
)	
In the Matter of the Quadrennial Review Required)	
By R.C. 4928.143(E) For The Electric Security Plans)	
Of Ohio Edison Company, The Cleveland Electric)	Case No. 20-1476-EL-UNC
Illuminating Company, And The Toledo Edison)	
Company.)	

**MEMORANDUM CONTRA FIRSTENERGY’S MOTION FOR A 90-DAY DELAY IN
THESE CASES INVOLVING REFUNDS TO CONSUMERS FOR EXCESS PROFITS
BY
OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The FirstEnergy Utilities, affiliates of the company that has just been charged with a federal crime of defrauding the public,¹ owe consumers at least \$200 million (by our count) in

¹ The federal charge and deferred prosecution agreement led to this front-page headline in the Sunday early print edition (on Saturday) of the July 24, 2021 Columbus Dispatch: “Feds: FirstEnergy Bribed Regulator.” *Available at* <https://www.pressreader.com/usa/the-columbus-dispatch/20210724>.

refunds for their significantly excessive profits. The FirstEnergy Utilities now seek a 90-day delay.² For consumers, the PUCO should say no.

There is no “good cause” to delay the PUCO’s consideration of refunds to consumers for 90 days. And so FirstEnergy’s motion should be denied under O.A.C. 4901-1-13(A).

Some context is in order for FirstEnergy’s motion. At the same time as FirstEnergy’s involvement in the scandal of H.B. 6, an anti-consumer benefit for FirstEnergy was slipped into the state budget bill, H.B. 166, over OCC’s objection and testimony. That budget-bill benefit would have protected FirstEnergy from refunding excess profits to consumers now under consideration.³ After the H.B. 6 scandal was revealed, the budget-bill scheme for FirstEnergy went south when repealed in H.B. 128.

Meanwhile, things were happening on profits for the FirstEnergy Utilities in another branch of government, at the PUCO. The PUCO ordered that the charges for FirstEnergy’s infamous “Distribution Modernization Rider” would not be counted in the calculation of whether the FirstEnergy Utilities had overcharged consumers for profits.⁴ That “new math” protected FirstEnergy by making its profits appear lower and less refundable *on paper*.

Then, in OCC’s appeal to the third branch of government, the Ohio Supreme Court, the Court threw out the PUCO’s order as unlawful.⁵ The Court protected consumers’ right to a refund of significantly excessive profits.

² See Motion for 90 Day Extension of the Remaining Case Schedule (July 23, 2021).

³ See H.B. 166 (133rd) at 1394 (modifying R.C. 4928.143(F) to allow FirstEnergy to consolidate its three operating utilities, on paper only, when assessing whether utility profits are significantly excessive, thus reducing the ability of consumers to get a refund for an individual utility’s significantly excessive profits).

⁴ *In re Determination of the Existence of Significantly Excessive Earnings for 2017 Under the Elec. Sec. Plan of Ohio Edison Co., the Cleveland Elec. Illuminating Co., & the Toledo Edison Co.*, Case No. 18-857-EL-UNC, Opinion & Order (Mar. 20, 2019).

⁵ *In re Determination of Existence of Significantly Excessive Earnings for 2017 Under Elec. Sec. Plan of Ohio Edison Co.*, 2020-Ohio-5450.

With that troubling background involving protection for FirstEnergy (at consumer detriment) and learning lessons from decades of experience in the PUCO's settlement process that favors utilities, it is virtually inconceivable that FirstEnergy's proposed three-month delay to negotiate a settlement is good for consumers. The FirstEnergy Utilities' strategy is no surprise.

The PUCO's settlement process favors utilities over consumers by implicitly endowing utilities with superior bargaining power. As former Commissioner Roberto noted in a PUCO opinion, in electric security plan cases, there is a "balance of power" favoring utilities such that intervenors "do not possess equal bargaining power."⁶ At the PUCO, there essentially is never a settlement unless the utility gives its consent to the settlement. It's like an unwritten rule. Utility consumers, through OCC, are not given that corresponding power over settlements.

Moreover, the PUCO allows the bad practice of utilities offering cash and cash equivalents to parties willing to sign settlements. Of course, OCC does not have cash to counter the utility cash—nor would OCC want it, for this PUCO settlement practice that should be void as against public policy. There was a case where the PUCO itself expressed concern about utility payments of cash to special interests in settlements, stating that settlements with cash payments to intervenors are "strongly disfavored by the Commission and are highly likely to be stricken from any future stipulation submitted to the Commission for approval."⁷

Further, the PUCO's review of settlements is limited, where the PUCO merely considers the settlement as a "package" instead of considering the merits of each individual issue. Again, that favors the utilities that are always part of every settlement.

⁶ *In re Application of [FirstEnergy] for Authority to Establish a Standard Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Sec. Plan*, Case No. 08-935-EL-SSO, Concurring in Part & Dissenting in Part Opinion of Commissioner Cheryl L. Roberto (Mar. 25, 2009).

⁷ *See In re Application of Columbus S. Power Co. & Ohio Power Co. for Authority to Recover Cost Associated with the Ultimate Construction & Operation of an Integrated Gasification Combined Cycle Elec. Gen. Facility*, Case No. 05-376-EL-UNC, Order on Remand at 11-12 (Feb. 11, 2015).

The settlement process problem for consumers can be seen in the recent experience on the same profits-refund issue for Dayton-area consumers. DP&L and the PUCO Staff (and others) signed a settlement where Dayton-area consumers were denied tens of millions of dollars in direct profits refunds and instead might receive a nebulous future offset to DP&L investment charges. Various of the settling parties were paid cash or cash equivalents by DP&L.

Against this backdrop it's no wonder that the FirstEnergy Utilities prefer to operate in the confidential setting of settlement negotiations. There, the public cannot attend. And the result will be subject to the PUCO's favorable settlement standards.

The PUCO should deny the three-month delay proposed by the FirstEnergy Utilities for a settlement. But regarding any settlement process in these cases, the PUCO should require the process to be conducted as follows.

The PUCO should bar FirstEnergy from paying cash and cash equivalents to special interests for signing the settlement. The PUCO should not consider a settlement unless it is signed by a bona fide⁸ consumer representative (such as OCC and NOPEC) broadly representing the FirstEnergy Utilities' consumers. The participation of the PUCO Staff, given they are employees of the very people judging the case (Commissioners), should not be participants in the settlement process. Or, at most, the PUCO Staff's role should be limited to impartial facilitation.

The hearing in these cases is currently scheduled for August 30, 2021. If parties want to pursue settlement—and OCC will consider reasonable settlement offers that benefit consumers—five weeks is more than enough time to determine whether there is a reasonable possibility of settlement.

⁸ Given the unsavory role of alleged social welfare organizations in the H.B. 6 scandal, utility front groups (were any to enter the case going forward) would not qualify as bona fide consumer advocates.

If it develops that a settlement might be achievable *on the terms for a fair process that OCC describes above*, then it might make sense for a 14-day extension and potentially a further postponement in the hearing date. But to now postpone the hearing date for 90 days, with an unfair process, would be prejudicial to the two million FirstEnergy utility consumers that OCC represents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Memorandum Contra* was served via electronic transmission to the persons listed below on this 26th day of July 2021.

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Summary: Memorandum Memorandum Contra FirstEnergy's Motion for a 90-Day Delay in These Cases Involving Refunds to Consumers for Excess Profits by Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.