

**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,)	Case No. 22-391-EL-RDR
the Cleveland Electric Illuminating)	
Company and the Toledo Edison)	
Company.)	

**INTERLOCUTORY APPEAL,
REQUEST FOR CERTIFICATION TO THE PUCO COMMISSIONERS
AND
APPLICATION FOR REVIEW
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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April 12, 2023

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A long overdue report that is needed as part of protecting consumers from FirstEnergy charges that may be corporate welfare will now be indefinitely delayed because of the Attorney Examiner's April 7, 2023 Entry (and because of FirstEnergy's delay). The report, ordered by the PUCO *over six years ago*,¹ has still not been completed. The report relates to whether FirstEnergy's Non-Market-Based rider ("Rider NMB") pilot program harms residential consumers.

And, to add insult to injury for consumers, within the past few years it has become clear that FirstEnergy charges consumers millions of dollars for supplemental transmission project costs through Rider NMB. In an abdication of regulatory responsibility by several agencies involved, supplemental transmission project costs are not reviewed for prudence by state or federal regulators.

¹ *In re Ohio Edison Co., the Cleveland Elec. Illum. Co., and the Toledo Edison Co.*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (October 12, 2016), ¶ 310.

The April 7th Entry indefinitely suspended the April 10, 2023 audit report due date without setting a new due date.² Consumers need a due date for equity. Consumers actually needed the promised report regarding the “pilot” program long ago. And FirstEnergy has shown that it needs a due date (an enforced due date), given its delays in turning over information to the PUCO’s auditor.

It is obvious that tainted FirstEnergy needs a due date (and PUCO enforcement of a due date) given its record as a bad actor. See the PUCO Entry’s recounting of FirstEnergy-caused delay in the report.³ And see the U.S. Deferred Prosecution Agreement about FirstEnergy’s recent approach to government.

The PUCO Examiner Megan Addison’s Entry takes needed action to potentially penalize FirstEnergy for anti-consumer delay. But the Entry also in essence *rewards* FirstEnergy for delay by not setting a near-term due date (or any due date) for the report. The PUCO should order FirstEnergy to respond *immediately* to the auditor and require the audit report to be filed no later than May 15, 2023. The review of FirstEnergy’s Rider NMB pilot has been delayed for far too long. Indeed, the recent House Bill 6 corruption trial reflected how FirstEnergy is capable of mobilizing its forces for action (when money can be made or influence exerted on government).

The PUCO’s requirement for the report, which OCC asked the PUCO to enforce after a long delay, has already been extended twice after the original long delay that OCC complained about. The PUCO Staff sought a second extension of the audit report’s due date until July 17, 2023 in its motion that OCC opposed. According to the PUCO Staff,

² PUCO Entry (April 7, 2023) (“April 7 Entry”).

³ April 7 Entry, at ¶ 15.

the extension is necessary because “data requests have taken longer than expected to be responded to” by FirstEnergy. The PUCO Staff says the auditor “is still missing information that they need to proceed” with the audit.⁴

But a previous PUCO order provided that FirstEnergy shall not “refuse or delay” providing information to the auditor.⁵ The Attorney Examiner’s April 7 Entry does take appropriate action in making FirstEnergy subject to forfeitures, as OCC recommended. But the Entry adds further delay to the audit report to the detriment of residential consumers. FirstEnergy wins; consumers lose.

The PUCO should certify OCC’s interlocutory appeal. For consumer protection, the PUCO Commissioners should modify the April 7, 2023 ruling,⁶ by modifying the indefinite suspension of the audit report due date to a definite near-term due date. Further, there is another regulatory response. The PUCO should respond to FirstEnergy’s failure or refusal to provide information in response to the auditor’s requests as reasons to make FirstEnergy shareholders, not consumers, fund the program. And the PUCO can respond by ending or suspending the Rider NMB pilot.

The way to modify the PUCO’s ruling under the PUCO’s rules is by interlocutory appeal to the PUCO Commissioners, per O.A.C. 4901-1-15, which OCC has now filed.

⁴ PUCO Staff Motion for Extension (March 31, 2023).

⁵ PUCO Finding and Order (June 15, 2022), at ¶ 15.

⁶ April 7 Entry (attached).

Respectfully submitted,

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**MEMORANDUM IN SUPPORT
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

PUCO Examiner Megan Addison should certify this appeal. The PUCO Commissioners should then modify the Examiner's ruling. The ruling indefinitely delays the audit report regarding FirstEnergy's Rider NMB. As the PUCO ruled years ago, residential consumers deserve to know how the Rider NMB pilot impacts them. They also deserve to know before the Ohio General Assembly votes on legislation that could make transmission cost recovery riders like Rider NMB and opt-out programs like the Rider NMB pilot permanent features of a utility's electric security plan.⁷

FirstEnergy's Rider NMB "pilot" program was approved by the PUCO over *six years ago* in FirstEnergy's last electric security plan proceeding (Case No. 14-1297-EL-SSO).⁸ When the pilot program was approved, the PUCO stated:

Further, the Commission notes that Rider NMB pilot program is a ***pilot program*** which bears further study to determine if the actual results of the pilot program, rather than the projected results, are in the public interest. ***The***

⁷ See Senate Bill 102 (by Rep. Wilkin), 135th General Assembly (proposed amendments to R.C. 4928.143).

⁸ *In re Ohio Edison Co., the Cleveland Elec. Illum. Co., and the Toledo Edison Co.*, Case No. 14-1297-EL-SSO ("ESP IV Case"), Opinion and Order (March 31, 2016), Fifth Entry on Rehearing (October 12, 2016).

Commission directs the Companies and Staff to continuously review the actual results of the Rider NMB pilot program and periodically report their findings to the Commission. Such review should include, at a minimum: whether there is an aggregate savings in transmission costs for all of the Companies' customers, whether and how much in transmission costs are being shifted to customers not participating in the pilot program, whether the benefits of the pilot program outweigh any costs, and whether Rider NMB results in an overall cost savings to customers. This review is necessary for the Commission to determine whether Rider NMB should be continued with the ability for customers to opt out, whether Rider NMB should be continued without the ability for customers to opt out, and whether Rider NMB should be terminated. The Commission retains the right, during the term of ESP IV, to modify the provisions of Rider NMB based upon the results of the review by Staff.⁹

In what has become a reinvention of the idea of a “pilot” program, the review of the Rider NMB pilot as ordered by the PUCO in 2016 has yet to occur, harming residential consumers.

In April 2022, after much consumer advocacy from OCC, the PUCO finally ordered an auditor to conduct a review of the Rider NMB pilot program.¹⁰ That was a year ago and an already protracted delay. The long-anticipated audit report was initially expected to be filed on February 10, 2023, and then was delayed until April 10, 2023.¹¹

But about a week before the due date for the audit report, the PUCO Staff requested a second extension of the due date to July 17, 2023.¹² According to the PUCO Staff, the extension is necessary because the auditor’s “data requests have taken longer

⁹ ESP IV Case, Fifth Entry on Rehearing (October 12, 2016), at ¶ 310 (footnote omitted) (emphasis added).

¹⁰ Case No. 22-391-EL-RDR, PUCO Entry (April 20, 2022).

¹¹ PUCO Entry (January 23, 2023).

¹² PUCO Staff Motion for Extension (March 31, 2023).

than expected to be responded to” by FirstEnergy and that the auditor “is still missing information that they need to proceed.”¹³ It is unclear why FirstEnergy has not provided the information requested by the auditor. But what is clear is the PUCO’s previous order that FirstEnergy shall not “refuse or delay” information to the auditor.¹⁴

In the April 7 Entry, the Attorney Examiner acknowledged a concern with FirstEnergy’s delay in responding to the auditor and directed FirstEnergy “show cause” by April 17, 2023 as to why it should not have to pay a forfeiture.¹⁵ But the result of the April 7 Entry is an indefinite delay of the audit report regarding the Rider NMB pilot program’s impact on residential consumers. That is unfair to consumers. The April 7 Entry should be modified to require FirstEnergy to respond immediately to the auditor (as FirstEnergy is already required to do) and require the audit report to be filed no later than May 15, 2023.

II. STANDARD OF REVIEW

The PUCO will review an attorney examiner’s ruling if the attorney examiner (or other authorized PUCO personnel) certifies the appeal.¹⁶ The standard applicable to certifying an appeal is that “the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission

¹³ *Id.*

¹⁴ PUCO Finding and Order (June 15, 2022), at ¶ 15.

¹⁵ April 7 Entry, at ¶ 15.

¹⁶ O.A.C. 4901-1-15(B).

ultimately reverse the ruling in question.”¹⁷ Upon consideration of an appeal, the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.¹⁸

III. REQUEST FOR CERTIFICATION

- A. **The Attorney Examiner’s ruling harms residential consumers by indefinitely suspending the due date for the audit report. Issues regarding the impact of the Rider NMB pilot on residential and non-participating consumers represent new or novel questions of interpretation, law or policy.**

The April 7 Entry indefinitely suspended the due date for the audit report regarding FirstEnergy’s Rider NMB pilot program and its cost-shifting impact on residential and non-participating consumers. These issues should be certified to the PUCO Commissioners, per O.A.C. 4901-1-15(B), because they represent new or novel questions of interpretation, law or policy.

As noted, the PUCO ordered a study to be conducted regarding the Rider NMB pilot over six years ago. The issues to be audited include whether the pilot shifts costs to non-participating consumers and whether there are cost savings to consumers as a result of the pilot program.¹⁹ However, despite the PUCO’s order when the Rider NMB pilot was approved in 2016, an audit has never been completed. Nor has the PUCO conducted an audit of the transmission cost recovery rider opt-out pilot programs of other electric utilities.

And, to add insult to injury for consumers, within the past few years it has become clear that FirstEnergy charges consumers millions of dollars for supplemental

¹⁷ *Id.*

¹⁸ O.A.C. 4901-1-15(E).

¹⁹ *See supra* note 9.

transmission project costs through Rider NMB. In an abdication of regulatory responsibility by several agencies involved, supplemental transmission project costs are not reviewed for prudence by state or federal regulators.

In its recent order regarding FirstEnergy’s Rider NMB annual update for 2023, the PUCO acknowledged that supplemental transmission project costs charged through Rider NMB “warrant[] further attention.”²⁰ How much residential consumers must pay for supplemental transmission project costs through Rider NMB – and how much big business customers can avoid paying by opting out of Rider NMB – are new and novel questions for the PUCO.

Consideration of these issues must not be ignored. Yet the Attorney Examiner’s ruling will indefinitely delay the audit report meant to shed light on these issues.

The PUCO made clear that FirstEnergy shall not “refuse or delay” the information to the auditor.²¹ Thus, there is no justification for further delay of the audit report. FirstEnergy should provide the information to the auditor now. Accordingly, this appeal “presents a new or novel question of interpretation, law, or policy, . . .” per O.A.C. 4901-1-15(B). The appeal should be certified for Commissioner review.

B. An immediate determination is needed to prevent undue prejudice.

This appeal should be certified to the PUCO. An “immediate determination” by the PUCO is needed to prevent undue prejudice²² to OCC and Ohio consumers who

²⁰ *In the Matter of the Review of the Non-Market-Based Services Rider Contained in the Tariffs of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 23-51-EL-RDR, Finding and Order (March 22, 2023), at ¶ 14; *see also In the Matter of the Application of Ohio Power Company to Update its Basic Transmission Cost Rider*, Case No. 23-57-EL-RDR, Finding and Order (March 22, 2023), at ¶ 14.

²¹ PUCO Finding and Order (June 15, 2022), at ¶ 15.

²² O.A.C. 4901-1-15(B).

cannot participate in the Rider NMB pilot program. As noted and thanks no doubt to lobbying by various industries, legislation is pending in the Ohio General Assembly that would make transmission cost recovery riders like Rider NMB and opt-out programs like the Rider NMB pilot permanent features of a utility's electric security plan.²³ The Attorney Examiner's delay of the audit could moot the PUCO's intended accountability for FirstEnergy to its consumers if the bill becomes law.

Therefore, an immediate PUCO determination is needed to avoid undue prejudice to the Ohio public and to OCC.

IV. APPLICATION FOR REVIEW

A review of FirstEnergy's Rider NMB pilot program, which allows big business customers to opt out of paying charges through Rider NMB, is long overdue. Residential consumers deserve to know sooner, rather than later, whether they are being forced by FirstEnergy to subsidize corporate welfare for big business customers. And they should expect protection from the PUCO against being charged for subsidies. Residential consumers should also know the extent to which they are forced to pay for FirstEnergy's expensive supplemental transmission projects that are not reviewed for prudence.

The April 7 Entry vacated the April 10, 2023 audit report "with a new deadline to be set by subsequent entry."²⁴ The Attorney Examiner then ordered FirstEnergy to "show cause" (by April 17, 2023) why it should not have to pay a forfeiture as a result of delaying information to the auditor. That is a good step. But the PUCO should modify the April 7 Entry to add a near-term due date with the expectation that FirstEnergy will

²³ See Senate Bill 102 (by Rep. Wilkin), 135th General Assembly (proposed amendments to R.C. 4928.143).

²⁴ April 7 Entry, at ¶ 15.

provide any overdue information. Delays by FirstEnergy in providing information are not new, as OCC has seen as recently as in the PUCO investigation cases into tainted House Bill 6.

The priority is getting the auditor the information it requires to complete the audit report. FirstEnergy should be required to produce all outstanding information requested by the auditor *immediately* – in addition to providing “an explanation as to when the Companies plan to respond to those outstanding data requests moving forward.”²⁵ How about a new deadline of *this week* for FirstEnergy to provide the information to the PUCO’s auditor? Indeed, FirstEnergy is obligated, by PUCO order, to provide information to the auditor without delay.

Moreover, FirstEnergy has known for *over six years* that an audit of the Rider NMB pilot would be forthcoming. The PUCO should not indulge FirstEnergy with even more time to respond. The PUCO should set a new date for the audit report no later than May 15, 2023.

Further, there is another regulatory response. The PUCO should respond to FirstEnergy’s failure or refusal to provide information in response to the auditor’s requests as reasons to make FirstEnergy shareholders, not consumers, fund the program. And the PUCO can respond by ending or suspending the Rider NMB pilot.

FirstEnergy cannot have it both ways. FirstEnergy cannot operate a Rider NMB pilot that is harmful to residential consumers yet obstruct the PUCO’s audit. Again, a review of what was sold by FirstEnergy as a “pilot” program was ordered by the PUCO

²⁵ *Id.*

over six years ago. The PUCO should grant this interlocutory appeal and modify the Attorney Examiner's April 7 Entry consistent with the recommendations above.

V. CONCLUSION

This interlocutory appeal of the Attorney Examiner's April 7, 2023 ruling meets the legal standards for certification, per O.A.C. 4901-1-15. And the appeal meets the standard for PUCO Commissioners to modify the Attorney Examiner's ruling, per the rule. Moreover, the issues in the Entry are time-sensitive and are prejudicial to the public, per O.A.C. 4901-1-15.

For the public convenience and public interest of 2 million FirstEnergy consumers, the PUCO should promptly modify the Attorney Examiner's April 7 Entry consistent with the recommendations above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Interlocutory Appeal, Request for Certification to the PUCO Commissioners and Application for Review was served on the persons stated below via electronic transmission, this 12th day of April 2023.

/s/ Angela D. O'Brien

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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF THE
NON-MARKET-BASED SERVICES RIDER
PILOT PROGRAM ESTABLISHED BY OHIO
EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY,
AND THE TOLEDO EDISON COMPANY.

CASE NO. 22-391-EL-RDR

ENTRY

Entered in the Journal on April 7, 2023

{¶ 1} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 2} R.C. 4928.141 provides that an electric distribution utility shall provide customers within its certified territory a standard service offer (SSO) of all competitive retail electric services (CRES) necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 3} On August 25, 2010, the Commission issued an Opinion and Order approving a stipulation and two supplemental stipulations (Combined Stipulation), authorizing the Companies' second ESP for the period beginning June 1, 2011 through 2014. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 10-388-EL-SSO (*ESP II Case*). Among other terms, the Combined Stipulation authorized the Companies' Non-Market-Based Services Rider (Rider NMB). Rider NMB is a non-bypassable rider that is designed to recover non-market-based transmission-related costs, such as Network Integration Transmission Service charges, imposed on or charged to the Companies by the

Federal Energy Regulatory Commission or PJM Interconnection, LLC (PJM). *ESP II Case*, Opinion and Order (Aug. 25, 2010) at 12.

{¶ 4} On July 18, 2012, the Commission issued an Opinion and Order approving a stipulation between FirstEnergy and certain parties, which provided for an ESP for the period beginning June 1, 2014, through May 31, 2016, pursuant to R.C. 4928.143. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 12-1230-EL-SSO (*ESP III Case*). In that Opinion and Order, the Commission clarified that the Companies should file annually an application, in a separate docket, for a review of certain riders approved in that proceeding, including Rider NMB. *ESP III Case*, Opinion and Order (July 18, 2012) at 44.

{¶ 5} The Commission subsequently approved the NMB Pilot Program, which will allow customers served under the program to be billed directly by PJM or their competitive retail electric service provider and to no longer be subject to the Rider NMB rates. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO (*ESP IV Case*), Opinion and Order (Mar. 31, 2016), Fifth Entry on Rehearing (Oct. 12, 2016). Participation in the NMB Pilot Program provides these customers an opportunity to control their transmission-related costs by controlling their Network Service Peak Load.

{¶ 6} When approving the Rider NMB Pilot Program, the Commission directed the Companies and Staff to review the actual results of the Rider NMB Pilot Program and report their findings to the Commission. The Commission directed that the review include, at a minimum: whether there is an aggregate savings in transmission costs for all of the Companies' customers, whether and how much in transmission costs are being shifted to customers not participating in the pilot program, whether the benefits of the pilot program outweigh any costs, and whether Rider NMB results in an overall cost savings to customers.

{¶ 7} Accordingly, on June 15, 2022, the Commission issued an Entry directing Staff to reissue a request for proposal (RFP) to acquire audit services to assist the Commission with the review of the Rider NMB Pilot Program.

{¶ 8} On August 10, 2022, after reviewing the proposals submitted, the Commission selected Exeter Associates, Inc. (Exeter) to conduct the requested audit services, in accordance with the terms set forth in the RFP. Pursuant to the terms of the RFP, a final audit report was to be filed by February 10, 2023.

{¶ 9} On January 6, 2023, Staff filed a motion for an extension of time, requesting that the final audit report be due on April 10, 2023. No party opposed the extension request or the request for an expedited ruling.

{¶ 10} By Entry issued January 23, 2023, the attorney examiner granted Staff's motion for an extension.

{¶ 11} On March 31, 2023, Staff filed a motion for a second extension of time, noting that Exeter has indicated it will require additional time to complete the audit report, given the complex nature of the case and delayed responses to certain data requests. Staff proposes that the final audit report be due on July 17, 2023. In the memorandum in support, Staff noted that the Ohio Consumers' Counsel (OCC) objected to the motion for an extension; however, in the motion itself, Staff inadvertently certified that no parties objected to the motion for continuance or the request for an expedited ruling, pursuant to Ohio Adm.Code 4901-1-12(C).

{¶ 12} Counsel for OCC contacted the parties and the attorney examiners shortly thereafter to confirm that OCC objects to expedited treatment of the motion and would like to reserve the right to respond to the motion for extension.

{¶ 13} By Entry issued March 31, 2023, the attorney examiner directed that any memoranda contra Staff's motion for extension to be filed by April 4, 2023.

{¶ 14} OCC timely filed a memorandum contra Staff's motion on April 4, 2023. OCC argues that the Commission ordered that FirstEnergy shall not "refuse or delay" the provision of information requested by the auditor over nine months ago. Finding and Order (June 15, 2022) at ¶ 15. OCC emphasizes Staff's statement in its motion that "Exeter is still

missing certain information that they need to proceed” and that FirstEnergy and Exeter “are working together to resolve any issues with these data requests.” However, according to OCC, it is unclear why FirstEnergy has not provided the information requested by the auditor, further arguing that the Companies have failed to provide any justification for this delay and apparent defiance of the Commission’s directives. OCC opines that the Commission should not tolerate these “stalling tactics” by FirstEnergy and recommends that the Commission assess forfeitures against FirstEnergy, pursuant to R.C. 4905.54 and 4905.56. According to OCC, the Commission should act in order to protect residential customers and not allow further delays in the filing of an audit report in this proceeding.

{¶ 15} At this time, the attorney examiner finds that the current April 10, 2023 deadline for the audit report should be vacated, with a new deadline to be set by subsequent entry. However, it is concerning that Staff’s extension request appears to be necessary due to FirstEnergy’s delay in responding to Exeter’s data requests. As noted by OCC, the Companies were previously instructed by the Commission to provide any and all documents or information requested by the auditor and were prohibited from refusing or delaying the provision of such information, even in the event FirstEnergy believed the information to be confidential. Finding and Order (June 15, 2022) at ¶ 15. Therefore, the attorney examiner finds that the Companies should be directed to show cause by April 17, 2023, demonstrating why they should not be assessed a forfeiture pursuant to R.C. 4905.54, for their delayed responses to the auditor’s data requests. As part of that show cause response, FirstEnergy should provide a list of the data requests that remain unanswered, in whole or in part, the dates upon which those data requests were initially received by FirstEnergy, and an explanation as to when the Companies plan to respond to those outstanding data requests moving forward.

{¶ 16} It is, therefore,

{¶ 17} ORDERED, That the April 10, 2023 deadline for the audit report be vacated. It is, further,

{¶ 18} ORDERED, That the Companies show cause by April 17, 2023, why they should not be assessed a forfeiture, pursuant to R.C. 4905.54, consistent with Paragraph 15. It is, further,

{¶ 19} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Megan J. Addison

By: Megan J. Addison
Attorney Examiner

JSA/dr

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in

Case No(s). 22-0391-EL-RDR

Summary: Attorney Examiner Entry ordering that the April 10, 2023 deadline for the audit report be vacated and ordering the Companies to show cause by April 17, 2023, why they should not be assessed a forfeiture, pursuant to R.C. 4905.54, consistent with Paragraph 15 electronically filed by Debbie S. Ryan on behalf of Megan J. Addison, Attorney Examiner, Public Utilities Commission of Ohio.

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Case No(s). 22-0391-EL-RDR

Summary: Application Interlocutory Appeal, Request for Certification to the PUCO Commissioners and Application for Review by Office of the Ohio Consumers' Counsel electronically filed by Ms. Alana M. Noward on behalf of O'Brien, Angela D..