

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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|--|---|------------------------|
| In the Matter of the Application of the Ohio |) | Case No. 08-124-EL-ATA |
| Edison Company, The Cleveland Electric |) | Case No. 08-125-EL-AAM |
| Illuminating Company, and The Toledo |) | |
| Edison Company, for Authority to Modify |) | |
| Certain Accounting Practices and for Tariff |) | |
| Approvals |) | |

**JOINT MOTION FOR LEAVE TO INTERVENE OF
CONSTELLATION NEWENERGY, INC. AND
INTEGRYS ENERGY SERVICES, INC. AND JOINT COMMENTS**

Now come Constellation NewEnergy, Inc. ("Constellation") and Integrys Energy Services, Inc. ("Integrys"), who, pursuant to Section 4903.221, Revised Code and Rule 4901-1-11 of the Ohio Administrative Code, move for joint intervention in the above styled proceeding as full parties of record. The reasons supporting the intervention are contained in the accompanying Memorandum in Support.

Constellation and Integrys are parties of record in the FirstEnergy Rate Distribution proceeding Case No. 07-551-EL-AIR et. al. a proceeding in which the subject of the fuel deferrals from 2006 and 2007 is also being litigated. Constellation and Integrys will present their position that by law the 2006 and 2007 fuel deferral must be bypassable for customers who only purchase non competitive services. Constellation and Integrys will take the same position in the matter at bar.

WHEREFORE, Constellation and Integrys respectfully request that the Commission grant this joint motion for leave to intervene and that Constellation NewEnergy, Inc. and Integrys Energy Services, Inc. be made full parties of record.

Constellation and Integrys also request that the individual officials and in house counsel for each company be placed on the service list for individual service.

Respectfully Submitted,

/s/

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MEMORANDUM IN SUPPORT

I. Background

On August 29, 2007, the Ohio Supreme Court ("Court") affirmed in part and reversed in part the Commission's orders approving a Rate Certainty Plan ("RCP") for Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("TE") (collectively, "FirstEnergy").

In its opinion in *Elyria Foundry Company, et al v. Pub Util Com*, 114 Ohio St. 3d 305 (2007), 2007 – Ohio – 4164, the Court held that the Commission violated Section 4928.02(G), Revised Code when it permitted FirstEnergy to collect deferred increased fuel costs through future distribution rate cases, or to alternatively use excess fuel-cost recovery to reduce deferred distribution-related expenses, and remanded the RCP to the Commission to remedy the statutory violation. On September 10, 2007, in light of the Court's remand, FirstEnergy filed an Application on Remand in Case No. 07-1003-EL-ATA, et al to address recovery of increased fuel costs during the 2006-2008 time period. In its January 9, 2008 Finding and Order, the Commission denied in part and granted in part FE's Application on Remand. Specifically, the Commission granted in part FE's proposal to recover ongoing fuel costs (beginning January 1, 2008) but denied FE's request to recover the fuel costs deferred during 2006-2007 in calendar year 2008 inasmuch as collecting those fuel costs (plus carrying costs) in a single year was unreasonable as it would cause rates to rise substantially. The Commission directed FE to file within thirty days a separate application for an alternative recovery mechanism to collect the 2006-2007 deferred fuel costs and carrying costs.

FE pursued obtaining collection for the deferred fuel expenses for calendar years 2006 and 2007 in two proceedings. First, FE modified its application in its distribution rate case, Case

No. 07-551-EL-AIR et. seq., and filed rebuttal testimony presenting a fuel rider that was non bypassable in order to collect the deferred 2006 and 2007 fuel costs. Integrys and Constellation NewEnergy intervened in the distribution rate case, filed an objection to the Staff Report objecting to the proposed treatment for deferred fuel and appeared for cross examination of the FE witnesses on that point. Though that case is still proceeding, FE made an almost identical request for treatment of the 2006 and 2007 deferred fuel expenses in the matter at bar.

II. Intervention

Section 4903.221, Revised Code and Rule 4901-1-11 of the Ohio Administrative Code, establish the standard for intervention in the above-styled proceeding as a full party of record.

Rule 4901-1-11 of the Ohio Administrative Code states in part:

Upon timely motion, any person shall be permitted to intervene in a proceeding upon a showing that:

* * *

(2) The person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties.

In addition to establishment of a direct interest, the factors that the Public Utilities Commission of Ohio ("Commission") considers in implementing the above rule are the nature of the intervenor's interest, the extent that interest is represented by existing parties, the intervenor's potential contribution to a just and expeditious resolution of the issues involved, and whether intervention would result in an undue delay of the proceeding. (See also R.C. 4903.221(B) upon which the above rule is authorized). A review of these factors in light of following facts supports granting Constellation's intervention.

Constellation NewEnergy, Inc. ("Constellation") provides electricity and energy-related services to retail customers in Ohio as well as in 15 other states, the District of Columbia and two Canadian provinces and serves over 15,000 megawatts of load and over 10,000 customers. Constellation holds a certificate as a competitive retail electric supplier ("CRES") from the Commission to engage in the competitive sale of electric service to retail customers in Ohio. Constellation currently provides service to retail electric customers in northern Ohio.

Integrus is a certificated competitive retail electric service ("CRES") provider. Integrus serves retail electric customers throughout the mid and eastern United States and Canada including 300 current Ohio electric customers. Whether the fuel deferrals are bypassable for customers who purchase their own energy from a CRES is a significant factor in Integrus' ability to provide service in Ohio. Integrus is so situated that the disposition of the fuel deferral issue in this proceeding without Integrus participation will impair and impede its ability to protect its interests, because others participating in this proceeding may not represent Integrus' interests. Integrus' perspective as a CRES supplier and the appellant in the *Elyria Foundry* case will contribute to the full, equitable and expeditious resolution of this proceeding.

Constellation and Integrus have a real and substantial interest in this case which is not being represented by other parties. Granting this Joint Motion to Intervene should not unduly delay the instant proceedings. Because of their expertise and participation in the competitive retail markets in Ohio and other states, Constellation and Integrus will be able to assist in the development of a full and complete record to assist the Commission in its consideration of the Application. The Commission should find that Constellation and Integrus both have a real and substantial interest in this case and meet the standards of Section 4903.221, Revised Code and Rule 4901-1-11 of the Ohio Administrative Code. Intervention should be granted.

IV. Conclusion

Constellation and Integrys respectfully request that they be permitted to intervene in this proceeding. Constellation and Integrys have followed this issue which directly affects them through now three proceedings in order ensure that FE follows the mandate of the Ohio Supreme Court. Thus, the Commission should grant them both intervention as full parties of record.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing documents was served this 28th day of March, 2008 by regular U.S. mail, postage prepaid, and, where indicated, by electronic mail, upon the persons listed below.

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Summary: Motion Joint Motion for Leave to Intervene of Constellation NewEnergy, Inc. and
Integrys Energy Services, Inc. and Joint Comments electronically filed by Stephen M Howard
on behalf of Constellation NewEnergy, Inc. and INTEGRYS ENERGY SERVICES INC
(RETURNED MAIL)