UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

FirstEnergy Operating Companies, *et al*.	**:**	Docket Nos. ER01-1403-006 ER06-1443-002 ER04-366-005 ER01-2968-007 ER01-845-006 ER05-1122-004 ER08-107-001

REQUEST OF THE PUBLIC UTILITIES COMMISSION OF OHIO
TO ACCEPT RESPONSE TO ANSWER
OF
FIRSTENERGY OPERATING COMPANIES

Pursuant to Rule 213 the Public Utilities Commission of Ohio respectfully requests the Commission accept the attached response to the Answer of the FirstEnergy Companies et al. The Public Utilities Commission of Ohio believes that the information contained in the attached response will assist the Commission in addressing the issues in this docket. The situation is an unusual one which could result in a market with substantial market power existing and potentially harming the public for a substantial period before this Commission would become aware of it. As noted in the attached response, this possibility is created by the vagaries of timing and the Commission needs to be aware of the potential outcomes of a decision in this matter. The Public Utilities Commission of Ohio therefore asks this commission to accept the attached response.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing have been served in accordance with 18 C.F.R. Section 385.2010 upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Thomas W. McNamee

Thomas W. McNamee
Assistant Attorney General

Dated at Columbus, Ohio this May 14 , 2008.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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THE PUBLIC UTILITIES COMMISSION OF OHIO'S
RESPONSE TO THE ANSWER OF
THE FIRSTENERGY OPERATING COMPANIES, *ET AL*.
MOTIONS TO INTERVENE AND RELATED PLEADINGS
CONCERNING MARKET POWER UPDATE FILINGS

EXECUTIVE SUMMARY

The Public Utilities Commission of Ohio (Ohio Commission) believes that the Federal Energy Regulatory Commission (FERC) should act now to review FirstEnergy's change in status reflecting that the company has no native load commitment in the State of Ohio after December 30, 2008. Such action by FERC will help ensure that the mandates of the Federal Power Act are realized and that the opportunity for market abuse is moderated. The public interest will not be served by an after-the-fact review of a change of status that ultimately results in a finding of market power. Such an after-the-fact determination will be too late for customers leaving them with no recourse for refunds of excessive rates. The magnitude of FirstEnergy's change in status that is to occur on

January 1, 2009, warrants the additional level of scrutiny required by the Delivered Price Test.

INTRODUCTION AND BACKGROUND

On January 22, 2008, FERC issued for public input FirstEnergy's updated market power analysis for the ensuing three-year period beginning 2009. On January 14, 2008, FirstEnergy submitted its market power analysis update requesting a grant by FERC of continuing market based rate authority pursuant to Order 697[1]. Comments responding to the FirstEnergy's application were due on March 14, 2008. On March 14, 2008, the Ohio Commission filed its request for further consideration and analysis, and opposition to request for waiver responding to FirstEnergy's updated market analysis. On March 31, 2008, FirstEnergy filed with FERC its answer to the motions to intervene and related pleadings concerning its market power update filing (FirstEnergy's answer).

[1] 18 C.F.R. § 35.37 (2008).

DISCUSSION

Market Power Screens and Change in Status Filings

FirstEnergy's response to the Ohio Commission's comments reflects that, among other things, Ohio's remarks and subsequent request for a Delivered Price Test is premature and contrary to FERC's Order No. 697. FirstEnergy notes that FERC provided in Order No. 697, as modified in the Order Clarifying Rule, that updated market power analysis are to be based on actual, unadjusted historical data for each complete season: winter, spring, summer, and fall prior to the year in which the analyses are submitted.

FERC's Order No. 697 requires that as a condition of obtaining and retaining market-based rate authority, a seller must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, the following: ownership or control of generation capacity that results in net increases of 100 MW or more or of inputs to electric power production, or ownership, operation or control of transmission facilities.[2]

FirstEnergy's answer indicates that, pursuant to this requirement, the company would file a change-in-status report (a) if its existing obligation to supply power as a Provider of Last Resort to Ohio's consumers in Ohio terminates on January 1, 2009, and (b)

2 18 C.F.R. § 35.42 (change in status reporting requirement).

if the Freemont plant begins commercial operation. The answer further reads that there is no cause for concern that FirstEnergy might continue to sell power at market-based rates in the event of a material change in circumstances that affected its ability to meet the standards which have been established by FERC.[3] In further support of its position, First Energy observes that FERC Order No. 697 indicates that historical data are more objective, readily available, and less subject to manipulation than future projections.[4]

The Ohio Commission maintains that FirstEnergy's change in status occurring on January 1, 2009, is not based on a "future projection." It is not a projection at all. It is a *certainty* that FERC must take into consideration to avoid potential abuse of market power. The Ohio Commission maintains that FERC must act now to guarantee against market abuses and to ensure that the mandates of the Federal Power Act (FPA) are realized by ensuring just and reasonable rates. As discussed in more detail below, FERC should take into consideration the various extenuating circumstances prior to moving forward on FirstEnergy's current updated market analysis.

The Ohio Commission maintains that FirstEnergy's change in status is of such a magnitude that, to ensure the public's interest is met, FERC should not wait until the status change occurs prior to addressing the matter. FirstEnergy's analysis does not

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3 FirstEnergy Answer at 6 (March 31, 2008).

4 *Id*. at 3.

account for the expiration of a power sales agreement between FirstEnergy Solutions and its affiliated operating companies, Ohio Edison, Toledo Edison, and The Illuminating Company (*i.e.*, the Companies).[5] The power sales agreement expires on December 31, 2008, and FirstEnergy has no commitment to serve native load beyond that date. Adjusting the market share analysis for this circumstance increases FirstEnergy's uncommitted generation by 6,893 megawatts for the summer season, 5,791 megawatts for the fall season, 6,375 megawatts for the winter season, and 5,744 megawatts for the spring season.

This change is between approximately 57 and 69 times the minimum limit established by FERC as a threshold for review. The Ohio Commission has reservations as to whether, upon constructing its change of status market requirements, an event of this

5 *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company, for the Approval of a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism and Phase-In, and Tariffs for Generation Service* (*i.e.*, the Companies' application), Case Nos. 07-796-EL-ATA and 07-797-EL-AAM (Application at 11) (July 10, 2007).

The Companies' application before the Ohio Commission further indicates that, within the proposed class of service acquisition of generation, that during 2008, one-third of *all* SSO Supply tranches will be procured for a 17-month period (January 1, 2009 through May 3, 2010), one-third of the tranches for a 29-month period (January 1, 2009 through Many 31, 2011), and one-third of the tranches for a 41-month period (January 1, 2009 through May 31, 2012.

magnitude was contemplated or anticipated.[6] The Ohio Commission maintains that the public interest will not be served by an after-the-fact review of a change of status of this significance. It will be too late, leaving customers with no recourse for refunds of excessive rates.

FERC's rules require that a change in status application need only be filed in a "timely" manner, which could result in additional delays as the language is sufficiently vague to allow a company to push back its updated filing. This would exacerbate the demands on rate payers since many months could pass after January 1, 2009 to debate the merits of the change in status application and for FERC to issue its decision declaring market power. Such a scenario would also be contrary to the FPA since FERC would not be fulfilling its responsibilities to ensure that rates and services of public utilities are just and reasonable and not unduly discriminatory. These unique circumstances, in conjunc-

[6] The Ohio Commission observes that FERC order 697-A, at paragraph no. 130, issued on April 21, 2008, reads as follows regarding change in status applications:

> While we continue to believe that the "snapshot in time approach" is appropriate, and will continue to require the use of historical data in the market power analysis, we nevertheless will consider, on a case-by-case basis, clear and compelling evidence presented by sellers and intervenors that seek to demonstrate that certain changes in the market, such as the expiration of a long-term contract, should be taken into account as part of the market power analysis in a particular case. Entities who seek to make this demonstration must present clear and compelling evidence in support of their argument. The Commission will address any countervailing factors that affect whether the seller will have the ability to exercise market power. Such countervailing factors could include, but are not limited to, any competitor that similarly has expiring long-term contracts and any other factors that might impact the market power analysis such as plant retirements, transmission access, and generation upgrades. In this regard, we remind entities that they must perform the market power screens as designed but may also provide a sensitivity analysis consistent with the discussion above."

tion with FERC's obligations under the FPA, dictate that it should act now, not later, to require First Energy to submit a Delivered Price Test including 2009 data.

Relevant Market

FirstEnergy notes that Order 697 indicates that where an entity sells power into markets such as those administered by PJM and the Midwest ISO, the entity may use the entire geographic footprint of the RTO as the geographic footprint within which to conduct it horizontal market analysis (Order No. 697 at ¶ 234).

The Ohio Commission observes that Order No. 697 reflects that FERC itself may explore whether an alternative geographic market is warranted based on the specific facts and circumstances of a given case.[7] In its 2006 State of the Market Report[8], the Market Monitor declared the western region of the Midwest ISO as a highly congested region. The Market Monitor further acknowledged in the report the presence of two Narrowly Constrained Areas (NCAs) in the Midwest ISO footprint; namely the Wisconsin-Upper Michigan System (WUMS) and the Minnesota regions. The Ohio Commission concludes that FirstEnergy's market share analysis, as presented in its application, is flawed as it has not explicitly incorporated the two NCAs acknowledged the Market Monitor in the 2006 market power analysis. It is, therefore, axiomatic that FirstEnergy's application is deficient. Consequently, FERC should require the company as part of FirstEnergy's Delivered Price Test application to include, on a season by season basis, all such areas identi-

[7] FERC Order 697 at footnote 219

[8] 2006 State of the Market Report, Midwest ISO, May 2007, David Patton, Ph.D., Potomac Economics

fied by the MISO market monitor. The outcome of this updated application should result in a modified relevant geographic market.

The Delivered Price Test

FirstEnergy maintains that it should not be required to prepare a Delivered Price Test because, among other things, it is relatively expensive and time consuming.[9] If assuring fair market prices for consumers is too costly, FirstEnergy should return to tariffed rates established by the Ohio Commission. The objective is the protection of the public not the convenience of the applicant.

The significance of FirstEnergy's change in status that is to take place on January 1, 2009, warrants the additional scrutiny against market abuses ensured by the application of the Delivered Price Test. The Ohio Commission is not proposing that FirstEnergy's application be denied. The Ohio Commission is simply requesting the application of the Delivered Price Test since the additional level of scrutiny will help to ensure that consumers' needs are being met and that the public interest is being served.

CONCLUSION AND RECOMMENDATIONS

FirstEnergy's market power analyses are inadequate because they ignore known facts and realities. Consistent with the FPA's mandates, FERC should act now as opposed to later to ensure against market power abuses and excessive rates. Consequently, FERC should require FirstEnergy to file a Delivered Price Test.

9 FirstEnergy Answer at 10.

The Ohio Commission thanks FERC for the opportunity to file its response in this proceeding.

Respectfully submitted,

/s/ Thomas W. McNamee

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/s/ Thomas W. McNamee

Thomas W. McNamee
Assistant Attorney General

Dated at Columbus, Ohio this May 14, 2008.