

FILE

14

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

RECEIVED-DOCKETING DIV
2008 AUG 29 AM 11: 59

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric) Case No. 08-935-EL-SSO
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.)

PUCO

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric) Case No. 08-936-EL-SSO
Illuminating Company and The Toledo)
Edison Company for Approval of a)
Market Rate Offer to Conduct a)
Competitive Bidding Process for Standard)
Service Offer Electric Generation Supply,)
Accounting Modifications Associated)
with Reconciliation Mechanism, and)
Tariffs for Generation Service.)

**MOTION FOR BIFURCATED HEARING IN MARKET RATE OFFER CASE,
MOTION TO CONSOLIDATE MARKET RATE OFFER CASE AND ELECTRIC
SECURITY PLAN CASE,
AND MOTION TO SEVER DISTRIBUTION RATE CASE ISSUES FROM THE
ELECTRIC SECURITY PLAN CASE, OR, IN THE ALTERNATIVE, MOTION
TO SUPPLEMENT THE RECORD IN THE ELECTRIC SECURITY PLAN CASE
USING THE RECORD IN THE DISTRIBUTION RATE CASES
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL¹**

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the
approximately 1.9 million residential utility consumers of Ohio Edison Company, the
Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively,

¹ Counsel for the OCC is authorized to represent the support for the instant pleading by other parties:
Northwest Ohio Aggregation Coalition ("NOAC"), Ohio Partners for Affordable Energy ("OPAE"), Sierra
Club (Ohio Chapter), and Natural Resources Defense Council.

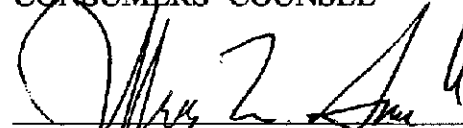
This is to certify that the images appearing are an
accurate and complete reproduction of a case file
document delivered in the regular course of business.
Technician SM Date Processed 8/29/08

"FirstEnergy" or the "Companies"), moves to bifurcate the market rate offer case ("MRO Case"), Case No. 08-936-EL-SSO, and to consolidate the MRO Case with the electric security plan case ("ESP Case"), Case No. 08-935-EL-SSO. The OCC also moves to sever distribution issues in pending distribution rate cases from consideration in the ESP Case, and, in the alternative, moves to supplement the record in the ESP Case using the record in the pending distribution rate cases.

The reasons for granting the OCC's motions are further set forth in the attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

A handwritten signature in black ink, appearing to read "Jeffrey L. Small", is written over a horizontal line.

Jeffrey L. Small, Counsel of Record
Jacqueline Lake Roberts
Richard C. Reese
Gregory J. Poulos

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (Telephone)
small@occ.state.oh.us
roberts@occ.state.oh.us
reese@occ.state.oh.us
poulos@occ.state.oh.us

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	Case No. 08-935-EL-SSO
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.)	

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	Case No. 08-936-EL-SSO
Illuminating Company and The Toledo)	
Edison Company for Approval of a)	
Market Rate Offer to Conduct a)	
Competitive Bidding Process for Standard)	
Service Offer Electric Generation Supply,)	
Accounting Modifications Associated)	
with Reconciliation Mechanism, and)	
Tariffs for Generation Service.)	

MEMORANDUM IN SUPPORT

I. INTRODUCTION

On July 31, 2008, Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company, (collectively, "FirstEnergy" or the "Companies") filed their applications in Case Nos. 08-935-EL-SSO ("ESP Application") and 08-936-EL-SSO ("MRO Application"). In Case No. 08-935-EL-SSO, the Companies are seeking the approval of their proposed Electric Security Plans ("ESP Case"). In Case No. 08-936-EL-SSO, the Companies seek approval of a Market Rate Offer ("MRO Case") to conduct a competitive bidding process for standard service offer electric generation supply, accounting modifications associated with a reconciliation

mechanism, and tariffs for generation service. Each of the applications affects FirstEnergy's electric service customers in Ohio, including approximately 1.9 million residential customers.

If granted by the PUCO, these applications will result in a significant increase in the rates paid by FirstEnergy's residential customers. The OCC requests that the Public Utilities Commission of Ohio ("PUCO" or "Commission") adjust the manner in which the MRO Case and the ESP Case proceed as a matter of both efficiency and equitable treatment of parties.

II. ARGUMENT

A. The MRO Case Should be Bifurcated.

The MRO Case should be bifurcated, as supported by numerous parties at the status conference held on August 25, 2008. Substantive matters that address the Commission's new rules for MROs should be the subject of a second hearing after the initial hearing that was set at the status conference for September 16, 2008.² FirstEnergy, on the other hand, argues that the Commission is hamstrung to decide whether to approve FirstEnergy's MRO proposal within 90 days of the filing of that case.³ The Commission is not limited in the manner argued by FirstEnergy.

Sub. S.B. 221, which substantially altered R.C. Chapter 4928, contains numerous "start up" provisions that alter the statutory treatment of initial applications submitted for approval of standard service offer ("SSO") rates. FirstEnergy's position depends upon R.C. 4928.142(B), which provides that "the Commission shall initiate a proceeding and,

² Such a hearing was set during the August 25, 2008 status conference for September 16, 2008.

³ FirstEnergy's MRO Application at 2.

within ninety days after the application's filing date, shall determine by order whether the electric distribution utility and its market-rate offer meet all of the foregoing [R.C. 4928.142] requirements." One such requirement, that a MRO application "detail the electric distribution utility's proposed compliance with . . . commission rules under division (A)(2) of this section,"⁴ cannot be immediately satisfied by any MRO filed in combination with an ESP application in the early days after Sub. S.B. 221 became law.

Instead of providing that the irreversible movement to market-based rates would take place without Commission supervision,⁵ Sub. S.B. 221 required that electric utilities file an initial ESP,⁶ and also provided that utilities taking advantage of multiple filings -- e.g. the MRO application filed along with an ESP application by FirstEnergy -- "shall not initiate its competitive bid until *at least one hundred fifty days after the filing date of those applications.*"⁷ Thus, Sub. S.B. 221 delayed any process for approval of an MRO beyond 90 days under circumstances where the Commission's rules would not be available to supervise the movement to market rates.

The instant pleading cannot definitively enumerate the issues that should be addressed in a hearing after September 16 for the same reason that FirstEnergy cannot satisfy the Commission's requirements -- the rules are not final. A broad inquiry into an MRO application is suggested by the rules proposed by Entry dated July 2, 2008.⁸ The proposed rules stated that a SSO application shall demonstrate how it "achieves the

⁴ R.C. 4928.142(B).

⁵ R.C. 4928.142(F).

⁶ R.C. 4928.141("shall include a filing under section 4928.143").

⁷ R.C. 4928.142(B) (emphasis added).

⁸ *In re SSO Rules*, Case No. 08-777-EL-ORD, Entry at 3 (July 2, 2008).

policy of the state as delineated in divisions (A) to (N) of section 4928.02.”⁹ Details for a MRO application are set out in Appendix A to proposed Ohio Adm. Code 4901:1-35-03, and may change as the Commission makes its final determinations. The possibility for change is highlighted by the Commission’s first of six questions in its Entry dated July 2, 2008 that set the rules for comment. That first question inquires into whether the rules should “consider[] alternative products and approaches to conducting competitive bidding.”¹⁰ The second hearing in a bifurcated proceeding may need to deal with the result of the Commission’s inquiry.

The Commission’s proposed rules provide that the Commission “shall set the matter for hearing and shall publish notice of the hearing” “[a]fter the filing . . . that conforms with the commission’s rules.”¹¹ Addressing both ESP and MRO applications, the proposed rules state that the “commission shall endeavor to make a determination on an application that substantively conforms to the requirements of this rule within one hundred fifty days of the filing of such complete application.”¹² A hearing other than the one now set for September 16, 2008, is contemplated by the proposed rules.

The procedure for the hearing on FirstEnergy’s MRO Application should consider FirstEnergy’s satisfaction of the Commission’s rules regarding MROs on a schedule designed, like the schedule for hearing the ESP Case, for a decision within 150 days of the filing date. The test of whether FirstEnergy’s MRO proposal meets the remaining requirements under R.C. 4928.142(A) and (B) should be heard on the shorter timeline

⁹ Proposed Ohio Adm. Code 4901:1-35-03(E).

¹⁰ *In re SSO Rules*, Case No. 08-777-EL-ORD, Entry at 3 (July 2, 2008).

¹¹ Proposed Ohio Adm. Code 4901:1-35-06(A).

¹² Proposed Ohio Adm. Code 4901:1-35-03(C).

designed to meet the 90-day requirement. The hearing should be bifurcated to match the statutory scheme.

B. The MRO and ESP Cases Should be Consolidated.

FirstEnergy's MRO and ESP applications are two means by which a SSO may be set, and the two approaches must be compared with one another under R.C. 4928.143(C)(1) (i.e. "compared to the expected results . . . under 4928.142"). The best, most efficient means to accomplish this task is by consolidating the two cases.

The link between FirstEnergy's applications and the administrative efficiency of dealing with the two matters together has already been recognized. A joint technical conference that dealt with both the MRO and the ESP applications was conducted on August 18, 2008. The public should be involved in the hearing process, and the OCC has proposed joint public hearings.¹³ The MRO Case and ESP Case generally involve the same parties and party representatives, as reflected in the numerous interventions that bear captions for both cases. Finally, as argued above, the final determination of the MRO Case should be determined with the same 150-day time horizon as is present for the ESP Case (i.e. timing for the cases is complementary).

The two cases, thus far proceeding in tandem, should be formally consolidated.

C. The Distribution Rate Case Issues Should be Severed and Resolved in the Distribution Rate Cases, and in the Alternative, the Record for the ESP Case Should be Supplemented Using the Record in the Distribution Rate Cases.

FirstEnergy included many provisions in its ESP Case that are at issue in the distribution rate cases (Case Nos. 07-551-EL-AIR, et al.) that remain pending before the

¹³ OCC Motion for Public Hearings (August 25, 2008).

Commission.¹⁴ Until the Company's ESP Application, FirstEnergy was a vocal opponent of including issues in a case that were the subject of other proceedings at the Commission.¹⁵ No doubt sensing an opportunity to again present its distribution rate case issues -- this time with opponents of its positions hampered by time and other constraints -- FirstEnergy has declared a "do-over" and asks the Commission to decide distribution issues on the Company's terms and without the extensive record developed that should guide the Commission's determinations. The Commission should reject the Company's strategy, a strategy designed not only to undermine the efforts of intervenors to the distribution rate cases but also to undermine the extensive efforts by the Commission's Staff.

The distribution matters taken up again by FirstEnergy have been extensively explored by means of discovery, Staff's preparation of its Staff Investigation, multiple pleadings (e.g. objections to the Staff Investigation), a partial stipulation, the presentation and cross-examination of witnesses for multiple parties, the presentation and cross-examination of rebuttal witnesses, and briefing in the form of initial and reply briefs. This extensive effort -- exerted over the time provided for distribution rate cases -- cannot be reproduced in the short period provided for the review and decision upon FirstEnergy's ESP Application.

Furthermore, the crush of expedited treatment of the ESP Case is asymmetric. The Company is far better positioned to reproduce certain elements of its distribution rate

¹⁴See, e.g., FirstEnergy's ESP Application at 19-23.

¹⁵ See, e.g., *In re FirstEnergy Distribution Rate Cases*, Case Nos. 07-551-EL-AIR, et al., FirstEnergy Motion to Strike Objections at 4 (January 10, 2008) (objecting to dealing with matters addressed in Case Nos. 05-1500-EL-COI, et al.).

case than intervenors are positioned to react during a condensed time period. The public is not served by any purposeful limitation to the record on the distribution issues. The distribution rate cases are ripe for decision, and the Commission should proceed with an order that would efficiently and equitably deal with distribution issues as well as simplify the ESP Case that must be handled expeditiously.

A decision in the distribution rate cases would uniquely benefit the comparison required of the Commission between FirstEnergy's MRO proposal and its alternative -- i.e. the ESP with its SSO plan for generation plus any non-generation issues considered as part of the ESP Case. Most of the distribution issues raised in FirstEnergy's ESP Application were extensively examined in the pending distribution rate cases, and the alternative to the MRO should be clearer for the FirstEnergy Companies than for Ohio's other electric distribution companies whose distribution rate cases are more distant in time. The resolution of distribution issues in the pending distribution rate cases would make efficient use of the Commission's resources that are hard pressed at the moment and make the best use of legal resources as well as analytical expertise that were applied to the distribution rate cases by intervening parties. A decision on distribution issues in the distribution rate cases would make best use of the existing, extensive record and treat all parties fairly.

In the alternative, and considering all the foregoing arguments regarding the best use of the record in the distribution rate cases, the Commission should not permit FirstEnergy to proceed with its distribution issues without intervenors having the ability to cite to the record in the distribution rate cases (accomplished, for example, by the PUCO taking administrative notice of the entirety of the record in the distribution rate

cases). Where FirstEnergy proposes the resolution of its distribution rate case issues in the ESP Case, other parties should be provided the opportunity to cite the record in the distribution rate cases with regard to FirstEnergy's proposals.

In a limited but important example of overlap between the distribution rate cases and the Company's ESP Application, FirstEnergy proposes to resolve the revenue requirement portion of its distribution rate cases based upon "\$75 million for OE, \$34.5 million for CEI, and \$40 million for TE" plus a "defer[al] [of] \$25 million in distribution-related costs" for CEI.¹⁶ These numbers exceed the amounts justified by the record as argued by the OCC, and are above all the ranges recommended by the Commission's Staff.¹⁷ The OCC, that PUCO Staff, and other parties should be able to rely on the extensive record developed in the distribution rate cases if they are required to respond to such matters as revenue requirements as part of the ESP Case.

FirstEnergy's introduction of distribution issues that are at issue in the Company-initiated distribution rate cases threatens to cause an inefficient, uninformed, and unfair treatment of issues and parties. The issues that can be determined in the distribution rate cases should be determined in those cases. In the alternative, parties should be able to rely upon the extensive record developed in the distribution rate cases as part of their cases in the ESP Case.

¹⁶ FirstEnergy's ESP Application at 19.

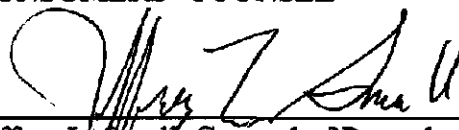
¹⁷ *In re FirstEnergy Distribution Rate Cases*, Case Nos. 07-551-EL-AIR, et al., Testimony of Staff Witness Tufts, Attachments LET-2 CEI, LET-2 OE, and LET-2 TE (revenue deficiencies, line 10 on each attachment).

III. CONCLUSION

The Commission should adjust the manner in which the MRO Case and the ESP Case proceed, as supported above, as a matter of both efficiency and equitable treatment of parties. The OCC's motions should be granted.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

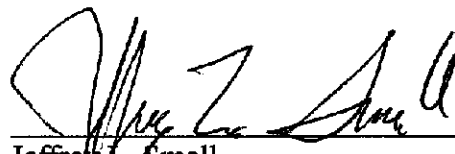


Jeffrey L. Small, Counsel of Record
Jacqueline Lake Roberts
Richard C. Reese
Gregory J. Poulos

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (Telephone)
small@occ.state.oh.us
roberts@occ.state.oh.us
reese@occ.state.oh.us
poulos@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motions was served via electronic transmission (hard copy offered upon request) to the persons listed below, on this 29th day of August 2008.



Jeffrey L. Small
Assistant Consumers' Counsel

SERVICE LIST

David F. Boehm
Boehm, Kurtz & Lowry
36 East Seventh St., Ste. 1510
Cincinnati, OH 45202

Attorney for Ohio Energy Group

John W. Bentine
Chester, Willcox & Saxbe LLP
65 East State St., Ste. 1000
Columbus, OH 43215-4213

Attorney for The Kroger Company, Inc.

Barth E. Royer
Bell & Royer Co. LPA
33 South Grant Avenue
Columbus, OH 43215-3927

Attorney for The Ohio Environmental
Council and Dominion Retail, Inc.

John Jones
William Wright
Assistant Attorneys General
Public Utilities Commission of Ohio
180 E. Broad St., 9th Fl.
Columbus, OH 43215

Samuel C. Randazzo
McNees, Wallace & Nurick LLC
21 East State St., 17th Fl.
Columbus, OH 43215

Attorney for Industrial Energy Users-Ohio

David C. Rinebolt
Ohio Partners for Affordable Energy
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793

Attorney for Ohio Partners for Affordable
Energy

James W. Burk
Arthur E. Korkosz
Mark A. Hayden
Ebony L. Miller
FirstEnergy Corp.
16 South Main Street
Akron, OH 44308

Leslie A. Kovacik
Dept. of Law
420 Madison Ave., 4th Fl.
Toledo, OH 43604-1219

Attorney for the City of Toledo and NOAC

Lance M. Keiffer, Asst. Prosecutor
711 Adams Street, 2nd Floor
Toledo, OH 43624-1680

Attorney for Lucas County and NOAC

Garrett Stone
Brickfield, Burchette, Ritts & Stone
1025 Thomas Jefferson St., N.W.
8th West Tower
Washington, D.C. 20007

Attorney for Nucor Steel Marion, Inc.

M. Howard Petricoff
Vorys, Sater, Seymour And Pease LLP
52 East Gay S., P. O. Box 1008
Columbus, OH 43216-1008

Attorney for Constellation NewEnergy,
Inc. and Constellation Energy
Commodities Group, Inc.

Cynthia A. Fonner
Senior Counsel
Constellation Energy Group, Inc.
550 W. Washington St., Suite 300
Chicago, IL 60661

Attorney for Constellation NewEnergy,
Inc. and Constellation Energy
Commodities Group, Inc.

Mark A. Whitt
Jones Day
P.O. Box 165017
Columbus, OH 43216-5017

Richard L. Sites
General Counsel and Senior Director of
Health Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620

Henry W. Eckhart
50 W. Broad St., #2117
Columbus, OH 43215

Attorney for The Sierra Club Ohio Chapter
and Natural Resources Defense Council

Craig G. Goodman
National Energy Marketers Association
3333 K St., N.W., Ste. 110
Washington, D.C. 20007

sam@mwncmh.com
john.jones@puc.state.oh.us
william.wright@puc.state.oh.us
drinebolt@aol.com
dboehm@bklawfirm.com
BarthRoyer@aol.com
jbentine@cwslaw.com
Cynthia.A.Fonner@constellation.com
mhpetricoff@vssp.com
gas@bbrslaw.com
leslie.kovacik@toledo.oh.gov
lkeiffer@co.lucas.oh.us
burkj@firstenergycorp.com
korkosza@firstenergycorp.com
haydenm@firstenergycorp.com
elmiller@firstenergycorp.com
mawhitt@jonesday.com
ricks@ohanet.org
henryeckhart@aol.com
cgoodman@energymarketers.com