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**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.)

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**REPLY TO FIRSTENERGY'S MEMORANDUM CONTRA
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' COUNSEL**

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.

On August 29, 2008, the OCC moved the Public Utilities Commission of Ohio (“PUCO” or “Commission”) to adjust the manner in which the MRO Case and the ESP Case proceed as a matter of both efficiency and equitable treatment of parties (“OCC’s Motions”).¹ On September 8, 2008, FirstEnergy submitted its Memorandum Contra OCC’s Motions (“Memo Contra”). The introduction to FirstEnergy’s Memo Contra claims that the OCC’s Motions seek to “unravel the Commission’s efforts to efficiently manage not only the FirstEnergy Companies’ cases, *but also the SSO cases filed by other Ohio EDUs.*”² The Companies’ alarmist argument regarding unraveling “the SSO cases filed by other Ohio EDUs” is unsupported in FirstEnergy’s Memo Contra. This Reply to FirstEnergy’s Memorandum Contra (“Reply”) responds to FirstEnergy’s arguments regarding the above-captioned cases that involve *FirstEnergy* (i.e. the cases that were actually the subject of the OCC’s Motions).

¹ As stated in the OCC’s Motions, the Northwest Ohio Aggregation Coalition (“NOAC”), Ohio Partners for Affordable Energy (“OPAE”), Sierra Club (Ohio Chapter), and Natural Resources Defense Council supported the OCC’s pleading. OCC’s Motions at 1, footnote 1.

² Memo Contra at 2 (emphasis added).

II. ARGUMENT

A. The MRO Case Should be Bifurcated.

FirstEnergy's argument against the bifurcated proceeding in the MRO Case assumes that the Commission has not seriously undertaken its responsibility to promulgate rules associated with the enactment of Sub. S.B. 221. FirstEnergy states that "the Commission is authorized to render its determination in an MRO before rules are final, as theoretically there may never be final rules."³ FirstEnergy presumably used the word "theoretically" because its representatives knew, but failed to acknowledge anywhere in the Memo Contra, that the Commission intended to issue its rules regarding MRO filings on a schedule that would provide new rules before the end of the year.

FirstEnergy's Memo Contra undertakes a piecemeal reading of Sub. S.B. 221. FirstEnergy states that R.C. 4928.142(B) "contemplates that the {sic} both the filing of an MRO application and the Commission's determination related thereto may occur before rules are final."⁴ R.C. 4928.142(B) also states that, "as the commission determines necessary, the utility shall immediately conform its filing to the rules upon their taking effect." While that provision is quoted in other portions of the Memo Contra, FirstEnergy does not appear to provide any role for the latter-quoted portion of the statute, and therefore does not recognize the Commission's full role in a MRO proceeding.

FirstEnergy argues for an extremely limited role for the hearing in the MRO Case that conflicts with both Ohio law and the Companies' own filings. FirstEnergy states that

³ Memo Contra at 5.

⁴ Id. at 5.

the “EDU may immediately initiate its competitive bidding process” after meeting the three requirements stated in R.C. 4928.142(B) regarding regional transmission organizations and published source of pricing information.⁵ R.C. Chapter 4928 provides for a Commission proceeding to determine whether the “utility and its market-rate offer meet all of the foregoing requirements.”⁶ The “foregoing requirements” include those stated in R.C. 4928.142(A), and the utility must “conform its filing to the [Commission’s] rules.”⁷ The scope of the proceeding in the MRO Case is, therefore, much broader than stated in FirstEnergy’s Memo Contra.⁸

One need go no further than FirstEnergy’s filings in the MRO Case to find a broad range of topics discussed by the Company’s witnesses in pre-filed testimony. The pre-filed testimony of FirstEnergy Witness Norris states, for example:

The purpose of my testimony in this [MRO] proceeding is to: (i) describe how the results of the competitive bid process will be converted to retail rates, (ii) explain the reconciliation mechanism process, (iii) address and support the design of propose rates an associate tariff sheets of the Companies’ Market Rate Offer (“MRO”), (iv) discuss avoidable charges, (v) discuss schedules which include generation and transmission rate impacts by customer class and rate schedule, and (vi) discuss schedules which reflect propose and current rates.⁹

Mr. Norris’ pre-filed testimony, therefore, does not deal with any of the regional transmission organization and price publication issues that are the subject of R.C.

⁵ Id. at 4. See also, FirstEnergy’s Memorandum Contra Motion for Public Hearings at 2 and 4 (September 2, 2008).

⁶ R.C. 4928.142.

⁷ R.C. 4928.142(B).

⁸ This view was expressed by an attorney examiner at the August 25, 2008 status conference for the MRO Case, and no FirstEnergy representative stated a contrary view of Ohio law.

4928.142(B)(1) through R.C. 4928.142(B)(3). The scope for the MRO Case supported in FirstEnergy's own pre-filed testimony is much broader than stated in FirstEnergy's Memo Contra. 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").

FirstEnergy states that "[c]onsolidation is generally reserved for cases that involve a similarity of issues."¹⁰ Incredibly, the Companies also state that "there is no similarity of issues between the FirstEnergy Companies' ESP and MRO."¹¹ Aside from the obvious similarity of issues stated in the Revised Code (i.e. quoted above), FirstEnergy recognizes that "[a]s of January 1, 2009, the FirstEnergy EDUs must provide SSO service through either an ESP or MRO."¹² The best, most efficient means to accomplish this task is by consolidating the two cases.

The OCC's Motions further supported consolidation based upon the additional efficiencies connected with "[t]he MRO Case and ESP Case generally involv[ing] the same parties and party representatives,"¹³ but such efficiencies were not the basis of the OCC's argument. FirstEnergy erects the straw man argument that "[o]n that basis, the

⁹ *In re FirstEnergy MRO Case*, Case No. 08-936-EL-SSO, Pre-filed Testimony of FirstEnergy Witness Norris at 3.

¹⁰ Memo Contra at 9.

¹¹ Id. at 10.

¹² Id. at 3.

¹³ OCC's Motions at 5.

SSO cases of all the EDU's should be consolidated – which is nonsense.”¹⁴ The proposal to consolidate FirstEnergy, AEP, and Duke Energy SSO cases is nonsense, but was neither proposed by the OCC nor suggested by arguments in the OCC's Motions. FirstEnergy's proposals in the MRO Case are not the alternative for comparison in the ESP cases that involve AEP and Duke Energy. Furthermore, the OCC never suggested involving the representatives of customers served by AEP and Duke Energy in a case that involves service in areas served by FirstEnergy.

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 Commission,¹⁵ and these issues should be resolved using the record developed in the distribution rate cases rather than in the vacuum supported by FirstEnergy. FirstEnergy initially states that there is “no statutory authority for the Commission to do what OCC requests.”¹⁶ The OCC's primary request is that the Commission decides the distribution rate case issues in the distribution rate cases in which an extensive record has been built, at a considerable cost in both time and money, to thoroughly examine the rate case issues. The authority for such determination of rates generally flows from the provisions of R.C. Chapter 4909 (“Fixation of Rates”).

¹⁴ Memo Contra at 9.

¹⁵ See, e.g., FirstEnergy's ESP Application at 19-23.

¹⁶ Memorandum Contra at 10.

FirstEnergy also criticizes the alternative proposed in the OCC's Motions -- taking administrative notice of the entirety of the record in the distribution rate cases -- as "premature and improper."¹⁷ The Companies do not provide any support for their argument that the request is "improper." However, as a general proposition of law, the Commission is generally entitled to organize its cases in a manner that it determines best serves its decision-making role, including the elimination of unnecessary duplication of effort.¹⁸ FirstEnergy provides no contrary argument. There is nothing improper about the OCC's request related to administrative notice, and there is nothing improper about the Commission granting the OCC's request.

The OCC's request regarding taking administrative notice is not premature, and the earliest possible approval of the request would provide the greatest efficiencies in handling the distribution issues that FirstEnergy would have the Commission hear again. FirstEnergy proposes that the Commission wait for parties to move for administrative notice at the hearing for the ESP Case regarding each scrap of the record that would inform the Commission regarding issues that overlap with those in the distribution rate cases.¹⁹ FirstEnergy's argument is based on imposing such tremendous administrative *inefficiencies and burdens* on parties, as well as the Commission, that little of the record in the distribution rate cases would be admitted in an organized manner that would be useful to the Commission in its determinations.

¹⁷ Memo Contra at 11.

¹⁸ See, e.g., *Weiss v. Public Util. Comm.* (2000), 90 Ohio St.3d 15. The Supreme Court of Ohio will not substitute its judgment for that of the PUCO unless the Commission's discretion is abused. *Sanders Transfer Inc. v. Public Util. Comm.* (1979), 58 Ohio St. 2d 21, 23.

¹⁹ Memo Contra at 11.

The OCC's Motions provided, as an example, the overlap between the distribution rate cases and the Company's ESP Application concerning FirstEnergy's proposal 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.²⁰ The "relevant evidence in the record of the distribution rate cases"²¹ on the topic of an appropriate revenue requirement is located in a record that includes three Staff reports, tens of pieces of testimony, and weeks of transcripts for the hearings. These pieces interrelate to one another -- e.g. testimony refers to other testimony that itself refers to portions of the Staff reports -- in a manner that is difficult to reproduce accurately for the ESP Case. FirstEnergy would have the parties labor at unproductive activities -- including extensive organization and reproduction of a record that the Commission holds in its files and that is publicly available to everyone interested in their contents -- that would never inform the Commission in a manner comparable to taking administrative notice of the record in the distribution rate cases in their entirety.

FirstEnergy's Memo Contra emphasizes the time constraints under which the Commission operates in these cases. For example, FirstEnergy states: "As of January 1, 2009, the FirstEnergy EDUs must provide SSO service through either an ESP or MRO."²² As a matter of administrative efficiency and in the interest of informed decisions, the Commission should not permit FirstEnergy to proceed in the ESP Case on issues that

²⁰ FirstEnergy's ESP Application at 19.

²¹ Memo Contra at 11.

²² Id. at 3 (emphasis sic).

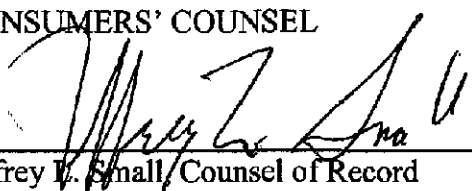
overlap with those already litigated in the distribution case without making good use of the extensive record developed in those distribution rate cases.

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,

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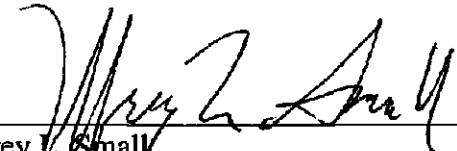


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply to FirstEnergy's Memorandum Contra was served via electronic transmission and via U.S. Mail, prepaid, to the persons listed below (including the Attorney Examiners, via electronic transmission), on this 11th day of September 2008.



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