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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**INDUSTRIAL ENERGY USERS-OHIO'S
POST HEARING BRIEF ON FIRSTENERGY'S
FOUR MONTH ELECTRIC SECURITY PLAN PROPOSAL**

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**POST HEARING BRIEF ON FIRSTENERGY'S
FOUR MONTH ELECTRIC SECURITY PLAN PROPOSAL**

I. INTRODUCTION

On July 31, 2008, Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("TE") (collectively, "FirstEnergy" or "Companies") filed their application for approval of a standard service offer ("SSO") under Sections 4928.143 and 4928.142, Revised Code, before the Public Utilities Commission of Ohio ("Commission"). In this case, FirstEnergy proposed an electric security plan ("ESP") with a three-year term from 2009 through 2011, indicating that if the Commission so chooses, it may terminate the final year of the ESP. Simultaneous with the ESP, FirstEnergy filed a market rate offer ("MRO") in Case No. 08-936-EL-SSO that will serve as the default option should the Commission modify or deny its ESP or if FirstEnergy does not accept changes made by the Commission to its ESP. Finally, within this case, FirstEnergy proposed an interim four-month ESP that FirstEnergy indicated would require Commission approval by November 14, 2008 to become effective on January 1, 2009 through April 31, 2009, in order to provide the

Commission with additional time to review the longer-term ESP or work through a competitive bidding process ("CBP") as part of FirstEnergy's MRO.

The interim ESP terms and conditions, including rate design, are the same as those set forth in the longer-term ESP except that for the four-month ESP the average base generation rate is 7.75 cents/kWh with a portion deferred such that the average base generation rate charged to customers will be 6.75 cents/kWh and the Green Resources program and the Economic Development Rider are off the table.¹ The fact that the issues raised by FirstEnergy's interim ESP and its longer-term ESP are nearly identical means that a Commission decision adopting FirstEnergy's interim ESP will effectively dispose of the issues raised by FirstEnergy's longer-term ESP.

In its application, FirstEnergy states that the Commission "must choose whether to accept this Short Term ESP by November 14, 2008 or it is deemed withdrawn from the Plan."² In an apparent attempt to meet FirstEnergy's request for an expedited ruling, the Attorney Examiners issued a ruling that parties should separately brief the issues regarding the interim ESP. In accordance with that ruling, Industrial Energy Users-Ohio ("IEU-Ohio") offers the following for the Commission's consideration.

II. THE SIGNIFICANT LEGAL ISSUES COMPEL THE COMMISSION TO NOT ISSUE A DECISION ON AN INTERIM ESP

In view of the tremendous amount of work that must be completed to establish new SSO prices, resolve issues in the Companies' distribution rate cases that have been fully litigated and, among other things, the complexities that have been added by the financial crisis that has rippled through our economy, the urge to find something that might provide a stress buffer is certainly understandable. At first blush, a proposal to

¹ Company Exhibit 1 at 36-37.

² *Id.* at 35.

establish a short-term or interim ESP pursuant to Section 4928.143, Revised Code, might sound like a prescription for stress relief. On closer examination, however, it may actually make things worse in the near term and ultimately preclude, as a matter of law, an ESP opportunity in the case of FirstEnergy.

There is no specific statutory authority for the Commission to approve a short-term or interim ESP. So, any proposal for a short-term or interim ESP is simply a proposal to establish an ESP with a shorter term than the term that might be otherwise permissible pursuant to Section 4928.143, Revised Code. If the Commission issues an order approving an ESP regardless of its term, it can only do so based on a finding that the short-term or interim ESP is, in the aggregate, more favorable than the expected results under Section 4928.142, Revised Code. The record in this proceeding lacks the information required to make this determination on any short-term or interim proposal except perhaps in the case of the proposal submitted by the Companies.³ However, the Companies' short-term proposal states that it will be deemed withdrawn if it is not approved by the Commission within the next two weeks (by November 14, 2008).

If the Commission modifies and approves the Companies' short-term ESP, the Companies may withdraw the application [thereby terminating the application according to Section 4928.143(C)(2)(a), Revised Code, after having satisfied the Section 4928.141, Revised Code, obligation to make at least one ESP application filing], and put all their SSO eggs in the Section 4928.142, Revised Code, MRO basket. In this circumstance, Section 4928.143(C)(2)(b), Revised Code, requires the Commission to issue such an order continuing the provisions, terms and conditions of the most recent SSO with expected increases or decreases in fuel costs, until a subsequent SSO is

³ Company Exhibit 2 at 21.

authorized under Section 4928.142, Revised Code. As the Commission knows, the Companies simultaneously filed a Section 4928.142, Revised Code, application and Section 4928.143, Revised Code, application, and the Commission's decision on certain threshold questions raised by the MRO application was due on October 29, 2009. So, the decision time line which the Commission must respect based on the requirements in Section 4928.142, Revised Code, works against any opportunity for the Commission to gain additional time through the exercise of authority under Section 4928.143(C)(2)(b), Revised Code, should the Companies terminate the ESP application in response to the Commission's decision on the interim ESP proposal. As the Commission also knows, once it approves an electric distribution utility's ("EDU") application under Section 4928.142(C), Revised Code, the EDU is foreclosed from seeking or receiving ESP authority.⁴

Looming in the background of the MRO v. ESP contest is a legal framework that requires, as a matter of prudence, an appreciation of the risk that federal legal principles, including the Supremacy Clause of the Constitution and the "filed rate doctrine," may intervene at the direction of a federal court to dictate how the Commission must discharge its pricing duties.⁵ Then too, even if the Companies were to agree to some short-term or interim ESP, implementation ultimately depends on whether the Federal Energy Regulatory Commission ("FERC") will authorize the

⁴ Section 4928.142(F), Revised Code.

⁵ *Monongahela Power Co. v. Alan R. Schriber, et al.*, 322 F.Supp. 2d 902 (S.D. Ohio, May 19, 2004).

Companies' generation affiliate to supply electricity to the Companies at prices and under terms and conditions that mesh with the short-term ESP.⁶

Section 4928.143(C), Revised Code, requires the Commission to issue an order on the Companies' ESP application not later than 150 days after the application's filing date or by December 28, 2008⁷ in the case of the Companies. The Companies could effectively extend the date by which the Commission must act on an ESP application by withdrawing the current ESP application and refiling a new ESP application [which would be subject to the 275-day clock in Section 4928.143(C), Revised Code] but this has not happened and there is no reason to expect that it will. There is nothing in Section 4928.143, Revised Code, that permits the Commission to alter the statutory time line because it approves (with or without acceptance by the Companies) a short-term ESP. A short-term ESP will not provide customers or community aggregators with the information they need to consider and act upon alternatives, if any. Any expectation that a short-term ESP decision will somehow make a material difference in the time that is available for the Commission to fulfill its statutory duty regarding the longer-term ESP issues is, accordingly and unfortunately, unwarranted.

In summary, it is dangerous and unrealistic to think that approval of a short-term or interim ESP can buy the Commission more time to perform its statutory duties or be useful in managing the risks that motivated the General Assembly to enact and the Governor to sign Amended Substitute Senate Bill 221 ("SB 221"). If the Commission issues an order in favor of a short-term ESP that prompts the Companies to withdraw

⁶ See *FirstEnergy Solutions Corp., et al.*, Amendments to Market-Based Rate Tariffs Waiving Affiliate Restrictions in Ohio, FERC Docket Nos. ER09-134-000, ER09-135-000, ER09-136-000, ER09-137-000 (October 28, 2008).

⁷ Because Section 4928.143(C)(1) states "The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date", and the 150th day falls on a Sunday, the Commission must issue an order by Friday, December 26, 2008.

and thereby terminate the ESP application, it may simply accelerate the need to complete the unfinished and now overdue MRO work. On balance, IEU-Ohio's candid assessment of the law (both Ohio and federal) compels IEU-Ohio to urge the Commission to press forward and complete the longer-term ESP work, promptly issue a decision on the threshold issues raised by the Companies' MRO application and promptly issue a decision in the Companies' fully litigated distribution rate increase proceedings.

For these very important reasons, IEU-Ohio urges the Commission to not issue any decision on the proposed interim ESP.

III. PRACTICAL REALITIES MAY FORECLOSE AN INTERIM ESP

Although there are significant legal issues that compel the Commission to not issue a decision on the proposed interim ESP, there are practical realities that may foreclose an interim ESP as well. FirstEnergy has a pending distribution rate case that includes significant tariff consolidation upon which both ESP proposals and the MRO are based.⁸ At the start of this proceeding, the Attorney Examiners granted a motion by the Office of the Ohio Consumers' Counsel ("OCC") to sever the issues raised in this proceeding from those that are duplicative of issues raised in the pending distribution rate case. The Companies' interim as well as long-term ESP proposals assume the

⁸ *In the Matter of the Application of Ohio Edison et al. for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices and for Tariff Approvals*, Case No. 07-551-EL-AIR, *et al.*, Application (May 8, 2007). Specifically, in the distribution rate case, FirstEnergy proposed significant changes in tariff design, such that each Company will have only one residential tariff, only four tariffs for commercial and industrial customers and three lighting tariffs. For the proposed general service tariff schedules applicable to large customers, eligibility is based on the voltage levels rather than usage. In addition, within the proposed tariffs, FirstEnergy proposed other changes generally including removing declining rate block structures, shifting from structures consisting of a number of demand and energy and/or hours use blocks to a single per kW or kVa rate structure, and eliminating contract term flexibility, among other proposed changes. The tariff consolidation also makes it difficult to make generalized characterizations about the impacts of FirstEnergy's ESP proposal on customers' bills. Identifying these impacts requires analysis on an individual facility basis.

tariff consolidation proposals initiated in the distribution rate case are accepted by the Commission. The alternative interim ESP proposal proposed by Staff witness Fortney assumes the tariff consolidation is accepted by the Commission as well.⁹ Thus, if the Commission were to accept either the Companies' or Staff's interim ESP proposal, but not contemporaneously address the pending distribution rate case, there would be generation rate schedules with no corresponding distribution rate schedules with which to attach. The converse is also true. If the Commission were to issue an order on the pending distribution rate case that accepts the proposed tariff consolidation but not issue an order on at least one of the SSO applications by January 1, 2009, there will be a mismatch of tariffs.¹⁰ In other words, acceptance of the distribution rate case proposal and rejection of the ESPs and MRO leaves eight distribution tariffs and approximately 117 generation tariffs. As Mr. Fortney stated, such a result would be an administrative nightmare.¹¹

The alternative ESP proposal advocated by the Ohio Energy Group ("OEG") may similarly not be practical. OEG witness Baron recommended that the "existing generation rates should be continued, subject to an adjustment to reflect the difference between the revenues produced by the currently effective generation rates and the cost of actual purchases from the MISO day-ahead market."¹² However, once the Commission issues an order in the distribution rate, there are no existing generation

⁹ Tr. Vol. VII at 127.

¹⁰ Tr. Vol. VIII at 130-131.

¹¹ *Id.* at 133.

¹² OEG Exhibit 1 at 12-13. Mr. Baron also states that "the RTC should be eliminated from current rates as it expires." *Id.* at 13. This adds nothing to OEG's proposal over a four-month period as regulatory transition charges ("RTC") end on December 31, 2008 for Ohio Edison Company and The Toledo Edison Company and would remain in effect for The Cleveland Electric Illuminating Company customers for the duration of the four-month period.

rates associated with the new rate schedules that can be adjusted. For this reason, IEU-Ohio believes that all of the interim ESPs may be administratively impractical.¹³

IV. CONCLUSION

For the reasons discussed herein, IEU-Ohio respectfully urges the Commission to not issue any decision on the proposed interim ESP and to permit the interim ESP to be deemed withdrawn by its own terms. Instead, IEU-Ohio urges the Commission to press forward and complete the longer-term ESP work, comply with the statutory requirement to issue a decision on the threshold issues raised by the Companies' MRO application and promptly issue a decision in the Companies' fully litigated distribution rate increase proceedings.

Respectfully submitted,



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¹³ It is worth noting again that should the Commission accept any of the alternative ESP proposals, as a modification to the Companies' interim proposal, such action would permit the Companies to withdraw the ESP application and proceed along the MRO path.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Post Hearing Brief on FirstEnergy's Four Month Electric Security Plan Proposal* was served upon the following parties of record this 31st day of October 2008, via electronic transmission, hand-delivery or first class mail, postage prepaid.



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