

FILE

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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In the matter of the Application
of Ohio Edison Company, the
Cleveland Electric Company, and
The Toledo Edison Company for
Authority to Establish a Standard
Service Offer Pursuant to Section
4928.43, Revised Code in the Form
of an Electric Security Plan

Case No. 08-935-EL-SSO

BRIEF OF THE OHIO MANUFACTURERS ASSOCIATION (OMA)
ON THE ISSUE
OF
AN INTERIM OR SHORT TERM
ELECTRIC SECURITY PLAN

I.

INTRODUCTION TO THE OMA'S POSITION

The provision of Substitute Senate Bill 221 does not authorize or even mention "Severable Short Term ESP SSO Pricing." Its genesis is of the First Energy Company's creation, reflected only in its filed Application, Section 8a, b, and c (pages 35, 36 and 37,) in which FirstEnergy presumes it has the authority to construct both the substance and metrics of any such "interim" ESP. Specifically it establishes the time frame in which First Energy *directs* the Commission to act:

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“The Commission must choose whether to accept this Short Term ESP by November 14, 2008 or it is deemed withdrawn from the plan.”

(Section 8 as of the ESP)

Nowhere in the provisions of SB 221 can one find such enabling authority being delegated to these regulated utilities!

First Energy’s interim, short term, ESP also determines the length (or duration) of the short term plan, thereby establishing the time frame, within which it *directs* its regulator (the Commission) must act on its proposed longer term ESP. FirstEnergy – not the legislature or its regulator -- establishes the cut off of that extension as March 4, 2009 marking the date it is directing the Commission to act on its long term ESP:

It is FirstEnergy’s

“Short Term ESP [that] provides the Commission until March 5, 2009 to act on the longer term ESP.”

(Section 8c of the ESP)

Thus, at the time it filed its ESP plan with the Commission, First Energy also took it upon itself to singularly determine, for administrative convenience or otherwise, how much time FirstEnergy would allow the Commission to both act upon its Severable Short Term ESP SSO Pricing Plan, as well as its long term ESP SSO plan.

In addition to presenting a plan not contemplated in SB 221; directing the Commission as to when it (the Commission) must act on the plan; and dictating the exact duration of the Severable Short Term ESP SSO Pricing Plan, these regulated electric distribution utilities seek to dictate to their regulator the terms and conditions of its Severable Short Term ESP SSO Pricing Plan during its directed four month duration. FE also directs the Commission as to which of the

terms and conditions of its Severable Short Term ESP SSO Pricing Plan shall extend beyond its four month life into the future – irrespective of whether a market rate offer or a long term ESP is ultimately put in place. To the extent the companies succeed in doing so, they are directing the Commission to regulatorily alter what otherwise would be an MRO SSO determined by the market. Now, the companies are not only dictating to the Commission -- but also to the market.

The Ohio Manufacturers Association opposes the First Energy Companies' Severable Short Term ESP SSO Pricing Plan on the fundamental grounds that (1) there is no legal authority for placing such a plan in place, (2) that placing such a plan in place violates the dictated time limits the General Assembly has established, in which the Commission must act; and, (3) the Severable Short Term ESP SSO reverses the roles of the Commission and the FirstEnergy Operating Companies such that the companies are regulating their regulator, and the marketplace.

II.

THE COMMISSION'S ADOPTION OF THE COMPANY'S SHORT TERM ESP PLAN VIOLATES THE PROVISIONS OF SB 221

In support of their short term ESP proposal the First Energy Companies advance benefits it perceives such a plan will potentially bring to all parties including (a) bringing early price certainty to customers for January 1, 2009; (b) granting the Commission additional time for consideration of the companies longer term ESP; (c) speculation that "if an MRO" is ultimately selected as the SSO, it provides a "more orderly competitive bid process;" and, (d) finally that it gives the companies "adequate time" to fully consider any modifications the PUCO might require to its long term ESP plan (Section 8a of the companies ESP.)

Unfortunately these benefits are – at best – illusory, not supported by any evidence of record, and violate the mandates of the General Assembly as embodied within SB 221.

First, the companies' rationale that the Commission may act upon such a short term plan appears to be premised upon the conclusion that any action on its proposed Severable Short Term ESP SSO constitutes compliance with the dictates of SB 221 directed to a singular long term ESP, and that these plans are one-in-the-same. But SB 221 does not provide for, or envisage, the creation of two ESP's. Quite to the contrary. As is made clear by the title of the companies interim ESP and footnote 20 to its plan application. "This Short Term ESP proposal is a *separate* ESP Standard Service Offer *severable* from the longer term ESP." Indeed, it is one thing for the regulated to dictate to its regulator, and an entirely different thing for the regulated to ignore the dictates of the Ohio general Assembly, as embodied in SB 221, and state SB 221 provides for two independent (i.e., severable) ESP's... Simply stated the Commission has no authority to approve *two separate and distinct* ESP's for the same companies covering different time periods on a time schedule dictated by the companies, which violates the exact and absolute action dates dictated by the General Assembly.

III.

THERE IS NO EVIDENCE SUPPORTING THE NEED FOR, OR JUSTIFICATION OF A SEVERABLE SHORT TERM ESP SSO PRICING PLAN

While the companies assert that one "benefit" of having two such plans is that by a short term plan customers obtain "early" price certainty for January 2009, that perceived benefit "disappears" if the Commission acts on the long term ESP in the same time frame the companies

dictate the Commission act on their short term ESP. Another benefit perceived by the companies as flowing from its short term plan is the Commission gains additional time to act on the long term ESP. Aside from the fact there is no evidence of record that the Commission “needs” additional time to render a decision on its longer term ESP,¹ the company’s proposal constitutes nothing short of an amendment of SB 221 to extend its absolute time limits² for Commission action – a legislative action beyond the authority of the Commission and certainly beyond the authority the First Energy Companies presume they possess.

The third and fourth bullet points advanced by First Energy in support of the adoption of its Severable Short Term ESP SSO Pricing Plan are equally as illusory as its earlier arguments. The companies allege that “if the MRO is selected as the SSO, it provides for a more orderly competitive bid process.” First this irresponsibly presumes that an MRO will be selected, and that somehow it will provide for [not result in] a more orderly competitive bid process to establish such an MRO. Secondly, the applicants fail to explain (or prove) how an interim ESP will provide for a “more orderly” MRO competitive bidding process. Finally the applicants asserts that if the Commission modifies its longer term ESP the companies will secure “adequate time to more fully consider” those modifications. Here, the companies’ own representations refute such an assertion. In Section 8c of the plan the companies expressly commit that a Commission ESP modified plan acceptable to the companies “will become effective seven days following Commission approval.” Thus, the companies represent they are capable of responding

¹ The parties to this proceeding have been subject to the same demanding time constraints; preparing for and engaging in the trial of complex cases involving expert witness while concurrently conducting discovery, engaging in settlement discussions, and preparing briefs such as the instant brief. While sharing some sympathy with the Commission, the parties are adhering to the demanding schedules place upon them by the Commission. The Commission should do no less in complying with the demanding schedule placed upon it by the General Assembly.

² While there is reasonable grounds for varying interpretations of many of the conflicting provisions of SB 221, the time limits in the statute leave no room for “interpretation” as evidenced by the Commission’s haste in conducting these proceedings.

to any order of the Commission within seven days of its issuance regardless of when that Order is issued. An Order issued on March 5, 2009 approving, with modification, a long-term plan will be considered, and acted on, by the company on or before March 12, 2009. An Order issued on December 24, 2008 will likewise be complied with by January 1, 2009. The adequacy of the time to comply is "seven days" in either event.

The companies' proposed Severable, Short Term ESP SSO Pricing Plan should be rejected as being contrary to the provisions of SB 221 and not supported by the evidence.

IV.
THE COMMISSION SHOULD NOT ADOPT ITS
STAFF INTERIM PROPOSAL OR THE PERSONAL
THOUGHTS OF WITNESS DANIEL JOHNSON³

The only proposal advanced on behalf of the Commission's *Staff* is found in the prefiled testimony of staff witness Fortney, the Staff's designated "point person" representing the overall summary as to "Staff's recommendations for this proceeding"⁴ In addressing the companies' proposed short term ESP, Mr. Fortney responded "*conceptually*" stating adoption of a "*some sort*" of a short-term plan "*could*" have merit."⁵

Staff did not address the legality, conceptual appropriateness, or the evidence supporting either the applicant's proposal or that tendered by Staff. Implicitly rejecting the companies' interim ESP (which the OMA represents is neither legally authorized, or supported by the evidence herein), the staff proposed – as an interim measure – allowing the companies to maintain their current rates and RTC charges, with a 2 ½ % surcharge on total bills, and

³ After four revisions to Mr. Johnson market rate analysis, one should question how much faith should be placed in his impromptu simplistic response to a question from the bench as to what a short term ESP generation rate might be. Is it with, or without deferrals, riders, contract extensions, etc?

⁴ Staff Exhibit No. 5, p. 1.

⁵ Staff Exhibit No. 5, p. 10.

extending existing CEI contracts. The Staff offered no reasoning or evidentiary support for its proposal other than to characterize it as a “rate stabilization plan.”

The OMA respectfully submits that the Staff has provided insufficient details of its proposed plan to evaluate either its appropriateness or its preferability to short term ESP plans proposed by other parties. For instance Staff fails to provide details of its short term plan as to either its intended duration or impact on the companies or their customers. Stated differently, the Staff has failed to analyze or quantify the results its plan might be expected to produce, by which the reasonableness of its plan may be evaluated.

For instance, if the duration of the Staff’s plan is short of the date SB 221 requires the Commission to prescribe an ESP plan, the staff’s proposal is meaningless as a “rate stabilization plan” for the current rates would continue in any event – providing a greater “stability” than that proposed by the Staff’s recommended addition of a 2 ½% surcharge. Also, in not addressing the subject of the extension of contracts outside the CEI service territory (i.e., those customers in the Toledo Edison and Ohio Edison service territories) the staff’s non-detailed recommendation would result in rate instability for such customers with expiring contracts. Simply stated, aside from the casual conclusion that the three operating companies’ collective customers’ “average” rate stability would possibly result, no inquiry was made as to the impact of the staff’s proposal on various customer groups or individual customers, which impacts could severely adversely impact Ohio’s economy.

The most glaring defect with the Staff’s proposal is with the possible results it would produce *should the undefined term* of its plan extend beyond December 31, 2008. By fixing its rates for both generation and distribution at the current fixed generation rate revenues and the fixed distribution rate revenues recommended in the companies distribution rate cases (plus a 2

½% surcharge) applicable to both, the Staff is inviting an unconstitutional confiscation of the companies' property should the companies' FERC authorized generation rate revenue exceed the generation rate revenue recovery provided for under the Staff's proposed short term plan beginning January 1, 2009.

V.

THE OMA'S RECOMMENDATION

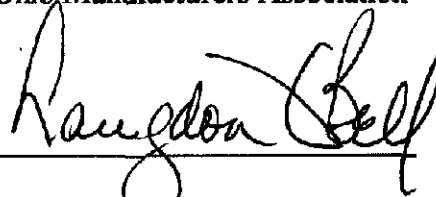
The OMA respectfully submits that the staff's Short Term ESP suffers the identical infirmities possessed by the applicant's plan in two respects. First, they both involve two separate and distinguishable ESP's not authorized by SB 221. Secondly, these short term plans of both the applicant and Staff will not allow for a regulatory determination of whether they are just and reasonable. The Staff's proposal will likely result in a determination that it results in the unconstitutional confiscation of FE's property should the reasonable wholesale rate be charged CEI, TE and OE as authorized by FERC be at a level higher than the Staff's proposal generation rate. On the other hand should this Commission or FERC be called upon to approve – by default or waiver – a black box contract rate neither agency has evaluated as to its reasonableness, customers stand the risk of market manipulation by affiliated company transactions. Neither of these scenarios should be allowed by either, and certainly not both, the PUCO and FERC.

Should the Commission conclude that it possesses the implicit authority to authorize two *severable* ESP Plans: one short term ESP extending into 2009 and another longer term ESP the direction of which is to be determined by the Commission (not the companies), OMA submits this Commission has but one choice: establish these companies' distribution rate design and revenue levels (based upon the distribution case record) in the short term ESP Order to be issued herein and establish the generation rate therein based upon the energy futures *actually*

experienced during the actual term the short term ESP remains in effect, adjusted up or down. It is only by such a proposal the Commission may assure that the companies are recovering their market based generation costs and that their customers are not being exploited during this most difficult period in which Ohio's economy is contracting. Any other regulatory action places the economy of this state at risk and in the hands of these regulated utilities and their unregulated affiliates.

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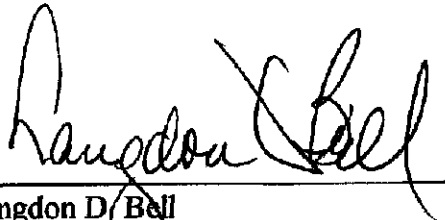
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CERTIFICATE OF SERVICE

I hereby certify that this 31st day of October 2009, a copy of the foregoing Brief was served on all parties of record electronically as stipulated to by the parties at the October 31, 2008 hearing.


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