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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of the )  
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 )

Case No. 08-0935-EL-SSO

PUCO

COMMENTS OF CONSTELLATION NEWENERGY, INC.,  
AND  
CONSTELLATION ENERGY COMMODITIES GROUP, INC.,  
REGARDING FIRSTENERGY'S COMPLIANCE TARIFFS

I. Introduction

In accordance with the Attorney Examiner's entry of December 26, 2008, now come Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. (jointly "Constellation") and present their comments concerning the December 22, 2008 tariff filing made by The Cleveland Electric Illuminating, Company, The Ohio Edison Company and The Toledo Edison Company (jointly "FirstEnergy"). Constellation is a full party of record in the matter at bar, who actively participated during the three week hearing on FirstEnergy's Electric Security Plan ("ESP") including sponsoring two expert witnesses and the filing of an interim plan brief and two trial briefs. The Commission's December 19, 2008 Opinion and Order carefully weighed the testimony and cross examination from some 37 expert witnesses and considered the countless public witnesses attending the nine public hearings in crafting its decision. However, on December 22, 2008, pursuant to Section 4928.14(C)(2)(a), FirstEnergy withdrew its ESP application rather than seek rehearing. FirstEnergy's impetuous decision to reject the terms and conditions of the ESP laid out in the Commission Opinion and Order raises the question of what tariff provisions apply now given the statutory changes established by

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Senate Bill 221 and the expiration of the Post Rate Stabilization (“RSP”) / Rate Certainty (“RCP”) plans. As will be discussed below, Constellation requests that the Commission deny in part the proffered tariffs and instruct FirstEnergy to update all of its applicable tariffs so that they remove all references to shopping credits and shopping credit caps as that regulatory paradigm no longer applies after as of January 1, 2009.

## **II. Background – RSP / RCP Tariff Regime**

Prior to the passage of Senate Bill 221, the statutory scheme presented in Chapter 4829 was fairly simple. Generation rates which formerly under Section 4909.18, Revised Code were based on cost of service principles with the utility having a monopoly as to the sale of generation were to be phased-out during a five year market development period. As of January 1, 2006 customers were to be free to purchase competitive services in the open market and non competitive services were to be supplied by the utilities pursuant to Commission approved regulated rates. By statute “competitive services” specifically includes generation and such other items as the Commission determines to be competitive in nature<sup>1</sup>. FirstEnergy filed an electric transition plan<sup>2</sup> in which it claimed both generation transition credits and regulatory transition credits due to the conversion from monopoly supplied generation to competitive sales of generation. The Commission authorized credits to FirstEnergy for both stranded generation costs and regulatory transition assets<sup>3</sup> to make FirstEnergy whole from the shift from cost of service to competitive generation markets and approved the transferred of Ohio Edison’s, Toledo Edison’s and Cleveland Electric Illuminating Company’s generation facilities to a non-regulated affiliate.

Prior to January 1, 2006 FirstEnergy filed an application with the Commission for a Rate Stabilization Plan in Case No. 03-2144-EL-ATA. The Rate Stabilization Plan delayed for

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<sup>1</sup> Section 4928.03, Revised Code.

<sup>2</sup> Case No. 99-1212-EL-UNC.

<sup>3</sup> Opinion and Order Case No. 99-1212-EL-UNC.

shopping customers the movement to the clean division between buying non competitive services from the utility at prices set by the Commission and competitive services in the market. The RSP continued the Electric Transition Case use of the shopping credits paradigm, but with reduced credits. Maintain the shopping credits, particularly at reduced rates was controversial resulted in a stipulation based upon a Revised Stabilization Plan introduced as part of the Rebuttal Testimony of FirstEnergy Chief Executive Officer Tony Alexander<sup>4</sup>. It was this revised RSP plan as presented by Mr. Alexander that the Commission adopted in its June 9, 2004 Opinion and Order and affirmed as to shopping credits in its August 4, 2004 Entry on Rehearing.

The Revised RSP Section I Paragraph 1 clearly states that the RSP plan terminates the earlier of termination of the RSP plan or December 31, 2008. A review of the terms and conditions of the RSP plan show that the hard termination date of December 31, 2008 was an integral part of the plan, for by that date all the key mutual promises will have expired. For example, the Rate Stabilization Charge is reduced each year ending of the three year RSP and by 2008 is completely eliminated<sup>5</sup>. Similarly, the Energy Efficiency and Economic Development programs all terminate on or before December 31, 2008.

Finally, the RSP had shopping credit caps<sup>6</sup>. The shopping credit caps essentially forbid customers whose Standard Service Offer generation costs exceed the caps from being able to truly purchase their competitive services at competitive prices. For example, a medium general service customer of Toledo Edison could have a generation cost of more than one cent per kWh over the shopping credit cap<sup>7</sup>. For competitive retail electric service ("CRES") providers, these shopping credit caps have long been viewed as the major barrier to customer choice and

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<sup>4</sup> Direct Prepared Testimony of Anthony J. Alexander Case No. 03-2144-EL-ATA filed February 24, 2004.

<sup>5</sup> See Revised RSP Plan Section III paragraph 2 and the price and rate discounts keyed to the RSC p. 3.

<sup>6</sup> See Attachment 5 of the Revised RSP plan.

<sup>7</sup> See Prepared Testimony of Teresa Ringenbach of Integrys Energy Services, Inc. Ohio House of Representatives Public Utilities Committee Hearings on Substitute Senate Bill 221.

competition and the reason for the collapse of any customer switching in the FirstEnergy service area following the introduction of the RSP plan.

The RSP plan provided for fuel adjustments, but prior to the actual increases being charged FirstEnergy filed its Rate Certainty Plan in docket 05-1125-EL-ATA. The RCP did not alter either the term of the RSP or the existence of the shopping credit caps. So that customer switching and retail competition did not recover in the RCP period, but the RCP program was not extended. The fuel charges that FirstEnergy planned to defer in the RCP program and charge back to all customers was determined to have crossed the line for charging generation fees via distribution rates and was remanded back to the Commission by the Ohio Supreme Court<sup>8</sup>.

As of January 1, 2009, the RSP / RCP is terminated by its own terms. There is no basis for the continued use of the shopping credit paradigm, let alone the shopping credit caps. Further, Senate Bill 221 seems to have shut the door on shopping credit caps or similar techniques which blur the lines so that the utility can collect generation type revenues via distribution charges. SB 221, following the *Elyria* decision, actually strengthened the prohibition in Section 4928.02 (H), Revised Code which was amended to read:

Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation related costs through distribution or transmission rates.  
(New language added in by SB 221)

In sum, it appears that by its own terms the shopping credit paradigm and the pernicious shopping credit caps terminated midnight December 31, 2008. Further, even if the RSP did not end under its own terms, the advent of the new language in Section 4928.02 (H), Revised Code on January 1, 2009 might have compelled the same outcome.

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<sup>8</sup> *Elyria v. PUC* 114 Ohio St. 3<sup>rd</sup> 305 (2007); 2007-Ohio 4164.

### **III. FirstEnergy's December 22, 2008 Tariff filing**

As discussed above, on December 22, 2008 FirstEnergy pursuant to Section 4928.14(C)(2)(a) FirstEnergy withdrew its ESP application. That leaves FirstEnergy without either an ESP plan or a Market Rate Option ("MRO") plan to procure and price the competitive generation portion of the Standard Service Offer ("SSO"). FirstEnergy in its December 22, 2008 tariff filing cites Section 4928.141(A), Revised Code for the proposition that after January 1, 2009 if a utility does not have an ESP or MRO then its current "rate plan" remains in effect. The term "rate plan" is a defined term in Chapter 4928:

"Rate plan" means the standard service offer in effect on the effective date of the amendment to this section by S.B. 221 of the 127<sup>th</sup> general assembly.<sup>9</sup> (emphasis added)

An SSO is the bundled combination of competitive and non competitive services that a utility must offer as a default to ensure that all retail customers have service<sup>10</sup>. It has no impact on shopping customers that purchase electric service from a CRES provider. In fact, the SSO exists to take care of retail customers who do not shop. Thus, FirstEnergy cannot extend the shopping credit paradigm with the shopping credit caps by virtue of extending its SSO. Nevertheless, First Energy's December 22, 2008 Tariff Filing improperly continues the use of shopping credit caps. For example, on Ohio Edison Company Original Sheet No. 63 2<sup>nd</sup> Revised Page 2 of 6 FirstEnergy proposes to keep the language:

In no event shall the total Shopping Credit, including the increased amounts, as determined in Option 1 or 2, exceed the Shopping Credit cap that has been approved by the Public Utilities Commission (PUCO) in Case No. 03-2144-EL-ATAS and as such Shopping Credit cap is adjusted per provisions of Case No. 03-2144-EL-ATA or Case No. 05-1125-EL-ATA.

Then, FirstEnergy adds the following to the tariff sheets that follow:

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<sup>9</sup> Section 4928.01(A)(33), Revised Code.

<sup>10</sup> Section 4928.141.

Notwithstanding any provisions to the contrary, the terms and conditions of the foregoing tariff shall remain in effect, including the 2008 charges or pricing calculation, as applicable, until otherwise revised or terminated.

As noted above, after midnight December 31, 2008 the RSP / RCP no longer exist. The compliance tariffs should be revised and all references to shopping credits should be removed. Instead, the tariffs should merely provide that a shopping customer pays the distribution charges and the applicable riders such as Universal Service Rider or State and Local Tax Rider. The proposed additional language by FirstEnergy would result in exactly the opposite happening. Maintaining the shopping credit caps after January 1, 2009 violates Section 4928.02(H), the Commission orders in Case No. 03-2144-EL-ATA and Case No. 05-1125-EL-ATA.

### **III. Conclusion**

For the reasons set forth above, Constellation requests that the Commission deny in part the proffered tariffs and instruct FirstEnergy to update all its tariffs to comply with the termination of the RSP in general and specifically the removal of shopping credits and the shopping credit caps, effective as of January 1, 2009.

Respectfully Submitted,



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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 5<sup>th</sup> day of January, 2009 by electronic mail or by regular U.S. mail, postage prepaid, upon the persons listed below.



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