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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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.	)))))))	Case No. 08-935-EL-SSO

MEMORANDUM CONTRA JOINT APPLICATION FOR REHEARING OF THE FIRSTENERGY-AFFILIATED DISTRIBUTION COMPANIES BY THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

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MEMORANDUM CONTRA JOINT APPLICATION FOR REHEARING OF THE FIRSTENERGY-AFFILIATED DISTRIBUTIN COMPANIES
BY
THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

I. INTRODUCTION AND PROCEDURAL HISTORY

The undersigned members of the Ohio Consumer and Environmental Advocates ("OCEA") file this memorandum contra to the application for rehearing ("Rehearing Application") submitted to the Public Utilities Commission of Ohio ("Commission" or "PUCO") on January 9, 2009 by the Ohio Edison Company ("OE"), the Cleveland Electric Illuminating Company ("CEI"), and the Toledo Edison Company ("TE," collectively with OE and CEI, "FirstEnergy" or "Companies"). The subject of the Remand Application was the Commission order ("Order") issued on January 7, 2009 that set interim rates after FirstEnergy withdrew its ESP Application on December 22, 2008. The tariffs ordered on January 7, 2009 provide for standard service offers ("SSOs") until such time that either a market rate offer ("MRO") or electric security plan ("ESP") is submitted to and approved by the PUCO.

II. ARGUMENT

A. FirstEnergy's Argument That The Commission's Order Continuing Portions Of FirstEnergy's Rate Certainty Plan (RCP), But Eliminating Regulatory Transition Charges (RTC) And The Fuel Recovery Mechanisms (FRM) Is Unreasonable And Unlawful Is Without Merit And The Request To Reconsider This Order Should Be Denied.

1. FirstEnergy Misinterprets R.C. 4928.141.

FirstEnergy states in its Application for Rehearing that its "rate plan" should be preserved "until an SSO arising from an approved ESP or MRO" is in place.[1] FirstEnergy's demand is unsupported by the applicable law. R.C. 4928.141(A)(1) provides that:

> The rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143.

This section of the Revised Code is only applicable in circumstances where a standard service offer is not authorized under R.C. 4928.142 or R.C. 4928.143. In its December 19, 2008 order, the Commission concluded that FirstEnergy's ESP application was more favorable in the aggregate as compared with a MRO application and accordingly approved FirstEnergy's ESP as modified in that order.[2] The Commission's approval of the ESP application, with modifications, satisfies the R.C. 4928.141(A)(1) requirement for "authorization" of a SSO. Accordingly, the Commission has already taken the necessary action of authorizing an ESP to serve as FirstEnergy's SSO.

R.C. 4928.143(C)(2)(a)-(b) provides that:

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[1] Rehearing Application at 4.

[2] Order at 70 (December 18, 2008).

> (a) If the commission modifies and approves an application . . . the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer.
>
> (b) If the utility terminates an application . . . or if the commission disapproves an application . . . the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer.

On December 22, 2008, in accordance with the above captioned statute, FirstEnergy withdrew and terminated its ESP application. Subsequently, in response to motions from several intervenors, the Commission issued its January 7, 2009 Order, pursuant to R.C. 4928.143(C)(2)(b), appropriately determining the "provisions, terms, and conditions" of FirstEnergy's most recent SSO that would be continued and those that would be discontinued. The Commission's Order was properly issued despite FirstEnergy's argument that there has never been a Commission authorization of the application. In the event that there was not an authorization, there must have been a termination, and the above stated statute provides that the Commission may issue an order setting the provisions, terms and conditions of continued electric service based upon FirstEnergy's most recent SSO.

Based upon FirstEnergy's most recent SSO, which was contained in its Rate Certainty Plan ("RCP") as approved by the Commission in Case No. 05-1125-EL-ATA, et al. (which incorporated provisions of the RSP approved in Case No. 03-2144-EL-ATA), the Commission determined that, as a part of the most recent SSO, RTC charges for customers of OE and TE were by their original design fully recovered and appropriately discontinued as of December 31, 2008. The RTC charges within the RCP

were a specified category of charges that contained a defined end date whereby full and equitable recovery to FirstEnergy was to be achieved whereas other charges and credits did not contain an end date. Accordingly, since the RTC charges have been fully recovered and since the charges have reached their original termination date, the Commission has correctly ordered and should not reverse its determination that FirstEnergy's RCP should continue without RTC charges.

The Commission also correctly ordered, and should not grant the request for rehearing or reverse its determination, that proposed tariffs containing provisions for a fuel recovery mechanism ("FRM") be denied. Based upon the Commission's Order, the "FRM was authorized in the RCP to collect specific amounts in the years 2006, 2007, and 2008, and the FRM offset the RTC amounts." Thus, full recovery of these charges occurred in 2006, 2007, and 2008.

Regardless of the statutory provision cited as the basis for the Commission's Order, it is inconceivable that FirstEnergy could expect that its customers would continue to pay RTC and FRM charges that have all been fully recovered. Continued payment would result in customers effectively paying the same charges twice. This cannot be the intent of the General Assembly in passing Amended Substitute Senate Bill 221.

For the aforementioned reasons, the Commission's Order was neither unreasonable nor unlawful, and ordered appropriate tariff rates.

2. FirstEnergy's second claim on rehearing that the Order is unlawful and unreasonable because it mistakenly applies R.C. 4928.143(C)(2)(b) to the situation presented here where no standard service offer has been first authorized under R.C. 4928.142 (MRO) or R.C. 4928.143 (ESP) is without merit and should be dismissed.

As its second ground for rehearing, FirstEnergy argues "[t]he Order is unlawful and unreasonable because it mistakenly applies R.C. 4928.143(C)(2)(b) to the situation presented here where no SSO has been first authorized under R.C. 4928.142 (MRO) or R.C. 4928.143 (ESP)."[3] FirstEnergy posits several arguments in support of this second ground, as set forth in the argument section "A.2" of its Memorandum in Support of its Application for Rehearing. All of FirstEnergy's arguments are without merit.

FirstEnergy first asserts R.C. 4928.143 does not apply because FirstEnergy withdrew its application, did not file accompanying tariffs, and therefore, no SSO was "authorized." To the contrary, the Commission followed the letter of the law required in R.C. 4928.143(C)(2)(a) and 4928.143(C)(2)(b). The Commission's order dated December 19, 2008 modified and approved FirstEnergy's ESP application and ordered FirstEnergy to file appropriate tariffs. Regardless of the fact that FirstEnergy exercised its right to withdraw the modified ESP plan and did not submit the accompanying tariffs, nothing in R.C. 4928.143 provides that such actions work to disallow, unauthorize or disapprove the Commission's actions set forth in its December 19, 2008 order.

The express language of R.C. 4928.143(C)(2)(b) commands that "[i]f the utility terminates an application pursuant to division (C)(2)(a) of this section... the Commission shall issue such order as is necessary to continue the provisions, terms and conditions of

[3] Rehearing Application at 5.

the utility's most recent standard service offer...." The Commission fully complied with the statutory directive by issuing its Order on January 7, 2009. FirstEnergy's attempt to avoid the effect of the Order by relying upon a purported difference between the terms "approved" and "authorized" is an attempt to make a distinction without a difference.

FirstEnergy next asserts that R.C. 4928.141 is more specific than R.C. 4928.143, and thus statutory construction rules dictate the former should take precedence over the latter. FirstEnergy's argument is belied by both the structure and language of those statutes. R.C. 4928.141 is a general provision that specifically cites to two more specific sections following it, R.C. 4928.142 and R.C. 4928.143. R.C. 4928.141 simply provides for establishment of an SSO by either an MRO, as specifically provided for in R.C. 4928.142, or by an ESP, as specifically provided for in R.C. 4928.143. Structurally, it is obvious that R.C. 4928.141 is a general provision and that R.C. 4928.143 is a more specific provision.

Moreover, the language of the sections involved reinforces the conclusion that R.C. 4928.141 is general and R.C. 4928.143 is specific. The former addresses the situation where an MRO or ESP has not been approved or authorized by January 1, 2009... i.e., where the Commission did not act in time. The latter addresses the situation where an ESP was approved and then withdrawn. The current situation presents a fact pattern that is most closely and specifically aligned with R.C. 4928.143. Both the rules of statutory construction, as set forth in R.C. 1.51, and as recognized in case law, such as *Ohio Edison Co. v. Public Util. Comm.* (1997), 78 Ohio St. 3d 466, support the proposition that R.C. 4928.143, the more specific section, takes precedence over R.C. 4928.141 which is more general. FirstEnergy's attempt to cast R.C. 4928.141 as the

more specific provision because it references a specific date, January 1, 2009, ignores both the structure and content of these two sections.

Lastly, FirstEnergy asserts that there had to have been a "first" authorized SSO under R.C. 4928.142 or R.C. 4928.143 before R.C. 4928.143(C)(2)(b) can be applicable. FirstEnergy rests its argument on the statutory provision that "the commission shall issue such order as is necessary to continue the provisions, terms and conditions of the utility's most recent standard service offer . . . until a subsequent offer is *authorized* pursuant to this section [i.e. 4928.143] or 4928.142 of the Revised Code."[4] FirstEnergy argues that a subsequent offer requires a "first" offer, and that its withdrawal of the modified ESP prevented a first offer from being "authorized" under R.C. 4928.143(C)(2)(b). FirstEnergy's argument is based upon the erroneous legal position that its withdrawal somehow "unauthorized" the Commission's approval of a modified ESP. For the reasons discussed above, such is not the case. The inclusion of the word "subsequently" simply implies that R.C. 4928.143(C)(2)(b) may be applied repeatedly over the coming years whenever an ESP application is approved with modifications and withdrawn or rejected by the Commission.

For the foregoing reasons, the Commission's Order was neither unreasonable nor unlawful and appropriately applies R.C. 4928.143(C)(2)(b), contrary to FirstEnergy's second ground for rehearing set forth in its application filed January 9, 2009.

B. The Discontinuation of RTC Charges is Appropriate.

As argued previously by OCEA, the result in the Order that RTC charges should not be charged to customers is correct. The reason that RTC charges should not be

[4] R.C. 4928.143(C)(2)(b) (emphasis added).

applied is the application of R.C. 4928.141(A) which states that transition charges should not be charged when the SSO is set "under section 4928.142 or 4928.143 of the Revised Code." The default provisions contained in R.C. 4928.143 are appropriate for setting the SSO, as stated in the Commission's Order. Therefore, RTC should not be charged as a matter of Ohio law.

C. FirstEnergy's third claim on rehearing that the Order is unlawful and unreasonable in its interpretation of R.C. 4928.143(C)(2)(b) in that it selectively terminated provisions of the Companies' rate plan related to RTC and fuel riders to the Companies' detriment because of alleged termination dates arising from the RCP, but then approved the continuation of other tariffs arising from the RTC with actual termination dates, is without merit and should be dismissed.

As its third ground for rehearing, FirstEnergy argues "[t]he Order is unlawful and unreasonable in its interpretation of §4928.143(C)(2)(b) in that it selectively terminated provisions of the Companies' rate plan related to RTC and fuel riders to the Companies' detriment because of alleged termination dates arising from the RCP, but then approved the continuation of other tariffs arising from the RTC with actual termination dates." This argument is addressed in two sections of its Memorandum in Support of its Application for Rehearing, specifically, sections B and C.

In section B, FirstEnergy asserts "[t]he Order is unlawful and unreasonable because it interprets §4928.143(C)(2)(b) to preclude the Companies from continuing to charge RTC charges and fuel riders after January 1, 2009." R.C. 4928.143(C)(2)(b) requires that the Commission shall issue such order as is necessary to continue the provisions, terms and conditions of the utility's most recent standard service offer. In effect, this section requires the Commission to continue the effectiveness of the last rate plan according to its terms.

Several of the terms of FirstEnergy's last rate plan, the Rate Certainty Plan ("RCP"), expressly provide for the discontinuation and end of specific charges thereunder. Most notably among these charges is the RTC for OE and TE customers. There can be little argument that these charges were set to expire and did expire, on their own accord, on December 31, 2008. Pursuant to the express terms of the RCP, these charges for these customers are not to be collected starting on and after January 1, 2009.

FirstEnergy argues that to "continue" means to continue all provisions, terms and conditions regardless of any expirations contained within the plan. Specifically, FirstEnergy argues that the December 31, 2008 expiration of RTC should be ignored and instead, continued on into 2009 and thereafter. To do as advocated by FirstEnergy, however, would result in a modification of the express terms of the RCP, an extension of the transition collection period and an over-collection of millions in transition charges from OE and TE customers. Such is not a continuation of the RCP, but rather a substitution of a modified RCP in derogation of its express terms. There can no argument that as of January 1, 2009 FirstEnergy is not entitled to collect RTC from customers of those two operating companies. As of January 1, 2009, these charges expired and were fully anticipated to drop off customers' bills going forward.

In section C, FirstEnergy asserts "[t]he order is unreasonable and unlawful in that it is internally inconsistent in that it selectively terminates certain rate plan provisions and relies upon an erroneous premise that RTC charges were expressly scheduled to terminate." FirstEnergy claims that "the RCP did not specify a specific end date for RTC charges" and that the Commission's finding to the contrary was based upon a "factual

error."[5] However, both the RCP documents and direct testimony provided in support of the RCP by FirstEnergy belies FirstEnergy's assertions.

The RCP Stipulation and Recommendation make clear that the RTC for OE and TE customers was to end no later than December 31, 2008. Note the following from the RCP Stipulation and Recommendation:[6]

> 2. The RTC and Extended RTC recovery periods and RTC rate levels for Ohio Edison and Toledo Edison both will be adjusted so that full recovery of all amounts authorized by the PUCO to be collected through the RTC rate components (RTC and Extended RTC) will occur through usage as of December 31, 2008.

Similarly, FirstEnergy's own witnesses in Case Nos. 05-1125-EL-ATA, et al., provided direct testimony indicating that RTC charges for OE and TE customers would expire no later than December 31, 2008. In the Direct Testimony of William D. Byrd, Director of Rate Strategy for FirstEnergy Service Company, FirstEnergy admitted:[7]

> The RTC and Extended RTC recovery periods and rate levels are adjusted to provide for full recovery of authorized costs no later than through usage as of December 31, 2008 for OE and TE, and as of December 31, 2010 for CEI.

Mr. Byrd also testified: "As a result, OE and TE customer rates covered by the plan will not change during the plan period, and at the end of the plan there will be a decrease due to the termination of RTC recovery period."[8]

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[5] Rehearing Application at 9-10.

[6] *In re FirstEnergy RCP*, Case No. 05-1125-EL-ATA, et al., RCP Stipulation at 6. See also the RCP Stipulation and Recommendation at 7-8 ("... based on usage as of December 31, 2008 for Ohio Edison and Toledo Edison...").

[7] Id., Byrd Direct Testimony at 6-7.

[8] Direct Testimony at 5. See also, Direct Testimony of Harvey L. Wagner, Controller and Chief Accounting Officer of FirstEnergy Corp., at 5 ("Q. Since the RTC rate [as reduced] for OE and TE will be in effect through a specific date [i.e., December 31, 2008] what would happen....").

The terms of the RCP clearly indicate that transition charges for OE and TE customers were set to expire on December 31, 2008, and were not to be collected thereafter. FirstEnergy's claim to the contrary is itself factually incorrect. Moreover, to claim, as FirstEnergy does, that because a tariff sheet may or may not share this end date ("[t]his was factually in error as the tariffs containing the RTC charges had no such end date."[9]) somehow means that the end date that all parties agreed upon within the RCP is nullified, is likewise baseless.

Also in Section C, FirstEnergy alleges that the Commission's January 7, 2009 Order "further erred when it applied a selective, factually incorrect, and internally inconsistent basis in deciding which provisions should terminate."[10] This argument is based in large part upon FirstEnergy's position that RTC charges had no termination dates and were ordered discontinued nonetheless. As discussed above, RTC charges for OE and TE customers, in fact, had specific termination dates. Moreover, additional charges, which had specific termination dates were, likewise, ordered discontinued consistent with the express language concerning these provisions in the RCP. There is certainly no inconsistency with ordering these provisions with specific termination dates discontinued per their express terms going forward.

For the foregoing reasons, FirstEnergy's third ground for rehearing set forth in its January 9, 2009 application should be rejected.

[9] Rehearing Application at 10.

[10] Rehearing Application at 9.

D. FirstEnergy's Argument That The Commission's Order Not Allowing For Any Increase Or Decrease In Fuel Costs Is Unreasonable And Unlawful Is Without Merit And The Request For Approval Of Purchased Power Costs Based Upon This Argument Should Be Denied.

1. The Commission Was Not Required To Allow For Increased Or Decreased Fuel Costs When It Modified And Approved The ESP.

FirstEnergy states that the Commission's Order did not allow for any increase or decrease in fuel costs, and is therefore unreasonable and unlawful.[11] FirstEnergy argues that increased or decreased fuel costs must be allowed since the Commission concluded that R.C. 4928.143(C)(2)(b) serves as the basis for establishing the provisions, terms, and conditions for the provision of electric service as of January 1, 2009. As stated above, this section of the Revised Code provides that "if a utility terminates an application . . . the Commission shall issue an order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs."[12]

Under the circumstances that FirstEnergy withdrew its ESP Application, the lawful rates for FirstEnergy service were set by statute. FirstEnergy proposed tariffs that did not comport with those lawful rates. The Commission issued its Order on January 7, 2009 "as [was] necessary" for the continuation of certain provisions and terms of the most recent SSO. The Commission was not required to provide for a fuel adjustment clause, and such a clause in the circumstances presented by FirstEnergy would be unlawful.

[11] Rehearing Application at 11.

[12] Rehearing Application at 9.

2. FirstEnergy Has Applied For Increased Fuel Costs In The Form of Rider FUEL in Separate Proceedings Pending Before the Commission and those Separate Proceedings.

On January 9, 2009, FirstEnergy filed a new Application with the Commission, thereby initiating proceedings in Case Nos. 09-221-EL-ATA, et al., for consideration and review of proposed Rider FUEL. In those proceedings FirstEnergy is requesting recovery of:[13]

> [t]he costs of all energy and capacity, planning reserve, and related carrying costs, less an offset for generation revenue collected from retail generation customers. More specifically, the surcharge would recover the difference between each Company's fuel costs, including purchased power, energy, capacity, planning reserve, alternative energy and credits, non-distribution uncollectible expense, Ohio Commercial Activity Tax expense and other applicable taxes, and any other expenses.

Parties to the FirstEnergy ESP case, including OCEA members, will be intensely interested in the proceeding initiated by FirstEnergy. The new application should be dismissed, and will be the subject of a motion to that effect by OCEA members. FirstEnergy's request, if granted, would result in rates that do not follow the default provisions for standard service offer pricing provided for pursuant to R.C. 4928.143.

In the alternative if such a proceeding moves forward, such a proceeding must include parties the opportunity to intervene to ensure that their interests are represented. OCEA members should be given an opportunity to investigate the Companies' filing and to present their arguments. Any investigation should carefully investigate FirstEnergy claim that its procurement process was appropriate and in compliance with Federal

[13] *In re FirstEnergy Rider FUEL Rider*, Application at 3, ¶2 (January 9, 2009).

Energy Regulatory Commission Guidelines.[14] Each component of the costs should be reviewed by the Commission in a fully briefed and argued case. Since FirstEnergy has only recently filed its application for Rider FUEL, under no imaginable circumstances has FirstEnergy's request for an increase been vetted appropriately. The OCEA and other stakeholders have not had an opportunity to fully review the Rider FUEL.

Accordingly, for the reasons set forth herein, FirstEnergy's argument that the Commission's Order not allowing for any increase or decrease in fuel costs should be rejected, and the new application in Case Nos. 09-21-EL-ATA should be addressed by the Commission as argued by the OCEA members in that new docket.

E. The Commission is Required to Follow Ohio Law, Which is Presumed to be Constitutional, and Not Reach Rate Determinations Based upon Unsupported Claims by the Companies.

FirstEnergy relies upon the "filed rate doctrine" for its argument that the Commission is compelled to pass along the cost of the Companies wholesale power costs to avoid complications that involve violation of the U.S. Constitution.[15] As stated above, the provisions of R.C. Chapter 4928 provide for default pricing under the current factual circumstances. Ohio's statutes are presumed to be constitutional,[16] and administrative bodies in Ohio do not have the authority to violate Ohio law because of their interpretation of the U.S. Constitution.[17]

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[14] Rehearing Application at 13.

[15] Rehearing Application at 16-17.

[16] *State v. Cook*, 83 Ohio St.3d 404, 409, 1998 Ohio 291.

[17] See, e.g., *Derakhshan v. State Med. Bd.*, 2007 Ohio 5802 at ¶26 (Ohio App. 10th Distr.) ("administrative bodies have no authority to interpret the Constitution"); also Grant v. Ohio Dept. of Liquor Control (1993), 86 Ohio App.3d 76, 83 ("constitutional issues cannot be determined administratively").

An important feature of the present circumstances is that FirstEnergy *chose* to withdraw its ESP Application and conduct itself under the default provisions of Ohio law. This choice was presumably made with consideration for the default provisions contained under Ohio law, and even the tariffs submitted by the Companies on December 22, 2008 (i.e. ordered modified on January 7, 2009) did not include the rate adjustments now claimed by FirstEnergy. FirstEnergy has made no claim that the Commission's order modifying the Companies' ESP Application was unlawful in any respect -- including any element offensive to the U.S. Constitution -- and the default rates were chosen by FirstEnergy over those originally approved by the Commission. The Commission should reject FirstEnergy's newest arguments which contradict its earlier submissions in this docket.

Finally, FirstEnergy quotes from a decision that states that state regulators "have much less actual authority" than they had previously.[18] The decision does not leave the Commission without authority. It is well established law that a state retains the jurisdiction to "determine the reasonableness of a utility company's claimed expenses."[19] The Commission should follow Ohio law regarding rates deemed therein to reasonable compensate the Companies for their expenses.[20]

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[18] Remand Application at 16, quoting Public Util. Dist. No. 1 of Snohomish Cty. v. FERC, 471 F.3d 1053 (9th Cir. 2006).

[19] *Pike County Light and Power Co. v. Pennsylvania Pub. Util. Comm.* (1983), 77 Pa.Comwlth. 268, 275; approved, *Public Service Co. v. Patch*, 167 F.3d 29, 35 (1st Cir. 1998). Where a utility has multiple sources from which it could have purchased power, the state can inquire into the prudence of the utility's purchasing practices and re-price retail rates on the basis that the utility should have purchased lower-priced power from some other source. Id.

[20] The Companies noticeably ignored purchase options that parties to the FirstEnergy ESP Proceeding deemed lower cost than the results from the Companies' RFP process. See, e.g., *In re FirstEnergy ESP Proceeding*, OCC Brief Regarding a Short-Term ESP at 8 (October 31, 2008).

F. New Rates Were Designated by Law, Which FirstEnergy Did Not Follow, and the Commission Issued the Order that Was Necessary to Instruct FirstEnergy Regarding Lawful Rates.

The Companies argue that the Commission ordered tariffs to be filed containing new rates "without evidence that a rate reduction is necessary" and that such new rates "confiscate the Companies' property in violation of the Fifth and Fourteenth Amendments to the United States Constitution."[21] The Commission took plenty of evidence regarding the ESP Application, and the Companies *chose* to reject the Commission's ensuing order in favor of the legal consequences of that choice. FirstEnergy has not argued that the Commission's order on December 19, 2008 failed to provide the Companies with adequate compensation. The Commission is a creature of statute, and is required to follow Ohio law.[22] Under the statutory scheme laid out in R.C. Chapter 4928, the Commission has the duty to set default rates according to the default provisions contained under Ohio law.

The Companies' argument is largely addressed in the last section of this pleading. Ohio's statutes are presumed to be constitutional, and administrative bodies in Ohio do not have the authority to violate Ohio law because of their interpretation of the U.S. Constitution. In the event that the Commission decides to entertain the Companies' application in Case Nos. 09-21-EL-ATA, et al. (and OCEA members argue that this is not the appropriate or legal course), FirstEnergy's assertion that it is suffering a "cost burden" should be carefully scrutinized.[23] It is the Companies' actions since they

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[21] Remand Application at 17.

[22] *Time Warner AxS v. Public Util. Comm.* (1996), 75 Ohio St.3d. 229, 234; *Canton Storage & Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St. 3d 1, 4.

[23] Rehearing Application at 18.

withdrew their ESP Application on December 22, 2008 that have not been subject to regulatory scrutiny.

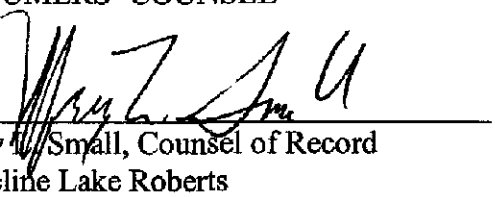
The Companies sixth assignment of error should be rejected.

III. CONCLUSION

The Commission issued its Order on January 7, 2009 because it was necessary to correct the default rates that FirstEnergy proposed on December 22, 2008. The Commission's results were correct, and FirstEnergy's arguments in its Remand Application should be rejected.

Respectfully submitted,

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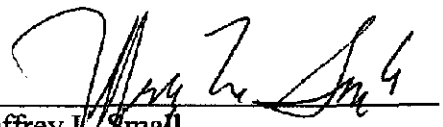
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra FirstEnergy's Application for Rehearing was served electronically on the persons stated below this 13th day of January 2009.



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