

FILE

93-7000-EL-FAD
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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

FirstEnergy Solutions Corp.	:	Docket Nos. ER09-134-000
FirstEnergy Generation Corporation	:	ER09-135-000
FirstEnergy Nuclear Generation Corporation	:	ER09-136-000
FirstEnergy Generation Mansfield Unit 1 Corp.	:	ER09-137-000

REQUEST FOR REHEARING AND CLARIFICATION
AND/OR REHEARING
SUBMITTED ON BEHALF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

PUCO

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Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission's (FERC or Commission), 18 C.F.R. § 385.713, the Public Utilities Commission of Ohio (PUCO) hereby respectfully requests rehearing of the Commission's December 23, 2008 order in the above captioned proceeding, *FirstEnergy Solutions Corp., et al.*, 125 FERC ¶61,356 (2008) (December 23 Order), which conditionally accepts Applicants' proposed tariff sheets, filed on December 24, 2008, granting Applicants' request for a Commission determination that the Order No. 697¹ requirement

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Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, FERC Stats. & Regs. ¶ 31,252, clarified, 121 FERC ¶ 61,260 (2007), order on reh'g, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268, order on reh'g and clarification, 124 FERC ¶ 61,055 (2008).

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to obtain prior approval for affiliate sales of electric energy or capacity does not apply to the Applicants' power sales to their affiliated regulated franchised public utilities in Ohio. In addition, pursuant to Rules 212 and 713 of the Commissions Rules of Practice and Procedures, 18 C.F.R. §§ 385.212, 713, the PUCO requests that the Commission clarify its determination and indicate that the waivers granted under this order are temporary and the Applicants must justify any future waiver of affiliate transaction rules.

I. Background

Applicants are market-regulated power sales affiliates, i.e., they make power sales at market-based rates and are non-franchised affiliates of franchised public utilities. Applicants' affiliated regulated franchised public utilities in Ohio include Cleveland Electric Illuminating Company, Ohio Edison Company, and Toledo Edison Company (collectively, Ohio Regulated Utilities). The Ohio Regulated Utilities serve retail load in Ohio as providers-of-last-resort. The power to do so had been supplied by the applicants under an affiliate power supply agreement that resulted from a Commission-approved settlement. The agreement expired December 31, 2008 necessitating the Ohio Regulated Utilities obtain a new supply of wholesale power.

How the Ohio Regulated Utilities shall provide retail power to end-use customers has been the subject of litigation before the PUCO. Ohio law provides two alternative mechanisms by which this can occur. These are termed a "market rate offer" and an "electric security plan". A market rate offer is a competitive bidding process with certain minimum safeguards including minimum number of bidders and oversubscription

requirements; however, the ultimate price to retail customers is not subject to PUCO approval. An electric security plan is a negotiated retail rate without any necessary bidding component. Retail prices under an electric security plan are approved by the PUCO, giving protection to retail customers from affiliate abuse. The Ohio Regulated Utilities filed applications under both alternatives.

On November 25, 2008, the PUCO rejected the Ohio Regulated Utilities' application for a market rate offer, thus leaving only the electric security plan as a live, available option² for setting retail rates. On December 19, 2008 the PUCO approved the electric security plan application that the Ohio Regulated Utilities had submitted with modifications. At this point, it was clear to the PUCO that it would be necessary for the Ohio Regulated Utilities to obtain wholesale power very quickly to effectuate the electric security plan it had just approved and so, given the exigency of time, on December 17, 2008, the PUCO indicated its conditional support for a waiver of the affiliate transaction rules for the applicants. In the PUCO's view, there would be no need for a review by the FERC under its affiliate rules because the PUCO's order approving the retail rates under the electric security plan already protected customers from the possibility of affiliate abuse. Thus, a temporary waiver was appropriate to accomplish the electric security plan and that is what the PUCO suggested in its letter.

Despite the PUCO's expectations, the Ohio Regulated Utilities did not obtain power to implement the electric security plan. Instead, as is their right under state law,

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When a market rate option application has been rejected by the PUCO, the applicant must make a new filing to correct whatever shortcomings exist in the proposal before the PUCO can consider that option again. To this point, no such correcting filing has been made.

on December 22, 2008, they withdrew the electric security plan application that the PUCO had just approved, making it void. The Ohio Regulated Utilities did apparently obtain wholesale power; retail service was maintained. This power has been obtained for a relatively short period. Despite the applicants' representations to this Commission, the approval of the PUCO was not obtained before this acquisition.

At this moment, the only potential way in which retail rates will be established in Ohio is through a market rate option.³ As noted previously, the market rate option is an acquisition through a competitive bidding process. A competitive bidding process should comply with the FERC's affiliate rules. There is no reason for a waiver under this circumstance. The only reason provided by Applicants is to avoid the need for a 205 filing, but that is no reason at all. That is precisely what is needed to protect the public. A proper competitive process should comply with the FERC's standards and that is what such a filing should show.

It is in this regard that the Commission's order should be clarified. While the waiver already granted to the Applicants appeared to be necessary at the time, continuing the waiver into the future has not been justified. When the PUCO submitted its letter agreeing to the grant of a limited waiver, it appeared that the underlying retail rates in Ohio would be at rates approved by the PUCO under an electric security plan. Thus, there was every reason to believe that customers would be protected from the potential of affiliate abuse. That underlying premise no longer holds. The circumstance has changed.

³ Even this market rate option is only available after the Ohio Regulated Companies make a correcting filing to their application to the PUCO and the PUCO approves those corrections.

In the absence of a new application to the PUCO and further proceedings on that hypothetical filing, the Ohio Regulated Companies will obtain their power through a competitive bidding process under a market rate option, and the usual rules should apply unless the Applicants can make a showing to the contrary and, to this point, they have made no showing at all.

The resolution of the problem outlined above is quite simple. The Commission's order should be clarified to indicate that the waivers granted are temporary and to require that the Applicants must file a new justification for a waiver of the affiliate transaction rules for future transactions.

II. Specification of Errors

PUCO respectfully submits that the Commission's December 23, 2008 Order erred by allowing the waiver of its affiliate transaction rules to continue past April 1, 2009, without justification and creating a risk that the wholesale rates charged by applicants to the Ohio Regulated Utilities will be unjust and unreasonable.

III. Application for Rehearing

As noted above, while the Commission's waiver of its affiliate rules was necessary at the time, the continuation of that waiver is unnecessary and potentially very harmful. This Commission noted:

Applicants add that, even if the requested authorization is granted, the Ohio Regulated Utilities could not make any purchases from Applicants without the prior approval

of the Public Utilities Commission of Ohio (Ohio Commission), which is fully empowered to protect the interests of Ohio's retail customers.⁴

This is not what happened. The Ohio Regulated Utilities did indeed make purchases without the prior approval of the PUCO. Further, it appears that the transaction or transactions occurred outside any sort of market which might act as a check on self-dealing. This is not just, not reasonable, and cannot stand.

As noted previously, the Applicants have provided no meaningful rationale for a continuing waiver of the normal affiliate transaction rules. A showing should be required before a waiver is provided. This Commission should clarify its December 23 order to require the Applicants to make a showing before a waiver of the affiliate rules would be considered in the future.

IV. CONCLUSION

WHEREFORE, for the forgoing reasons, the Public Utilities Commission of Ohio hereby respectfully requests that the Commission provide clarification of its findings, or in the alternative, grant rehearing as described above.

⁴ December 23 Order at 4, ¶ 6.

Respectfully submitted,

/s/ Thomas W. McNamee

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V. PROOF OF SERVICE

I hereby certify that the foregoing have been served in accordance with 18 C.F.R. Sec. 385.2010 upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Thomas W. McNamee

Thomas W. McNamee
Assistant Attorney General

Dated at Columbus, Ohio this January 21, 2009.