

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio	)	
Edison Company, The Cleveland Electric	)	Case No. 09-21-EL-ATA
Illuminating Company and The Toledo	)	Case No. 09-22-EL-AEM
Edison Company for Approval of Rider	)	Case No. 09-23-EL-AAM
FUEL and Related Accounting Authority.	)	

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**MEMORANDUM CONTRA FIRSTENERGY'S MOTION FOR  
EXTENSION OF TIME AND TO APPLY PROCEDURAL PRECEDENT  
BY  
THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES**

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**I. INTRODUCTION**

On January 9, 2009, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or "Companies") filed their Application for the approval of their proposed Rider FUEL. The Application sought rate increases above the default standard service offers provided for under R.C. Chapter 4928. The Application states that FirstEnergy contracted for power supply for the first three-months of 2009.<sup>1</sup> Sparse information is provided by the attachments to the Application concerning the process and results of the wholesale purchases of electricity. On August 14, 2009, the Commission issued an order ("Rider Order") that, among other matters, granted FirstEnergy permission to place a purchased power surcharge into effect for their customers and required a review of the prudence of the Companies' purchasing decisions.<sup>2</sup>

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<sup>1</sup> Application at 10, ¶15.

<sup>2</sup> Rider Order at 7 ("prudency review").

The Rider Order required the filing of testimony by FirstEnergy on February 2, 2009, and also promised that a procedural schedule would be set by later entry.<sup>3</sup> On January 23, 2009, FirstEnergy filed a Motion for Extension of Time and to Apply Procedural Precedent (“Motion”). Among other matters, FirstEnergy’s Motion sought an eleven-day extension to the February 2, 2009 deadline for filing testimony.<sup>4</sup>

Pursuant to Ohio Adm. Code 4901-1-12, the undersigned members of the Ohio Consumer and Environmental Advocates (“OCEA”) respond to FirstEnergy’s Motion that was filed at the Public Utilities Commission of Ohio (“Commission” or “PUCO”) on January 23, 2009. Although FirstEnergy’s Motion discusses procedures in prudence reviews before the Commission, the Companies do fail to set out a procedure for this proceeding that would serve the fundamental purpose of determining amounts that should be returned to customers as the result of the surcharge levied upon customers in the form of Rider FUEL.

## **II. ARGUMENT: Procedures Should be Followed that are Appropriate for a Prudence Review.**

FirstEnergy’s Motion addresses procedure in prudence reviews and states its position regarding the date that should be set (i.e. extended) for the Companies’ testimony. FirstEnergy fails to set out a procedure that would serve the purposes set for this proceeding. The procedural schedule in this case should be set to recognize the

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<sup>3</sup> Order at 7, ¶(13).

<sup>4</sup> Motion at 1 (“until February 13, 2009”).

particular testimonial needs in a prudence review as well as to grant the pending motions by OCEA members regarding expedited discovery.<sup>5</sup>

The key procedural requirement for a proceeding on the subject of the prudence of a utility's purchasing decisions is that testimony by Staff and intervening parties be submitted *after* the end of the period under review. That requires a date for PUCO Staff and intervenor testimony that is at least two weeks beyond March 31, 2009.

This case resembles the PUCO's after-the-fact prudence review of the purchasing decisions made by natural gas distribution utilities in Ohio.<sup>6</sup> Such gas cost recovery ("GCR") reviews are the subject of Ohio Adm. Code Chapter 4901:1-14 and R.C. 4905.302(C) and (E).<sup>7</sup> The procedure used in GCR reviews provides for an audit conducted for the period of the purchases in question<sup>8</sup> and a hearing no less than "thirty days after the filing of each audit report."<sup>9</sup> Since an audit reviews the period of the purchases, its presentation to the Commission is after-the-fact.

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<sup>5</sup> The request for expedited discovery was submitted as an alternative to dismissal of FirstEnergy's case. OCEA Motion to Dismiss and, in the Alternative, Motion for Expedited Discovery (January 13, 2009). On January 29, 2009, FirstEnergy stated in a filing that it does not oppose the Motion for Expedited Discovery. FirstEnergy Memorandum Contra OCEA Motion to Dismiss at 7 (January 29, 2009).

<sup>6</sup> By after-the-fact review, the OCC makes the observation that any measurement of imprudence must encompass actual information from the entire period under review. The OCC recognizes that prudence involves areas of inquiry that evaluate the utility's purchasing decisions given the information available to the utility at relevant points in time. See, e.g., *In the Matter of the Regulation of the Fuel Cost Adjustment Clause Contained Within the Rate Schedules of the Ohio Power Company and Related Matters*, Case No. 79-234-EL-FAC (Subfile A), Entry on Rehearing at 3 (October 15, 1980).

<sup>7</sup> The purpose of Ohio Adm. Code 4901:1-14 is, in part, "to review each company's gas production and purchasing policies to the extent that those policies affect the gas cost recovery rate." Ohio Adm. Code 4901:1-14-02. See R.C. 4905.302(C) and (E). Analogously, the instant proceeding is intended to review FirstEnergy's wholesale power purchasing policies that have resulted in a surcharge on customers' electric generation service rates.

<sup>8</sup> Ohio Adm. Code 4901:1-14-07.

<sup>9</sup> Ohio Adm. Code 4901:1-14-08(A).

The undersigned OCEA members consider such an audit by an expert knowledgeable in the area of review to be desirable due to the large amount of revenues at stake for both FirstEnergy as well as its customers. In the event that a formal audit is not conducted, the PUCO Staff should file its testimony in this case by April 16, 2009 with intervenor testimony due two weeks later on April 30, 2009. Only such timing of testimony after the period in question will permit the PUCO and interested parties with the opportunity to present evidence regarding the amount that should be refunded to customers as the result of any imprudent decisions on the part of FirstEnergy. This timing also argues for the continuation of discovery until at least the time set for Staff's testimony in April. An appropriate time for hearing would be mid-May, in conformity with the Commission's policy in GCR cases that is designed to provide interested parties full rights to discovery and an opportunity to fully participate in the proceeding.

With the above-stated discussion in mind, the Company's desire to submit testimony on February 13, 2009 will fit the timeframes for adequate process. Such testimony will aid in a review of the Companies' purchasing decisions that were conducted outside regulatory review, and particularly outside the process outlined in R.C. 4928.142 for providing a market rate option for pricing electric generation services.

As a cautionary note, the Office of the Ohio Consumers' Counsel ("OCC") will shortly submit a motion in conjunction with FirstEnergy's failure to cooperate in entering into a reasonable protective agreement that is needed to provide the OCC with its discovery rights.<sup>10</sup> If FirstEnergy's failure to cooperate regarding discovery works to the prejudice of the OCC, the schedule outlined in the instant pleading may need to be re-

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<sup>10</sup> This lack of cooperation may be repeated with other parties, including other OCEA members.

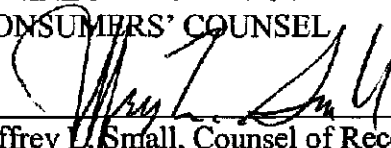
evaluated and extended. In such an event, the OCC will proceed before the Commission by an appropriate motion.

### III. CONCLUSION

The procedure for this case should recognize the usual needs for prudence review to protect Ohio customers. FirstEnergy's request for an eleven-day extension for filing its testimony addresses just the first step for this prudence review. The Commission should approve the procedure specified in this pleading that provides for testimony by the PUCO Staff and intervenors in April and a hearing in May. Of special importance, testimony regarding measurement of imprudence by FirstEnergy in its wholesale power purchases must be due after the three-month period that is at issue in these cases.

Respectfully submitted,

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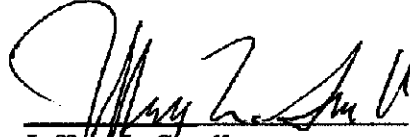
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**CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing *Memorandum Contra* was served via First Class Mail, postage pre-paid (also electronically), this 30<sup>th</sup> day of January, 2009.

  
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