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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric) Case No. 08-935-EL-SSO
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.)

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.)

PUCO

2009 FEB 20 PM 5:00

RECEIVED-DOCKETING DIV

**MOTIONS FOR CONTINUANCE OF THE HEARING DATE AND FOR
EXTENSION OF TIME FOR FILING TESTIMONY
AND
REQUEST FOR EXPEDITED RULING
BY
THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES**

The undersigned members of the Ohio Consumer and Environmental Advocates ("OCEA") moves the Public Utilities Commission of Ohio ("Commission" or "PUCO") for a continuance of the hearing currently scheduled for Wednesday, February 25, 2009, in these proceedings related to the procurement of power and prudence review and for an extension of the February 23, 2009 deadline for filing testimony by Intervenor who did not sign the Stipulation docketed in these proceedings on February 19, 2009.¹ The hearing date and testimony deadline, which were established in the February 19 Entry, gives Intervenor such as OCEA and other parties who are challenging the fuel rider of

¹ OCEA files its Motions pursuant to Ohio Adm. Code 4901-1-12 and 4901-1-13. The OCEA members were granted intervention in an Entry journalized on February 19, 2009 ("February 19 Entry"), at 2.

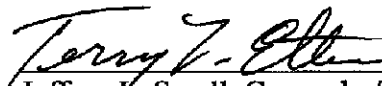
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Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or "Companies") in Case Nos. 09-21-EL-ATA, *et al.* ("Fuel Rider case") an unreasonably short time line to prepare a case regarding whether the fuel rider that customers are paying is reasonable and lawful. OCEA requests a five-day continuance of the hearing, until March 2, 2009, and an extension until February 27, 2009 for Intervenor who did not sign the Stipulation to file testimony.² Because Intervenor must file testimony in the Fuel Rider case by February 23, 2009, OCEA also seeks an expedited ruling on this Motion.

There is good cause for granting OCEA's Motions, per the standard in Ohio Adm. Code 4901-1-13(A). The reasons why OCEA's Motions should be granted are set forth in the attached Memorandum in Support.

Respectfully submitted,

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² The PUCO Staff and Intervenor who signed the Stipulation apparently support FirstEnergy and thus should not be granted additional time to file testimony.

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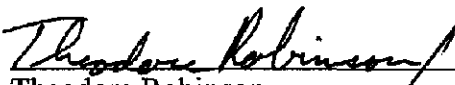
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On January 9, 2009, FirstEnergy filed an Application for the approval of its proposed Rider FUEL. In the Application, FirstEnergy sought to increase customers' rates above the default standard service offers provided for under R.C. Chapter 4928. The Application stated that FirstEnergy contracted for power supply for the first three months of 2009.³ Sparse information was included in the attachments to the Application concerning the process and results of the wholesale purchases of electricity.

On January 14, 2009, the Commission issued a Finding and 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

³ Application at 10, ¶15.

the Companies' purchasing decisions.⁴ The Commission "direct[ed] the Companies to make an appropriate filing, by February 2, 2009, which includes testimony and provides information sufficient for the Commission to conduct a prudency review of the costs incurred in purchasing power for customers receiving generation service pursuant to the Companies' power supply agreement and information sufficient for the Commission to consider whether the recovery of such costs is necessary to avoid a confiscatory result."⁵

On January 23, 2009, the Companies filed a motion to extend the deadline for filing the testimony and information regarding the prudency review to February 13, 2009. In an Entry issued on January 30, 2009, the Commission granted the extension for filing testimony, but set a deadline of February 2, 2009 for FirstEnergy to docket its final report regarding the competitive bidding process for procurement of power ("Post-RFP Report") for the January 5-March 31, 2009 period.⁶ The Companies filed the Post-RFP Report on February 2. FirstEnergy, however, **did not file** the required testimony on February 13, and **did not file** a request for an additional extension of time.

In the meantime, hurried negotiations took place between the Companies and the PUCO Staff regarding a possible settlement of the Companies' ESP in Case No. 08-935-EL-SSO ("ESP case"), which included resolving the Fuel Rider case. The substance of that Stipulation, in the form of a Staff proposal, first became known to the undersigned OCEA members on February 6, 2009. The final Stipulation, which was docketed on February 19, 2009, purports to resolve all the issues in both the ESP case and the Fuel

⁴ Rider Order at 7 ("prudency review").

⁵ Id.

⁶ Id. The Post-RFP Report reviewed the Request for Proposal and competitive bidding process that FirstEnergy used to purchase power for the interim period between the termination of the Companies' rate stabilization program on December 31, 2008 and the anticipated beginning of the Companies' Electric Security Plan ("ESP") on April 1, 2009.

Rider case.⁷ The undersigned OCEA members are not signatories to the Stipulation, and oppose the Stipulation.

As a result of the Stipulation, the Commission established a new expedited procedural schedule for the review of whether the costs that customers are paying for the period April 1, 2009 through May 31, 2009 are reasonably incurred and the prudence review of the competitive bidding process mandated by the Commission's January 14, 2009 Order. Under the accelerated procedural schedule, FirstEnergy must file its testimony by Friday, February 20, 2009; Intervenors' and PUCO Staff's testimonies are due by Monday, February 23, 2009; and an evidentiary hearing regarding the prudence review is scheduled for Wednesday, February 25, 2009. This schedule is unreasonable and unfair, and as a practical matter denies OCEA's right to be heard. There has been little time to conduct discovery on the post-RFP report. There will be no time to conduct discovery on FirstEnergy's testimony, and there will be merely one business day to review and respond to FirstEnergy's testimony.

The Commission should therefore grant a continuance of the hearing until Monday, March 2, 2009. The Commission should also grant an extension of time, until February 27, 2009, for filing testimony by Intervenors who did not sign the Stipulation.

II. STANDARD OF REVIEW

Ohio Adm. Code 4901-1-13(A) provides that "[e]xcept as otherwise provided by law, and notwithstanding any other provision in this chapter, continuances of public hearings and extensions of time to file pleadings or other papers may be granted upon motion of any party for good cause shown, or upon motion of the commission, the legal

⁷ Stipulation at 1. The Stipulation also purports to resolve Case Nos. 09-22-EL-AAM and 09-23-EL-AAM.

director, the deputy legal director, or an attorney examiner.” As discussed herein, there is good cause for granting OCEA’s Motion.

Ohio Adm. Code 4901-1-13(B) requires:

A motion for an extension of time to file a document must be timely filed so as to permit the commission, legal director, deputy legal director, or attorney examiner sufficient time to consider the request and to make a ruling prior to the established filing date. If two or more parties have similar documents due the same day and a party intends to seek an extension of the filing date, the moving party must file its motion for an extension sufficiently in advance of the existing filing date so that other parties who might be disadvantaged by submitting their filing prior to the movant submitting its filing will not be disadvantaged. If two or more parties have similar documents due the same day and the motion for an extension is filed fewer than five business days before the document is scheduled to be filed, then the moving party, in addition to regular service of the motion for an extension, must provide a brief summary of the request to all other parties orally, by facsimile transmission, or by electronic message by no later than five-thirty p.m. on the day the motion is filed.

In this instance, the February 19 Entry gave OCEA and other intervenors only two business days of notice that their testimony regarding the prudency review would be due on February 23. OCEA is filing its Motion on the day after the Entry was issued, and thus OCEA is doing its best to give “the commission, legal director, deputy legal director, or attorney examiner sufficient time to consider the request and to make a ruling prior to the established filing date.” Further, OCEA is providing all parties a summary of OCEA’s Motion, as well as the Motion itself, electronically.

III. ARGUMENT

The February 19 Entry established an unreasonably short time frame for Intervenors who did not sign the Stipulation to respond to the Companies’ testimony and to prepare for an evidentiary hearing on the prudency review. Among other things, the

Entry precludes such Intervenor from having ample rights of discovery, in violation of R.C. 4903.082 and Ohio Adm. Code 4901-1-16 et seq. Also, by giving the Companies 37 days to file their testimony but allowing Intervenor opposing the Stipulation only two business days to submit responsive testimony, the February 19 Entry is fundamentally unfair to all Intervenor, and especially unfair to the Intervenor who did not sign the Stipulation and are thus in the most adverse position with respect to FirstEnergy's overall plan under the stipulation. In order to bring a modicum of balance to this proceeding which adversely affects FirstEnergy's customers, the evidentiary hearing should be continued for five days and Intervenor who did not sign the Stipulation should be granted a five-day extension of time for filing testimony.

A. The Procedural Schedule for the Prudency Review Hearing Established in the February 19 Entry Is Unreasonable and Unlawfully Forecloses OCEA's Discovery Rights.

The February 19 Entry established an unnecessarily hasty procedural schedule for the prudency review hearing regarding the fuel rider. The Entry gave parties less than one week's notice of a hearing that will determine whether the rates that FirstEnergy is charging customers during the first three months of 2009 are based on prudent power purchases.

In addition, the procedural schedule violates R.C. 4903.082, and the PUCO's discovery rules, by foreclosing intervenors from having ample rights of discovery. Although this proceeding began on January 9, 2009, the Application filed at that time contained little information from which discovery could be obtained. Nevertheless, four OCEA members – the Office of the Ohio Consumers' Counsel ("OCC"), Citizen Power, NOPEC and NOAC – filed a motion to expedite discovery on January 13, 2009. The Commission has yet to act on that motion.

The discovery process has proceeded slowly. OCC sent discovery to the Companies on January 15, 2009 and again on January 23, 2009. FirstEnergy responded to OCC's discovery on February 4 and 12, 2009. The Companies, however, refused to respond to much of the first set of discovery due to confidentiality concerns. OCC then became subject to a protracted negotiation for a protective agreement with FirstEnergy, and concluded the agreement on February 12, 2009. OCC received the confidential discovery responses on February 16, 2009.⁸

The first meaningful information docketed in this proceeding was the post-RFP report, which was filed on February 2, 2009. That filing, however, contained information that was filed under seal, which could only be obtained through a protective agreement negotiated with the Companies. After the protective agreement was reached, FirstEnergy transmitted the report to OCC on February 12, 2009.

As in most cases, however, a key element of the discovery process in this proceeding should result from the prefiled testimony and the deposition of witnesses. Because the testimony of OCEA's witnesses would respond to specifics in the Companies' prefiled testimony, the ability to conduct discovery on and depose the Companies' witnesses is essential to the preparation of OCEA's testimony and its case at hearing.

This will not be possible, however, due to the unreasonable procedural schedule that the Commission has imposed on the prudency hearing. There is simply not enough time in this schedule for reasonable discovery and incorporation of that discovery into positions (including testimony and cross-examination) in the case.

⁸ Because February 16 was the Presidents Day holiday, OCC's offices were closed when FirstEnergy transmitted the report electronically. Thus, OCC did not have access to the report until February 17.

The Commission has thus effectively foreclosed OCEA from having ample rights of discovery, contrary to the requirement of Ohio law and PUCO rule. Although written discovery may be futile, due to the absence of expedited discovery in the Fuel Rider case, a five-day extension of the deadline for OCEA (and others similarly situated) to file testimony would at least give OCEA the opportunity to depose the Companies' witnesses. Such an extension of time, with a concomitant continuance of the prudency review hearing, is necessary in order to protect the interests of FirstEnergy's customers. The PUCO should grant OCEA's Motion.

B. Allowing FirstEnergy 37 Days to Prepare Its Testimony But Giving Intervenors Only One Business Day to Prepare Responsive Testimony Contravenes Fundamental Fairness.

The Commission is unfairly favoring the Companies in the prudency review proceeding. FirstEnergy has had more than a month to prepare its testimony in support of the fuel rider Application. Yet, OCEA and others similarly situated have a mere one business day to respond. That alone is unfair.

The inappropriateness of the procedural schedule is compounded by the fact that FirstEnergy failed to file its testimony on February 13, 2009, as the PUCO ordered in granting the Companies' motion for an extension of time on January 30, 2009. FirstEnergy did not even bother to seek a second extension. Had FirstEnergy filed its testimony as required, OCEA would have had a greater opportunity to evaluate and respond to the testimony, prior to filing its own testimony. Intervenors now have seven fewer days to prepare a response to the Company's testimony than they would have had if FirstEnergy had filed testimony as the PUCO ordered in granting the Companies' request for an extension of time.

As the Companies stated in their January 23, 2009 motion for an extension of time, “the Companies anticipate that preparation of the filing will require considerable analysis and preparation of materials, including testimony, in order to respond to the Commission’s directive. While underway, that task alone is substantial and will be extraordinarily difficult to complete in the time period allotted.”⁹ The “time period allotted” was nearly **three weeks** after the Fuel Rider Order was issued.

FirstEnergy did not file its testimony as required on February 13, however. Instead, with the procedural schedule set forth in the February 19 Entry, the Companies have had 37 days to prepare their testimony. OCEA, on the other hand, has been given only two business days after the February 19 Entry – and just one business day after FirstEnergy files its testimony – to protect consumers by providing the PUCO with analysis of the complex issues raised in the Fuel Rider case.

The unreasonable procedural schedule in the February 19 Entry has effectively foreclosed the opportunity for OCEA and others similarly situated to be heard in this proceeding by providing little time to prepare for testimony and a hearing. This is especially prejudicial, given that “parties challenging the reasonableness of ... costs have the obligation to present some concrete evidence supporting their position.”¹⁰

The Commission cannot make a reasoned decision, under R.C. 4903.09, based on such an unfair procedural schedule. The Commission granted an extension of time to the Companies because of their stated need to properly conduct considerable analysis of this case. The Commission should give OCEA and others similarly situated the same

⁹ FirstEnergy’s Motion for Extension of Time (January 23, 2009) at 2.

¹⁰ *In the Matter of the Application of the Cleveland Electric Illuminating Company for Authority to Amend and to Increase Certain of Its Filed Schedules Fixing Rates and Charges for Electric Service*, Case Nos. 88-170-EL-AIR, *et al.*, Opinion and Order (January 31, 1989) at 107-108.

consideration. The short continuance of the hearing and extension of time for filing testimony sought by OCEA would not unduly prejudice FirstEnergy, the PUCO Staff or the signatory parties to the Stipulation. To the contrary, the relief sought by OCEA would help diminish the undue prejudice caused by the February 19 Entry against those Intervenorers who did not sign the Stipulation.

The continuance sought by OCEA would help restore a semblance of procedural balance to this proceeding. The Commission should grant OCEA's Motion.

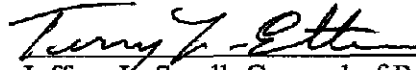
Given the extremely short time frame for submitting testimony and preparing for a hearing, OCEA also seeks an expedited ruling on OCEA's Motion. OCEA cannot certify that no party objects to an expedited ruling.

IV. CONCLUSION

The procedural schedule established for the prudency hearing unlawfully forecloses discovery rights and is unreasonably favorable to the Companies. In order to lessen the adverse impact of the procedural schedule, the Commission should grant OCEA's Motion. The prudency hearing should be continued to March 2, 2009 and Intervenorers who did not sign the stipulation should have until February 27, 2009 to file testimony.

Respectfully submitted,

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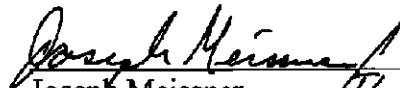
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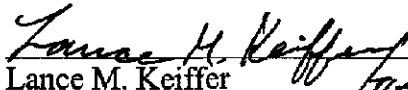
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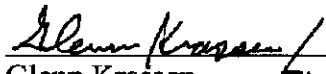
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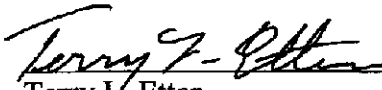

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Motions for Continuance of the Hearing Date and for Extension of Time for Filing Testimony and Request for Expedited Ruling by the Ohio Consumer and Environmental Advocates was served upon the persons listed below via electronic transmission this 20th day of February 2009.


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