

FILE

BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for )  
Alternative and Renewable Energy )  
Technologies and Resources, and Emission ) Case No. 08-888-EL-ORD  
Control Reporting Requirements, and )  
Amendment of Chapters 4901:5-1, 4901:5-3, )  
4901:5-5, and 4901:5-7 of the Ohio )  
Administrative Code, Pursuant to Chapter )  
4928, Revised Code, to Implement Senate )  
Bill No. 221. )

FIRSTENERGY SOLUTIONS ASSOCIATES'  
MEMORANDUM CONTRA  
APPLICATION FOR REHEARING OF THE  
OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES'

PUCO

2009 MAY 27 PM 5:21

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The Commission should deny that part of the Ohio Consumer and Environmental Advocates (OCEA) Application for Rehearing that goes to the text of Chapters 4901:5-1, 4901:5-3 and 4901:5-5 of the Ohio Administrative Code.<sup>1</sup> To the extent that OCEA believes that the proposed text of O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5 should apply to the FirstEnergy Solutions Associates,<sup>2</sup> denial is compelled because there is no statutory basis that authorizes the Commission to impose the proposed O.A.C. 4901:5-1, 4901:5-3 and 4901:5-5 requirements on the FirstEnergy Solutions Associates, and also because the text of the proposed rules is unreasonable

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<sup>1</sup> PUCO Case No. 08-888-EL-ORD, *Application for Rehearing by OCEA*, pp. 19-25 (May 15, 2009).

<sup>2</sup> The FirstEnergy Solutions Associates are: FirstEnergy Solutions Corp.; FirstEnergy Generation Corp.; FirstEnergy Nuclear Generation Corp.; and FirstEnergy Nuclear Operating Company.

with regard to the FirstEnergy Solutions Associates.<sup>3</sup> Denial also is compelled because OCEA fails to advance legal authority that justifies OCEA's proposed changes to the rule.

**1. Denial Is Compelled Because There Is No Statutory Basis That Authorizes Application Of O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5 To The FirstEnergy Solutions Associates**

It is possible to read OCEA's Application for Rehearing as including an assumption that the O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5 should apply to the FirstEnergy Solutions Associates. This is because the proposed text is written to apply to the Associates,<sup>4</sup> and because the OCEA's Application for Rehearing does not take issue with such broad application of the rules.

In their Application for Rehearing, the FirstEnergy Associates explained why they should not be subject to proposed O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5. In summary, the FirstEnergy Associates demonstrated: (i) that there is no justification or basis in Amended Senate Bill 221 (2007) that requires or authorizes application of the proposed rules to the FirstEnergy Solutions Associates; (ii) that the proposed rules conflict with the General Assembly's legislative enactments concerning long-term forecasting and integrated resource planning;<sup>5</sup> and (iii) that the proposed rules contain

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<sup>3</sup> See PUCO Case No. 08-888-EL-ORD, *Application for Rehearing of FirstEnergy Solutions Associates* (May 15, 2009).

<sup>4</sup> Proposed O.A.C. § 4901:5-1-02.

<sup>5</sup> See O.R.C. §§ 4935.04(C) (directing that electric companies that serve customers in Ohio must file long-term forecast reports); § 4928.05(A)(1) (expressly excusing "electric utilities" and "electric service companies" from filing long-term forecast reports); and SB 3 (1999) (revising text of 4935.04 to reduce class of public utilities and other persons subject to long-term forecast reporting requirement).

drafting errors of sufficient magnitude as to render the rules unreasonable if applied to the Associates. The Associates hereby incorporate by reference this part of their Application for Rehearing.

OCEA provides no law or facts that contradict this analysis, and therefore advance no legal reason that would justify application of the proposed O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5 to the FirstEnergy Solutions Associates. As such, the Associates' fundamental proposition – that because the General Assembly circumscribed carefully the class of entities that are subject to a long-term forecast reporting requirement, any attempt to broaden the reporting requirement to the FirstEnergy Solutions Associates must fall – is sound.<sup>6</sup> Accordingly, the Commission should reject those parts of the OCEA's Application for Rehearing that could be read to mean that proposed O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5 should apply to the FirstEnergy Solutions Associates.

## **2. Denial Is Appropriate Because OCEA Advances No Legal Justification For Its Proposed Changes**

OCEA cites to a Supreme Court of Ohio case, *Amoco Oil Co. v Petroleum Underground Storage Tank Release Compensation Board*, as legal support for OCEA's position that proposed O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5 are unreasonable and unlawful.<sup>7</sup> The cited case does not support OCEA's position.

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<sup>6</sup> E.g., *Athens Home Telephone Co. v. Peck*, 158 Ohio St. 557, 574 (1953); *Kelly v. Accountancy Board of Ohio*, 88 Ohio App.3d 453, 458 (1993).

<sup>7</sup> PUCO Case No. 08-888-EL-ORD, *Application for Rehearing by OCEA*, p. 19.

As is relevant here, the *Amoco* case dealt with the question of whether certain procedural rules that were adopted by Ohio's "Petroleum Underground Storage Tank Release Compensation Board" conflicted with the legislation that classified certain owners of underground storage tanks as eligible for compensation from the board. The Supreme Court noted the legal distinction between agency rules that deal with substantive rights and agency rules that deal with procedural rights, and classified the *Amoco* case as concerning an entity's procedural rights in bringing claims for compensation to the Board. The Court then ruled that where an agency's procedural rules do not impermissibly add to or conflict with the underlying statute (such as by frustrating the public policy embedded in the organic legislation or by changing procedural requirements described in the statute), the administrative agency's procedural rule would be valid. The Court determined that the Board's procedural rule – here a time limit on bringing claims for compensation – did not conflict with the underlying statute. On this basis, the Court affirmed the Board's rule.<sup>8</sup>

OCEA cites the *Amoco* case for its position that *substance* of the proposed O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5 is unlawful. The FirstEnergy Solutions Associates have noted that the statutes that underlie proposed O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5 authorize a long-term forecast reporting requirement only for a limited class of entities. However, O.R.C. § 4935.04(C) does impose a long-term

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<sup>8</sup> *Amoco Oil Co. v. Petroleum Underground Storage Tank Release Compensation Board*, 89 Ohio St.3d 477, 484 (2000).

forecasting requirement for certain entities.<sup>9</sup> Thus, there are appropriate statutory grounds for rules that describe or provide for the substance and process of long-term forecasting requirements for the affected entities.

In order, however, for OCEA's *Amoco* case to apply, OCEA would need to demonstrate that there was a conflict between the "procedural" terms in proposed O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5 and the language in O.R.C. § 4935.04. OCEA doesn't raise or argue this point, and therefore the *Amoco* case cited by OCEA does not provide legal support for OCEA's arguments about the text of proposed O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5.

OCEA presents no other legal grounds for its arguments concerning proposed O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5. Accordingly, the Commission can disregard OCEA's arguments about the text of proposed O.A.C. Chapters 4901:5-1, 4901:5-3 and 4901:5-5.

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<sup>9</sup> Specifically, the text of O.R.C. § 4935.04(C), as qualified by its own text and by other statutes such as O.R.C. § 4928.05(A)(1), results in a long-term forecast report requirement for: (i) entities that own electric transmission lines that are rated at 125 kV or more; (ii) entities that are other than "electric utilities" or "electric services companies" and that serve more than 15,000 electric customers; and (iii) entities that are other than "electric utilities" or "electric services companies" and that serve less than 15,000 electric customers.

## CONCLUSION

WHEREFORE, for the reasons explained herein, the Commission should deny that part of the Ohio Consumer and Environmental Advocates (OCEA) Application for Rehearing that goes to the text of Chapters 4901:5-1, 4901:5-3 and 4901:5-5 of the Ohio Administrative Code.

Dated: Akron, Ohio  
May 27, 2009

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Motion to Intervene and Application for Rehearing of FirstEnergy Solutions Associates*, together with all supporting documents, was served upon the following parties on the attached Service List this 27<sup>th</sup> day of May, 2009 by e-mail or by first-class mail.

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