

FILE

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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 ) Case No. 10-388-EL-SSO  
Establish a Standard Service Offer )  
Pursuant to R.C. § 4928.143 in the Form )  
of an Electric Security Plan. )

PUCO

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**MOTION FOR EXPEDITED DISCOVERY  
AND  
MOTION FOR INSTRUCTIONS TO FIRSTENERGY AND ITS AFFILIATES  
REGARDING THE DISCOVERY OF AGREEMENTS  
AND  
MOTION FOR EXPEDITED RESOLUTION OF DISCOVERY DISPUTES  
AND  
REQUEST FOR AN EXPEDITED RULING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") to grant its motions regarding the application ("Application") filed by Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company ("FirstEnergy" or the "Companies"). In its Application, FirstEnergy seeks to establish standard service offer ("SSO") rates and make other changes to rates and conditions for the electric service it will provide to customers, including 1.9 million residential consumers, on and after June 1, 2011.

The OCC's Motion for Expedited Discovery should be granted to shorten the time for discovery responses to ten days and require electronic transmittal of such responses.

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Recent energy legislation, enacted as Sub. Senate Bill 221 ("S.B. 221"), provides the PUCO and participants in an electric security plan ("ESP") up to two hundred seventy-five days for review and a decision.<sup>1</sup> However, FirstEnergy requests that the Commission act in a stifling forty-three days after its filing and issue an Order by May 5, 2010.<sup>2</sup>

The OCC moves for instructions to FirstEnergy and any of its affiliates, including but not limited to FirstEnergy Solutions ("FES"), regarding their timely responses to discovery. The instructions should replicate the attorney examiner's directive to FirstEnergy Solutions in the prior SSO case that it was obligated to answer discovery regarding agreements with other persons (including customers).

The OCC also moves for a process that provides expedited resolution of discovery disputes, in the form of discovery conferences before a PUCO attorney examiner. The delay encountered by the OCC in receiving discovery in FirstEnergy's most recent SSO case should not be repeated. The Commission should address obstacles to timely discovery at the onset of this case by setting in place the requested process for parties to obtain the expedited resolution of discovery disputes without the delay of the process for resolution of written motions to compel.

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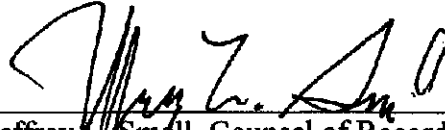
<sup>1</sup> R.C. 4928.143(C)(1).

<sup>2</sup> Application at 1. The OCC opposes FirstEnergy's request -- and any related FirstEnergy ultimatum to Ohio government -- to cut short the PUCO and parties' review of the Companies' Application. The timeline proposed by FirstEnergy is unfair to the parties seeking a better result for Ohio consumers than that proposed in FirstEnergy's Stipulation, and the relief sought in this pleading cannot alone cure that unfairness.

These OCC's motions should be granted on an expedited basis, as further explained and supported in the attached Memorandum in Support.<sup>3</sup>

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL



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<sup>3</sup> The following entities or groups have authorized the OCC to state that they support this pleading: Citizen Power; Citizens Coalition of the Neighborhood Environmental Coalition, the Empowerment Center of Greater Cleveland, United Clevelanders Against Poverty, Cleveland Housing Network, and the Consumers for Fair Utility Rates; Natural Resources Defense Council ("NRDC"); Northeast Ohio Public Energy Council ("NOPEC"); Northwest Ohio Aggregation Coalition ("NOAC"); and the Ohio Environmental Council ("OEC").

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| of an Electric Security Plan.            | ) |                        |

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**MEMORANDUM IN SUPPORT**

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**I. HISTORY OF THE CASE**

On March 23, 2010, FirstEnergy filed its Application. The Application proposes adjustment that would affect generation, transmission, and distribution rates for serving the Companies' customers, and would affect the terms of serving FirstEnergy's customers if approved by the Commission.

FirstEnergy attached to its Application a Stipulation and Recommendation ("Stipulation") that requests Commission approval of the Application by May 5, 2010.<sup>4</sup> Ohio law contains requirements that may not be satisfied in such a short timeframe. This pleading, however, addresses obstacles to timely discovery, and leaves to later argument the matter of the fairness and lawfulness of the requested timeline.

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<sup>4</sup> Stipulation at 2.

## **II. OHIO LAW REGARDING SSO APPLICATIONS**

The applicable statute regarding SSO applications by means of an ESP, R.C. 4928.143, contains procedural requirements. Combined with statutory requirements regarding discovery, it would be a disservice to the public for the PUCO to rule in this contested case by May 5, 2010. In this regard, the Commission's ruling with regard to FirstEnergy's proposal for a rate stabilization plan ("RSP") recognized parties' need for adequate review time: "Although the Commission is committed to proceeding with these applications in an expeditious manner, we also believe that due to the complexity of the issues it is important to provide parties adequate time to prepare for hearing."<sup>5</sup> The issues in this case are more complex than those in FirstEnergy's RSP case. Timesaving procedures are, however, available that will permit more effective development of information that can be presented for Commission consideration.

R.C. 4928.143(C)(1) provides that the "commission shall issue an order . . . for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility . . . , not later than two hundred seventy-five days after the application's filing date." FirstEnergy filed its first ESP application on July 31, 2008 soon after enactment of S.B. 221. The new Application contains a "subsequent" FirstEnergy's ESP that, as established under Ohio law, must be decided in two hundred seventy-five days.

The PUCO need not act on an ESP application as soon as it would for a Market Rate Offer ("MRO") application under R.C. 4928.142 -- where a ninety-day period

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<sup>5</sup> *In re FirstEnergy RSP Proposal*, Case Nos. 03-2144-EL-ATA, et al., Entry at 3, ¶(9) (November 25, 2003).

applies for a decision on a MRO<sup>6</sup> -- but an ESP and a MRO application share procedural requirements.<sup>7</sup>

The commission shall set the time for *hearing* of a filing under section 4928.142 [i.e. a MRO filing] or 4928.143 [i.e. an ESP filing] of the Revised Code, send written notice of the hearing to the electric distribution utility, and *publish notice in a newspaper of general circulation* in each county in the utility's certified territory.

The additional time provided for an ESP corresponds to its potential added complexity, a situation that is presented in FirstEnergy's Application. Approval of an ESP requires the additional determination by the PUCO that the ESP "is more favorable in the aggregate as compared to the expected results [under a MRO]."<sup>8</sup> "The burden of proof in the proceeding shall be on the electric distribution utility."<sup>9</sup>

R.C. 4903.082 requires "ample rights of discovery" in proceedings before the Commission. More specifically to the circumstances of SSO cases, R.C. 4928.145 provides for discovery of certain matters from applicant utilities.

[U]pon submission of an appropriate discovery request, an electric distribution utility shall make available to the requesting party every contract or arrangement that is between the utility and any of its affiliates and a party to the proceeding, consumer, electric services company, or political subdivision . . . .

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<sup>6</sup> R.C. 4928.142(B).

<sup>7</sup> R.C. 4928.141(B) (emphasis added).

<sup>8</sup> R.C. 4928.143(C)(1).

<sup>9</sup> Id.

Precedent exists, in the form of a reversal of the PUCO's earlier denial of the OCC's discovery rights, which supports the relevance of agreements obtained in discovery for the evaluation of settlements such as the Stipulation filed in this case.<sup>10</sup>

### **III. ARGUMENT**

#### **A. Motion for Expedited Discovery**

The Application includes a proposal for a competitive wholesale auction during 2010 as part of the process for determining SSO rates that would begin on June 1, 2011. The proposed July auction<sup>11</sup> is not necessary in order to provide for SSO rates in 2011, as evidenced by an additional auction proposed for October 2010 to procure the remainder of tranches for delivery on June 1, 2011.<sup>12</sup> The second auction proposed for October 2010 provides approximately eight months lead time before the initial time for delivery, much more than provided by the successful 2009 auction. Nonetheless, expedited discovery should be provided so that a wider range of proposals for the initial auction process are possible for Commission determination.

The Commission should expedite the discovery process because extensive discovery will be required in this case in which the Stipulation addresses a wide range of issues that were not present in FirstEnergy's most recently filed MRO case.<sup>13</sup> For

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<sup>10</sup> *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 ("*Consumers' Counsel 2006*"). The decision in *Consumers' Counsel 2006* was partly codified in R.C. 4928.145, both of which provide for additional transparency in the Commission's proceedings.

<sup>11</sup> Stipulation, Attachment A.

<sup>12</sup> *Id.*

<sup>13</sup> The Stipulation contains a request that administrative notice be taken of the record in the pending MRO case, Case No. 09-906-EL-SSO. Stipulation at 33. That record not only relates to a different plan to produce SSO rates, it is narrow in scope to only the SSO matters that may be raised in a MRO proceeding.

example, the Stipulation includes a controversial proposal for quarterly increases in distribution rates that could result in hundreds of millions of dollars in additional collections from FirstEnergy's customers without the documentation normally provided in distribution rate cases.<sup>14</sup> The Stipulation provides for the complete or partial resolution of a number of pending cases before the Commission that have their own timelines for review.<sup>15</sup> If approved, the Stipulation requires the Commission to withdraw from activities to protect Ohio consumers before the Federal Energy Regulatory Commission and close the PUCO's related docket.<sup>16</sup> The Stipulation also contains provisions that involve parties, consumers, electric service companies, and a political subdivision.<sup>17</sup> The OCC intends to investigate agreements to reveal the means by which the Stipulation was developed, pursuant to R.C. 4928.145 and Ohio case law.<sup>18</sup>

Ohio Adm. Code 4901-1-19(A) allows for the PUCO to shorten response times for interrogatories, setting forth that responses are due "within twenty days after the service thereof, or within such shorter or longer time as the commission, the legal

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<sup>14</sup> Id. at 13-17 ("Rider DCR").

<sup>15</sup> See, e.g., Stipulation at 22-23 (reference to Case No. 09-1820-EL-ATA regarding FirstEnergy's "Smart Grid" proposal); and id. at 30 (reference to Case No. 09-462-EL-UNC, the "Companies corporate separation plan"). In making its motions, the OCC does not concede the appropriateness of deciding other cases by means of a settlement in an ESP case.

<sup>16</sup> Id. at 31 ("withdraw" and "close").

<sup>17</sup> See, e.g., id. at 26-29 ("Economic Development and Job Retention").

<sup>18</sup> Another obstacle to rapid progress in this case is the execution of the Stipulation attached to the Application by signatories who are not automatically parties to this case. FirstEnergy proposes that parties to Case No. 09-906-EL-SSO be deemed parties to this case. Application at 2. Until the Commission takes action on that request or signatories to the Stipulation move to intervene, discovery on the signatories may only progress by means of the more burdensome and time consuming methods that can involve non-parties.



director, the deputy legal director, or an attorney examiner may allow.” Ohio Adm. Code 4901-1-20(C) contains a similar provision for production of documents.

As stated previously, R.C. 4903.082 requires “ample rights of discovery,” and the PUCO should provide interested parties the opportunity to conduct expedited discovery to ensure that discovery is “ample” in this case. Discovery should be conducted with ten-day turn-around. The Commission should require service of all discovery requests and responses by e-mail. Service by e-mail is allowed, but not required, by Ohio Adm. Code 4901-1-5(C).

Ohio Adm. Code 4901-1-14 authorizes attorney examiners and others to enter procedural rulings such as that requested here. Pursuant to Ohio Adm. Code 4901-1-27(B)(7)(d), examiners are authorized to “assure that the hearing proceeds in an orderly and expeditious manner,” and this objective should be followed by proceeding with ten-day turn-around and e-mail service for discovery. Expedited discovery was ordered in the most recent SSO case filed by FirstEnergy.<sup>19</sup> The PUCO has altered the manner of service for discovery in many previous cases.<sup>20</sup> The PUCO should do so again in these cases where timely discovery is important.

**B. Motion for Instructions to FirstEnergy and Its Affiliates  
Concerning the Discovery of Agreements**

Arguments arose in FirstEnergy’s most recent SSO case that slowed discovery, which should not be permitted to slow discovery responses in this case. In response to the OCC’s Motion to Compel Discovery of agreements between FirstEnergy and

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<sup>19</sup> *In re FirstEnergy 2009 MRO Proceeding*, Case No. 09-906-EL-SSO, Entry at 1 (October 29, 2009).

<sup>20</sup> See, e.g., *In re AEP’s Proposed IGCC Generating Facility*, Case No. 05-376-EL-UNC, Entry at ¶(10) (May 10, 2005) and *In re Prudence Review of DP&L’s Billing System Modification Costs*, Case No. 05-792-EL-ATA, Entry at 4-5 (October 4, 2005).

customers, FirstEnergy argued that Ohio Adm. Code 4901:1-37-04(D) prohibited certain discovery responses.<sup>21</sup> FES raised the same concern in response to related discovery served upon this affiliate of the Companies, and added that tariff and Commission orders might not permit the production of documents to the OCC.<sup>22</sup> The OCC's Motion to Compel Discovery by FirstEnergy was granted.<sup>23</sup> Similarly, FES was instructed to respond to discovery in spite of FES' concerns that the production of documents to the OCC might conflict with provisions in tariffs, rules, or in Commission orders.<sup>24</sup> A similar instruction should be given in this case to FirstEnergy and all of its affiliates that become subject to discovery in this case, including affiliates that may become subject to a subpoena duces tecum.

The Commission should grant the OCC's motion and instruct FirstEnergy and its affiliates that they are required to respond to discovery regarding their agreements. Early action will avoid the delays that were experienced in the most recent FirstEnergy SSO case.

### **C. Motion for Expedited Resolution of Discovery Disputes**

The most recent SSO application, filed as an MRO and subject to the requirement of a decision in ninety days,<sup>25</sup> discovery disputes arose between the OCC and FirstEnergy and resulted in the delay of information being delivered to the OCC. While an ESP

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<sup>21</sup> *In re FirstEnergy 2009 MRO Proceeding*, Case No. 09-906-EL-SSO, FirstEnergy Memorandum Contra OCC's Motion to Compel at 3 (December 4, 2009).

<sup>22</sup> *Id.*, Tr. I at 20 (December 15, 2009).

<sup>23</sup> *Id.*, Entry at 1 (December 7, 2009).

<sup>24</sup> *Id.*, Tr. I at 20 (December 15, 2009) (Attorney Examiner Price).

<sup>25</sup> R.C. 4928.142(B).

permits longer deliberations on more complex proposals, the OCC would not like to see a repetition of the situation confronted in the MRO proceeding. As stated above, Ohio Adm. Code 4901-1-14 authorizes attorney examiners and other Commission representatives to enter procedural rulings. Pursuant to Ohio Adm. Code 4901-1-27(B)(7)(d), examiners are authorized to “assure that the hearing proceeds in an orderly and expeditious manner.” These and other rules, including Ohio Adm. Code 4901-1-23 for motions to compel, allow the PUCO to arrange for discovery conferences before an examiner who can hear an oral motion to compel and rule immediately or shortly thereafter.

The PUCO has previously allowed this expedited approach to resolving discovery disputes. In a case involving FirstEnergy’s RSP, parties moved for a discovery conference before PUCO examiners regarding FirstEnergy’s non-response to discovery. The full Commission granted the motion, by Commission entry, and held the conference with a transcription of the conference later filed in the docket.<sup>26</sup> The Commission entry stated that the PUCO was “committed to proceeding with these [RSP] applications in an expeditious manner . . . [but] also believe[d] that due to the complexity of the issues it [was] important to provide all parties adequate time to prepare for hearing.”<sup>27</sup> The issues in this case are more complex than those in FirstEnergy’s RSP case, involving much more than arrangements for generation service and the pricing of such service. The PUCO should order a process similar to that provided in FirstEnergy’s RSP case regarding expedited dispute resolution.

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<sup>26</sup> *In re FirstEnergy RSP Proposal*, Case Nos. 03-2144-EL-ATA, et al., Entry at 3, ¶(9) (November 25, 2003).

<sup>27</sup> *Id.* at 2, ¶(7).

**D. An Expedited ruling should be issued.**

In order to facilitate the timely development of this case, the Commission should grant the aforementioned motions on an expedited schedule pursuant to Section 4901-1-12(C) of the Ohio Adm. Code. Unfortunately, after efforts by the OCC to contact FirstEnergy counsel regarding an expedited ruling as contemplated in Ohio Adm. Code 4901-1-12(C), the OCC cannot represent that FirstEnergy does not object to such an expedited ruling. Such approval should, however, be issued as expeditiously as possible.

**IV. CONCLUSION**

Expedited discovery with shortened discovery response times should be provided to timely permit parties to develop their cases regarding the wide range of issues raised by the Application.

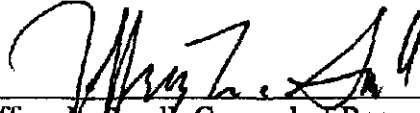
The Commission should grant the OCC's Motion for Instructions to FirstEnergy and Its Affiliates Regarding the Discovery of Agreements in order to prevent the difficulties that impeded timely discovery in the FirstEnergy's previously filed SSO case.

The Commission should establish a process to permit prompt resolution of discovery disputes.

The OCC's motions should be granted as expeditiously as possible.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL

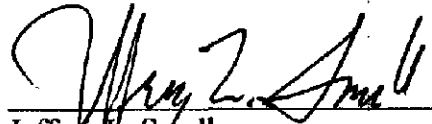
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the persons listed below, via first class U.S. Mail, postage prepaid, this 24<sup>th</sup> day of March 2010. An electronic courtesy copy was also mailed to the addresses stated below.

  
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