

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of FirstEnergy Solutions)
Corp.'s Ten-Year Alternative Energy) Case No. 10-468-EL-ACP
Compliance Plan)

**FirstEnergy Solutions Corp.'s Memorandum Contra the Motion to Compel Responses to
Discovery by the Office of the Ohio Consumers' Counsel**

The Commission should deny the Office of the Ohio Consumers' Counsel's ("OCC") Motion to Compel Discovery because it is not entitled to discovery in this matter. The OCC is simply misinformed about the nature of FirstEnergy Solutions Corp.'s ("FES") ten-year compliance filing. It is not a "proceeding" in which it, or any other entity, is entitled to intervene and serve discovery. It is simply an annual informational filing required by the Commission, nothing more. The discovery sought by the OCC serves no purpose other than to unduly burden FES. It cannot and will not be used for any legitimate reason, because this is simply not a proceeding in which discovery can or will be used. There is no standard with which FES's filing must comply; there is no objective that FES must meet with its filing; and there is no action that the Commission will take with regard to the filing. The filing is simply a non-binding projection of FES's plans for future compliance with its alternative energy benchmarks. Because discovery is neither authorized nor necessary in this matter, the Commission should deny OCC's Motion.

O.A.C. 4901-1-16(A) explains that the purpose of discovery "is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings." O.A.C. 4901-1-16(B) adds that "any party to a *commission proceeding* may obtain discovery of any matter, not privileged, which is relevant to the subject matter *of the proceeding*." (emphasis added). Thus, it demonstrates that for the OCC to be entitled to discovery, it must prove that this is a proceeding, which it cannot

do. While there is no definition of “proceeding” in the Commission’s Rules, Black’s Law Dictionary defines the term “administrative proceeding” as a “hearing, inquiry, investigation, or trial before an administrative agency, usu. adjudicatory in nature but sometimes quasi-legislative.”¹ BLACK’S LAW DICTIONARY 48 (8th ed. 2004). A proceeding generally requires some sort of adjudicative review by the body before which it is pending. The required ten-year filing is not a statutory proceeding. It is nothing more than an informational filing.

FES filed its ten-year compliance plan pursuant to O.A.C. 4901:1-40-03(C), which requires electric utilities and electric services companies to “file a plan for compliance with future annual advanced- and renewable-energy benchmarks, including solar, utilizing at least a ten-year planning horizon” by April 15 of each year. This plan must include:

- (1) Baseline for the current and future calendar years
- (2) Supply portfolio projection, including both generation fleet and power purchases.
- (3) A description of the methodology used by the company to evaluate its compliance options.

¹ While there is no definition of proceeding in the Commission’s rules, in Case No. 06-685-AU-ORD the OCC requested that the Commission add a definition to its rules that would define a proceeding as any “filing, hearing, investigation, inquiry, or rulemaking, which the Commission is required or permitted to make, hold, or rule upon.” *In the matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order at p. 3 (December 6, 2006). The OCC sought this broad definition so that “all parties will be permitted to participate fully in all matters before the Commission,” which would, at a minimum, include the right to intervene and propound discovery. *Id.* Rejecting this definition, the Commission explained that “[i]f OCC’s proposal were adopted, any interested person would have the right to intervene, conduct discovery, and present evidence in any Commission case. *The Commission does not believe that such right exists.*” *Id.* at pp. 3-4 (emphasis added). Two important points can be made based on this exchange. First, OCC itself understood that intervention only is possible when there is a matter upon which the Commission will issue a final order. Such is not the case here. Second, although the Commission later decided not to use whether a hearing would be conducted as a factor in granting intervention, the Commission did not abandon the distinction between a proceeding in which intervention may be appropriate and other matters in which intervention (and discovery) is not appropriate.

(4) A discussion of any perceived impediments to achieving compliance with required benchmarks, as well as suggestions for addressing any such impediments.

O.A.C. 4901:1-40-03(C). These are the only requirements in the rules regarding the ten-year plan. There is no mention or suggestion that the ten-year filing will be reviewed or approved by the Commission or its Staff. Even more importantly, the Commission's rules contain no standards for review of the ten-year filing and no procedures for performing such a review. Because O.A.C. 4901:1-40-03(C) does not provide for an adjudicative review of the 10-year plan and requires only an informational filing, OCC is not entitled to discovery in this matter.

An informative comparison easily can be made with the Commission's rule requiring the filing of annual status reports. Unlike the ten-year plan, the Commission's rule governing annual status reports allows for comments to be filed by any person within thirty days of the report's filing. O.A.C. 4901:1-40-05(B). Moreover, the rule directs the Commission's Staff to conduct annual compliance reviews of the status report and any timely filed comments. O.A.C. 4901:1-40-05(A), (C). The Commission has discretion to schedule a hearing on the status report. O.A.C. 4901:1-40-05(D). Rule 40-05 clearly establishes that FES's annual status report is a proceeding in which discovery by the OCC, or any other person, could be permitted. Conversely, the fact that Rule 40-03(C) does not permit any person to intervene, allow for comments by anyone, direct Staff to review the filing, or even allow the Commission to schedule a hearing on the ten-year plan clearly indicates that the OCC is not legally permitted to conduct discovery in this matter.

The OCC attempts to invent a proceeding by pointing to the Commission's comment in its Entry on Rehearing in Case No. 08-888-EL-ORD that O.A.C. 4901:1-40-03(C) is "important for our review of Ohio's progress in meeting statutory AEPS requirements." (OCC Mot. at pp.

7-8). This evidently is a reference to the Commission's statutory obligation to report annually to the General Assembly regarding AEPS compliance and strategies. *See* R.C. § 4928.64(D). As noted above, the Commission also could have in mind its review of annual status reports under Rule 40-05. Regardless, what is clear, and what the OCC steadfastly ignores, is that no statute and no rule establishes a proceeding for review of a ten-year plan.

Given the lack of a proceeding here, the OCC cannot provide any legitimate reason for obtaining the discovery which it seeks. Discovery requests must be "relevant to the subject matter of the proceeding" (O.A.C. 4901-1-16(B)), but here there is no subject matter in dispute. Thus, any discovery served by OCC would, by definition, be irrelevant. Moreover, because OCC cannot demonstrate any need for discovery in this matter, its requests are unduly burdensome.² No purpose is served by the OCC's discovery requests, and there is no legitimate use in this matter for the information it seeks.

The OCC's Motion makes no attempt at demonstrating why or how this is a proceeding other than relying on *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384 (2006). However, the OCC's reliance on that case is misplaced as it involved an actual application requiring Commission review and approval using an adjudicative process. *Id.* at 385. That process, and the Commission's final order, had the potential to affect OCC stakeholders. *Id.* at 385, 397. Indeed, the Court decided that the OCC should have been allowed to intervene so that she "could have raised her concerns about the accounting changes" and the Commission then could take those concerns into consideration when ruling on the utilities' applications. *Id.* at 387-88. In stark contrast, no review is provided for here, no final order will be issued, and

² Notably, FES's annual compliance filing will be reviewed by the Commission and, thus, provides an opportunity for parties to conduct appropriate discovery to the extent permitted by the Commission's rules.

OCC's stakeholders will not be affected in any way. All the Court decided in *Ohio Consumers' Counsel* is that intervention may be appropriate in an adjudicative proceeding even if a hearing will not be part of that process.³ Here, there is no adjudication, no proceeding, and no concern of any kind, whether expressed by OCC or otherwise, that could be taken into consideration by the Commission in this matter. This simply is not a proceeding in which the OCC is entitled to intervene or to conduct discovery.

Despite its best efforts, the OCC cannot demonstrate any legitimate purpose for the information that it seeks. There is no objective that FES needs to satisfy with its ten-year filing. There is no standard with which the filing must comply. The rules require a simple informational filing that outlines FES's non-binding projection of its compliance with the alternative energy requirements of R.C. § 4928.64. For the foregoing reasons, FES respectfully requests that the Commission deny the OCC's Motion to Compel.

Respectfully submitted,

/s/ Kevin P. Shannon

Mark A. Hayden (0081077)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-7735
(330) 384-3875 (fax)
haydenm@firstenergycorp.com

James F. Lang (0059668)
Kevin P. Shannon (0084095)
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114

³ Even if intervention is appropriate, that by itself does not entitle a party to conduct discovery that is irrelevant, oppressive and burdensome, as is the case here.

(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
kshannon@calfee.com

ATTORNEYS FOR FIRSTENERGY SOLUTIONS
CORP.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solution's Corp.'s Memorandum Contra the Motion to Compel Responses to Discovery by the Office of the Ohio Consumers' Counsel* was filed this 26th day of July, 2010 with the Public Utilities Commission of Ohio Docketing Information System. Notice of this filing will be sent via e-mail to subscribers by operation of the Commission's electronic filing system, and courtesy copies were provided by electronic mail to the persons listed below.

Christopher J. Allwein
Office of the Ohio Consumers' Counsel
10 W. Broad Street, Suite 1800
Columbus, OH 43215
allwein@occ.state.oh.us

Attorney for the Office of the Ohio
Consumers' Counsel

Duane Luckey
Assistant Attorney General
Public Utilities Commission of Ohio
180 E. Broad St., 6th Fl.
Columbus, OH 43215
Duane.luckey@puc.state.oh.us

/s/ Kevin P. Shannon
One of the Attorneys for FirstEnergy Solutions Corp.

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

7/26/2010 9:15:04 AM

in

Case No(s). 10-0468-EL-ACP

Summary: Memorandum Contra the Motion to Compel Responses to Discovery by the Office of the Ohio Consumers' Counsel electronically filed by Mr. Kevin P. Shannon on behalf of FirstEnergy Solutions Corp.