BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of The Application of Ohio Edison Company for Approval of an Agreement with a New Customer (ASC Industries, Inc.)	)	Case No. 99-389-EL-AEC
In the Matter of The Application of Ohio Edison Company for Approval of an Agreement with an Existing Customer (R-G-T Plastics Company)	)	Case No. 99-390-EL-AEC
In the Matter of The Application of Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Sherwin-Williams' Consumer Group	)	Case No. 99-427-EL-AEC
In the Matter of The Application of Ohio Edison Company for Approval of an Agreement with a New Customer (Plas Tech, Inc.)	)	Case No. 99-664-EL-AEC
In the Matter of The Application of Ohio Edison Company with an Existing Customer (Preferred Rubber Compounding Company)	)	Case No. 99-734-EL-AEC
In the Matter of The Application of Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Lakeside Association Phase I	)	Case No. 99-786-EL-AEC (NOT CONSOLIDATED)

FIRSTENERGY CORP.'S MEMORANDUM CONTRA THE APPLICATION FOR REHEARING AND REQUEST FOR LIMITED INTERVENTION BY ENRON ENERGY SERVICES, INC.

FirstEnergy Corp., on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy"), files this

Memorandum Contra the Application for Rehearing and Request for Limited Intervention filed by Enron Energy Services, Inc. in these cases.

I. Enron Cannot Either Intervene at This Late Date or be Granted Leave to File an Application for Rehearing

Enron requests "limited admission as a party of record in order to address the common issue" in these cases. App., p. 2. But a request for limited intervention cannot be used to circumvent the problem raised by Enron's failure to intervene before the issuance of the Findings and Orders in these cases. The real issue is whether Enron, which is not a party to the cases, should be granted leave to file an application for rehearing pursuant to Section 4903.10 Revised Code. It should not. Section 4903.10 prohibits the Commission from permitting a nonparty to file an application for rehearing unless two conditions are met: the applicant's failure to enter an appearance was due to just cause and the applicant's interests were not adequately considered. Enron's request for leave to file an application for rehearing fails on both counts.

Enron's failure to enter an appearance before the issuance of the Commission's Findings and Orders in these cases was not due to just cause. The best Enron could come up with -- the only reason it could give for not intervening before the issuance of the Commission's orders -- is that it does not generally intervene in special contract cases. It suggests that it should now be permitted to intervene in these cases because "the Commission in its December 14th meeting, recognized the policy making nature of this matter." App., p. 7. Actually, the Commission made known its view that these cases raised a question in light of Senate Bill No. 3 before its December 14th meeting. The cases were discussed at the Commission's December 7 meeting; at the December 9 meeting, Chairman Schriber announced that at the meetings that were to be held the next week, representatives of FirstEnergy, a customer and a marketer would attend the Commission meeting to discuss the matter of special contracts. Counsel for Enron

who signed the Application for Rehearing participated in the discussion at the December 14 meeting, as the marketer representative. Enron had ample notice that the Commission was considering the implications of S.B. 3 on these contracts. If there were issues that Enron wanted to raise in these cases, it could have done intervened before the Commission issued its December 14 Findings and Orders. Thus, its failure to do so was not due to just cause.

Moreover, it is clear that Enron's interests were adequately considered by the Commission. Even though Enron did not intervene in these matters, Enron's counsel participated in the Commission's December 14 discussion of the cases on behalf of marketers, and was given ample opportunity to raise whatever issues he believed were significant to the Commission's decision. While no "record" was made of the discussion, the Commission had the benefit of the open discussion before it made the decision to include only the statement that "[t]he approval of this contract is subject to the determinations and constraints of S.B.3" in each of the Findings and Orders.

Because Enron has not satisfied the requirements of Section 4903.10, it should not be granted leave to intervene, even in a "limited" manner, and it should not be granted leave to file an application for rehearing.

II. The Application for Rehearing Raises Nothing New

Even if the Commission does grant Enron leave to file an application for rehearing, it should not grant the application. Enron has given no compelling reason for granting rehearing in these cases. It has raised nothing new that was not considered by the Commission before it made its determination in these cases.

Enron states that its concerns are over "the extension of special contracts beyond the starting date of retail competition and the subsequent anticompetitive impact on the marketplace." App., p. 7. It says that the issue in these cases is whether the finding that the

approval of the contracts "is subject to the determinations and constraints of S.B. 3" means "that the contracts will have to be unbundled and the end users permitted to purchase competitive supplies." App., p. 2. Those issues were raised in the Commission's December 14 discussion. Mr. Petricoff specifically recommended that the Commission approve the contracts only through December 31, 2000. The Commission simply chose not to implement that recommendation. That does not mean that Enron's concerns have not been adequately considered by the Commission. There is no basis for granting rehearing in these cases.

III. The Application for Rehearing is Without Merit

Even if, in the Commission's view, Enron has raised some new arguments, it has certainly not raised any that have merit. In offering its view of "what amended Substitute Senate Bill 3 requires in the post deregulation period" (App., p. 4), Enron makes numerous assertions that are simply not supported by the language and intent of S.B. 3.

Enron erroneously suggests that if special contract customers are "barred from entering the emerging Ohio power market on the starting date of competition," Section 4928.02 would be violated. App., p. 4. The customers that have entered into the contracts approved in these cases are well aware that electric restructuring will begin January 1, 2001. If they choose to enter into a contract for a term that goes beyond that date, it is their right to do so. They have exercised a choice. They obviously receive value from the contract that makes it worthwhile to make that choice rather than wait to be able to make some other choice after January 1, 2001.

The effects of competition are already being felt in the electric industry. Even putting aside the competition that already exists between FirstEnergy and municipal suppliers, customers are also being approached by marketers to sign up for service after January 1, 2001. The Commission cannot assume that customers who enter into special contracts that extend

beyond January 1, 2001 are not exercising a choice to take service from FirstEnergy rather than from a Competitive Supplier.

The implication of Enron's statements is that the Commission is permitted to take some action, as a result of S.B. 3, to change the obligations of the parties to the contracts. That is not the case. Section 4905.31 was unaffected by the passage of S.B. 3. Nothing in S.B. 3 gives the Commission the authority to permit customers to abrogate their contracts or to require some change in the contracts as a result of electric restructuring.

In fact, the language of S.B. 3 clearly contemplates that contracts with terms extending beyond January 1, 2001 will continue in effect beyond that date. Section 4928.34(A)(6) provides that the rate cap applicable to a special contract customer "is, for the term of the arrangement, the total of all rates and charges in effect under the arrangement." (Emphasis added.) The language clearly contemplates that contracts will not be abrogated or otherwise affected during their term. The Commission's rules likewise refers to the rate cap "during the term of the agreement." Rule 4901:1-20-03, Appendix A, Section (D).

Enron's suggestion that special contracts are not permitted after the start of competitive retail electric service is also without merit. Enron contends that "[a]llowing some consumers to benefit from special contracts while others are not afforded the same opportunity" is in direct conflict with Sections 4928.03 and 4928.15(A), which require that customers have comparable and nondiscriminatory access to the retail electric services of the utility. App., p. 4. The requirements for "comparable and nondiscriminatory access" are not new. Utilities have always been required to provide service on a nondiscriminatory basis. And they have always been able to enter into special arrangements under Section 4905.31. Clearly, then, the fact that some customers take service under special arrangements and others do not has never been -- and continues not to be, even under S.B. 3 -- unreasonable or unlawful.

Moreover, the fact that the Commission has approved these contracts has nothing to do with the arrangements other customers will be able to enter into after January 1, 2001. There is no reason to grant rehearing in these cases because of a concern about the availability of special contracts in the future.

Equally meritless is Enron's contention that special contracts violate Section 4928.17(A)(3), which deals with corporate separation. Enron suggests that if a utility offers special contracts it is giving itself, or its affiliate, an undue preference or advantage. App., p. 5. But in light of the fact that S.B. 3 contemplates the continuation of special contracts, after January 1, 2001, that were entered into before that date, the offering of such contracts cannot be a violation of the corporate separation provisions of S.B. 3.

Enron's view of the world after January 1, 2001 -- at least with respect to special contracts -- does not comport with the language of S.B. 3 or with the fact that Section 4905.31 was unchanged by S.B. 3. Because Enron's arguments present a distorted picture of the future of special contracts, and because, as a result, its arguments are without merit, Enron's application for rehearing should be denied.

IV. Conclusion

Enron suggests that a rehearing "would permit development and refinement of the legal restraints on special contracts." App., p. 5. Because there are no legal restraints on special contracts, rehearing is not necessary. The unbundling of contract rates, for the purpose of determining how much of the existing rates is available to transition costs, is addressed in the unbundling plan filed as part of FirstEnergy's transition plan in Case No. 99-1212-EL-ETP. These contract approval cases are not the appropriate forum for examining these questions.

Because there is no good cause for granting Enron limited intervention or permitting Enron to file an application for rehearing, because it has raised nothing new, and

CERTIFICATE OF SERVICE

A copy of the foregoing FirstEnergy Corp.'s Memorandum Contra The Application For Rehearing And Request For Limited Intervention By Enron Energy Services, Inc. was served upon the following this 24th day of January, 2000:

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because its arguments are without merit, the Commission should deny Enron's request for limited intervention and its application for rehearing.

Respectfully submitted,

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