

**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 Provide)	Case No. 12-1230-EL-SSO
for a Standard Service Offer Pursuant to)	
R.C. § 4928.143 in the Form of an Electric)	
Security Plan)	

**DIRECT ENERGY SERVICES, LLC, DIRECT ENERGY BUSINESS, LLC, AND
IGS ENERGY, INC'S
CORRECTED JOINT MEMORANDUM CONTRA MOTION FOR WAIVER OF RULES**

Respectfully Submitted,

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I. Introduction¹

On April 12, 2012, Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company (collectively, “FirstEnergy”) filed an Application at the Public Utilities Commission of Ohio (“Commission”) for approval of an electric security plan (“ESP” and specifically the instant filing will be referred to as “ESP 3”). Additionally, FirstEnergy filed a Stipulation and Recommendation (“Stipulation”) as well as a Motion for Waivers (“Motion”) of the Commission’s rules related to the filing of electric security plan filings. FirstEnergy’s Motion states that a waiver of the Commission’s rules is necessary in order to meet the May 2, 2012 deadline for approval of the ESP 3 filing requested by FirstEnergy and the Signatory Parties to the Stipulation, so that FirstEnergy can bid demand response and energy efficiency resources into PJM Interconnection, LLC’s (“PJM”) base residual auction (“BRA”) for the 2015/2016 planning year. In the alternative, FirstEnergy requests a decision by June 20, 2012, to give FirstEnergy time to implement a three-year bid period. Direct Energy Services, LLC and Direct Energy Business, LLC (collectively “Direct Energy”) and IGS Energy, Inc. (“IGS”) jointly oppose the Motion for several reasons, as explained below.

II. The Commission Should Deny the Motion for Waivers

The Commission should not allow the non-signatory parties to the Stipulation, as well as those who might intervene in this case (who were not part of the last ESP proceeding in Case No.

¹ Direct Energy and IGS are re-filing this Memorandum Contra out of an abundance of caution inasmuch as the Commission has not yet granted FirstEnergy’s request that all Parties to the 10-388 Case automatically be made Parties to this proceeding. Direct Energy supports this aspect of FirstEnergy’s Motion as it could increase opportunities to participate in this case and is consistent with Commission precedent in FirstEnergy ESP cases (*See 10-388 Case*, Entry at 2, March 24, 2010). However, again, out of an abundance of caution, Direct Energy is also concurrently filing a Motion to Intervene in this proceeding in the event that the Commission does not grant FirstEnergy’s request to ensure it is properly a Party in this proceeding, as well as re-filing this Memorandum Contra to ensure that it is properly filed within the time frames set out in the Commission’s rules.

10-388-EL-SSO, hereafter “10-388 Case”), to be held hostage to the timeframe demanded by FirstEnergy, or by the lack of information provided by FirstEnergy

FirstEnergy asks the Commission for waiver of the rules and a Commission decision within nineteen (19) calendar days and thirteen (13) business days after it filed its Application and associated documentation (conveniently, just before the close of docketing on a Friday afternoon). Furthermore, FirstEnergy requests a hearing on April 23, 2012, a mere ten days after its Friday afternoon filing. FirstEnergy’s Motion repeatedly relays its rushed timeframe as a justification for its need for waivers of the Commission’s rules.² FirstEnergy also repeatedly references the similarity of this ESP Stipulation with that approved by the Commission in the 10-388 Case to provide some comfort that granting the Motion will not prejudice any of the non-signatory parties to the Stipulation, or any other interested parties who did not formally participate in the 10-388 Case.³

Ohio Revised Code § 4928.143(C)(1) provides the Commission with two hundred seventy-five (275) days to issue an order on an ESP application. FirstEnergy asks the Commission to approve the ESP Application and Stipulation in **seven percent (7%)** of the time allotted by the General Assembly. Granting FirstEnergy’s request for waiver would facilitate FirstEnergy’s attempt to shut off any real opposition to its Application and Stipulation, even though the ESP 3 Application could prove to be much more than just an extension of its current ESP.

² See, e.g., Motion at 1 (“time is of the essence”), Motion at 2 (“to effect expedited consideration and approval” and “given these circumstances”), Motion at 5 (“In an effort to facilitate such a procedural schedule”).

³ See, e.g., Motion at 2 (“**With very limited exceptions**, the rate schedules under the proposed ESP merely carry forward the existing rate schedules with which the Commission and the interested parties are already familiar”), Motion at 4 (“The Commission previously determined that the prior ESP was consistent with state policy. Given that the current proposal **largely mirrors** that plan, no new or additional discussion should be required.”), Motion at 4 (“the ESP **essentially** carries forward for an additional two years the provision, schedules and impacts of the existing ESP”) (emphasis added).

FirstEnergy essentially asks the Commission to circumvent its own processes simply because FirstEnergy needs a decision fast, and because this Stipulation looks similar to the settlement approved by the Commission in the 10-388 Case. This is not good cause and would deprive parties like Direct Energy of very valuable information needed to evaluate FirstEnergy's proposed ESP and Stipulation. Perhaps worse, it will severely curtail intervention from organizations/entities/businesses, like IGS, that were not parties to the 10-388 Case.

The Commission's rules regarding the ESP process were created to provide interested parties with the opportunity to fully evaluate a company's ESP proposal. Granting the Motion would thwart any opportunity to understand the totality of the Application and Stipulation, both for parties that were previously involved in the 10-388 Case, and potential intervenors.

Much has changed in the past twenty months since the Commission's order approving the stipulation and recommendation in the 10-388 Case, not the least of which is the completion of the merger between FirstEnergy and Allegheny Power. Without adequate time to evaluate ESP 3, the Commission would fail parties who opposed 10-388, parties seeking to intervene in ESP 3, and the general public which has entrusted the Commission through the General Assembly to fully scrutinize these ESPs.

The Commission should also deny FirstEnergy's specific requests for waiver that, in and of themselves, are unlawful and unreasonable. Specifically, the following points are salient in opposition to FirstEnergy's requests:

- Rule 4901:1-35-03(C)(2) – Financial Projections – If the ESP 3 filing is so similar to the previously approved ESP, why can't FirstEnergy provide pro forma financial projections? FirstEnergy must have a solid understanding of the impact to its financial position by what essentially amounts to a two-year

extension of its current three-year ESP. The logical extension of FirstEnergy's arguments about familiarity with the ESP contradict its statement that it cannot provide pro forma financial projections. Additionally, the Commission previously denied a FirstEnergy Motion for Waiver of this provision in the 10-388 Case, saying that "these financial projections are essential to our consideration of the application and stipulation ..."⁴ The Commission should ensure that parties opposing the Application and Stipulation have adequate time to review such materials once the Commission requires FirstEnergy to produce them.

- Rule 4901:1-35-06 – Hearings and Interventions – The Motion asks for the Commission to shorten the period for intervention for interested parties who were not parties to the 10-388 Case to be required to file a Motion to Intervene in this case by April 20, 2012. There were very few competitive retail electric suppliers ("CRES") who participated in the 10-388 Case, but Direct Energy believes there will be several other CRES, like IGS, who were not in the 10-388 Case but will want to participate in this proceeding. Asking them to review the Application and Stipulation and make a decision on intervention within one calendar week is unreasonable, especially when the rule allows interventions for 45-days after the entry scheduling a hearing in the ESP case. Intervention is not an easy decision to make, as it entails being fully engaged in the process, opening oneself up to discovery, and requires a risk analysis/assessment that cannot be conducted in the timeframe requested by First Energy.

⁴ 10-388, Entry at 4 (April 6, 2010).

- Section 4903.082, Revised Code – Discovery – Section 4903.082, Revised Code, provides that “All parties and intervenors shall be granted ample rights of discovery. The present rules of the public utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties. Without limiting the commission’s discretion the Rules of Civil Procedure should be used wherever practicable.” Granting FirstEnergy’s Motion would not provide parties “ample rights” of discovery and would therefore be illegal. Indeed, under the Commission’s rules (Ohio Administrative Code 4901-1-19(A) and 4901-1-20(C), even if Direct Energy served discovery on FirstEnergy today, April 16, 2012, the responses from FirstEnergy wouldn’t be due for 20 days, or 14 days after the requested hearing in this case on Monday, April 23, 2012. While FirstEnergy requested such an expedited timeframe to consider its case, it didn’t file with all of its documents a Motion for an expedited response time for discovery or for electronic service of discovery requests and responses. This, in turn, would further block parties that want to explore FirstEnergy’s filing from doing so through the ordinary discovery response channels.

III. Conclusion

For the reasons explained above, Direct Energy and IGS respectfully requests the Commission deny FirstEnergy’s Motion.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Direct Energy Services, LLC, Direct Energy Business, LLC, and IGS Energy, Inc.'s Corrected Joint Memorandum Contra Motion For Waiver Of Rules was served upon the parties of record listed below this 18th day of April, 2012 via electronic mail.

/s/ Joseph M. Clark

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