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

REPLY BRIEF OF THE ENVIRONMENTAL LAW & POLICY CENTER

INTRODUCTION

The Public Utilities Commission of Ohio ("Commission") has before it the application ("Application") of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively "FirstEnergy" or "Companies") for regulatory authority to provide a standard service offer ("SSO") pursuant to Ohio Revised Code ("ORC") § 4928.141. As their SSO, the Companies propose an electric security plan ("ESP") pursuant to ORC § 4928.143 and Ohio Administrative Code ("OAC") § 4901:1-35 Application at 1. The Attorney Examiners in this case conducted hearings on June 4-6 and 8, 2012. On June 22, 2012, the parties filed initial post-hearing briefs. The Environmental Law & Policy Center ("ELPC") hereby replies to FirstEnergy and Commission Staff's June 22, 2012 Initial Post-Hearing Briefs [hereinafter "FE Brief" and "Staff Brief" respectively]. For the reasons below and as outlined in ELPC's June 22, 2012 Initial Brief, ELPC requests that the Commission deny FirstEnergy's Application with leave to file a complete application for consideration by the Commission, under a timeline that will provide all parties an opportunity to properly respond and allow the Commission to make a thoughtful decision.

ARGUMENT

COMMISSION APPROVAL OF A PROVISION IN ESP 2 DOES NOT NECESSITATE APPROVAL OF A SIMILAR PROVISION IN ESP 3

Ohio law requires FirstEnergy to include in its Application a "complete description of the ESP and testimony explaining and supporting each aspect of the ESP." OAC § 4901:1-35-03(C)(1). Thus, FirstEnergy must support each aspect of this ESP 3, separate and apart from the previous filing – just as the Commission treats each rate case as a new case. Rather than base its arguments for approval of ESP 3 on the testimony filed in this case, however, FirstEnergy's Initial Brief relies heavily on testimony and findings from the case approving its current ESP, Case No. 10-0388-EL-SSO [hereinafter "ESP 2"], and the record in 09-906-EL-SSO [hereinafter "MRO Case"], claiming that because aspects of ESP 3 were approved by the Commission in a past ESP, they must be approved in this ESP. "Importantly, nearly all of the terms and conditions contained in ESP 3 have already been considered and approved by the Commission in Case No. 10-388-EL-SSO." FE Brief at 5. This is consistent with the Direct Testimony of Mr. Ridmann stating that his testimony is "not all inclusive" and only provides an "overview of a number of features of the Stipulation." Ridmann Direct at 3.

While it is true that the Commission approved certain aspects of ESP 2 that are mirrored in ESP 3, it by no means follows that such aspects are *necessarily* a part of a successful ESP 3. The facts surrounding an application play an important role in the Commission's decision to accept or reject any given provision. As the Commission noted in ESP 2, an additional evidentiary hearing was required to hear evidence "regarding the impact of the proposed ESP on customers' bills." Opinion and Order, Case No. 10-388-EL-SSO, at 6 (August 25, 2010). In fact, the Commission rejected certain arguments by Ohio Consumers' Counsel ("OCC") because OCC's assumptions were "unrealistic." Id. at 44. Similarly, the Ohio Supreme Court in a 1992

proceeding ruled that an objection by OCC to the inclusion of certain expenses in a Cincinnati Gas & Electric Company rate case was without merit because OCC's objection was based on an "unrepresentative circumstance." Office of Consumers' Counsel v. Pub. Util. Comm., 64 Ohio St.3d 123, 130 (Ohio 1992).

FirstEnergy, therefore, cannot simply assume that every aspect of ESP 3 that mirrors an aspect of ESP 2 still merits approval. Yet this is exactly the argument that FirstEnergy makes when it states that ESP 3 "reduces the risk of unforeseen or unanticipated outcomes because it is essentially an extension of the existing, successful ESP." FE Brief at 52; see also FE Brief at 36 ("As an initial matter, the arguments that a three-year auction product, as part of a staggered multi-year, multi-auction procurement strategy, is not beneficial are belied by the Commission's approval of the current ESP."). FirstEnergy claims that "[b]ecause most of the components of ESP 3 are identical to the current ESP, the parties have already extensively negotiated and litigated these issues in 10-288-EL-SSO." FE Brief at 45. FirstEnergy's reliance on ESP 2 to support its Application gets it no further than proving that the Commission has accepted a similar proposal in the past, but it does not satisfy the legal requirement of "explaining and supporting each aspect of the ESP."

FirstEnergy's reliance on prior cases effectively shifts the burden to opposing parties to show that something has changed between ESP 2 and ESP 3. FirstEnergy ignores the fact that it filed ESP 3 under circumstances that it admits are vastly different than those under ESP 2. The Companies' own attorney, Mr. Kutik, made a point of these changing circumstances during his cross-examination of OCC witness James Wilson. Mr. Kutik noted that the uncertainties bidders of generation faced in 2009 were so different from the uncertainties they face in 2012 that "you just never know" what to expect going forward. Tr. Vol. 2, at pages 151-53 (June 5, 2012). It is

not the obligation of opposing parties to take the first crack at explaining why provisions from previous ESPs are no longer viable. Rather, the burden is on FirstEnergy to support each aspect of ESP 3 under today's facts, not under the facts of ESP 2. ORC § 4928.143(C)(1).

FirstEnergy has not met its burden with the testimony filed in this case. The Commission should require FirstEnergy to file additional support for its Application to bring it into compliance with Ohio law, and allow parties to address that support before the Commission makes a decision on the merits.

COMMISSION STAFF INCORRECTLY SHIFTS THE BURDEN FROM FIRSTENERGY TO OPPOSING PARTIES

Like FirstEnergy, Commission Staff relies on the alleged success of ESP 2 to argue that the Commission should approve similar provisions in ESP 3. Though ORC § 4928.143(C)(1) places the burden of proof in an ESP proceeding "on the electric distribution utility," Commission Staff attempts to shift that burden to opposing parties. For example, rather than point to any explanation or support by FirstEnergy for its proposal to extend Rider DCR, Commission staff merely argues that there "should be a very good reason to change something that is working and achieving the intended result." Staff Brief at 10. Along the same lines, Staff argued for approval of the Stipulation by the Commission because "[n]o reason is presented to reject the Stipulation and Recommendation." Staff Brief at 8. Commission Staff is effectively proposing that the Commission base 2016 rates on 2010 facts. Ohio law, however, does not require the Companies to support only those aspects of the ESP that are directly addressed by opposing parties. The burden is on FirstEnergy to support "each aspect of the ESP." OAC § 4901:1-35-03(C)(1). Commission staff attempts to fundamentally change this requirement by requiring opposing parties to attack aspects of the ESP even if FirstEnergy fails to support them.

FIRSTENERGY HAS NOT DEMONSTRATED THE NEED FOR A MID-JULY APPROVAL BY THE COMMISSION

By shifting its requested deadline for a Commission decision on the proposed ESP 3 whenever the previous one is missed – from May 2, 2012, to June 20, 2012, and now to mid-July 2012 – FirstEnergy asks the Commission to hit a continuously moving target. FE Brief at 3. Yet FirstEnergy has not supported the need for these deadlines. The Commission should utilize as much of the 275 days allotted to it by ORC § 4928.143(C)(1) as it needs to require the Companies to file additional testimony to support each aspect of ESP 3 and make an informed decision.

FirstEnergy came to groups in March 2012, attempting to negotiate in one month a stipulation for a two-year ESP that is not needed until 2014, and for which they were seeking approval in only 20 days. FE Brief at 46. The Companies claimed that they needed such a fast decision in order to bid energy efficiency and demand response into the May 7, 2012 PJM Base Residual Auction ("BRA"). Application at 3. Despite not having a decision by May 2, however, FirstEnergy still managed to bid energy efficiency into the BRA. Tr. Vol.1, at pages 301:11-24 (June 4, 2012). When 20 days came and went, the Companies sought approval by June 20, 2012, 69 days after filing the Application. FE Brief at 3. The Companies purported to need a June 20 deadline to allow them to implement a three-year bid period for generation. Application at 3. June 20 has come and gone, and now the Companies seek approval by mid-July, 2012 in order to secure bids over three months later on October 23, 2012. FE Brief at 3. Yet FirstEnergy has not specified why it needs to shrink the approval deadline from the statutory maximum of 275 days to what would now be approximately 90 days. While FirstEnergy claims in its Initial Brief that a mid-July decision is suboptimal because it would require the August 9 start of the bid applications "to be done under the shadow of any pending application for rehearing," FE Brief at

3, FirstEnergy witness Mr. Ridmann stated in cross-examination that he did not know whether the documents filed on August 9 must reflect whether the bids will be for one-year, two-year, or three-year products. Tr. Vol. 1, at page 196-97 (June 4, 2012). The Companies still have not specified the drop dead date at which a laddered bidding process would no longer be possible.

Pursuant to ORC § 4928.143(C)(1), the burden of proof is on the Companies. The Companies have not proven that an extremely attenuated timetable of what would now be roughly 90 days is necessary. The Commission should take as much time as is necessary and require FirstEnergy to complete its Application pursuant to OAC § 4901:1-35-03(C) to allow a thorough vetting of this important proposed SSO.

CONCLUSION

Ohio law places the burden on FirstEnergy to fully explain and support each aspect of its proposed ESP 3. FirstEnergy's Application fails to provide such support, and therefore cannot be approved in its current form. The Companies cannot rely on Commission approval of ESP 2 to support Commission approval of ESP 3. The Commission should reject FirstEnergy's stipulation for ESP 3 and require the Companies to file a properly supported Application.

Dated: June 29, 2012

Respectfully submitted,

/s Justin Vickers

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief submitted on behalf of the Environmental Law & Policy Center of the Midwest, was served by electronic mail, upon the following Parties of Record, this 29th day of June, 2012.

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