BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of The Alternative Energy Rider Contained in The Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company.	)))))	Case No. 11-5201-EL-RDR

MOTION FOR A PREHEARING CONFERENCE TO OBTAIN THE FULL (NON-REDACTED) PUCO-ORDERED MANAGEMENT AUDIT REPORT
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
REQUEST FOR EXPEDITED RULING

The Office of the Ohio Consumers' Counsel ("OCC") moves for a prehearing conference[1] in this case to address FirstEnergy's decision to not provide to parties the full version of the management/performance audit report in which the auditor criticizes FirstEnergy for overpaying for certain renewable energy credits ("RECs") and, by implication, overcharging Ohio customers for those RECs. This document is of interest to multiple parties that include OCC. Administrative efficiency will be served by providing a prompt opportunity for interested parties to present positions to, and obtain a ruling from, a hearing officer before the Public Utilities Commission of Ohio ("Commission" or "PUCO").

The prehearing conference should be held during the week of October 1st. The PUCO should grant this Motion on an expedited basis. The reasons supporting this Motion for a prehearing conference and request for expedited ruling are contained in the following Memorandum in Support.

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[1]The August 22, 2012 Entry scheduled a prehearing conference for November 20, 2012. That prehearing conference will be held after the deadline for filing intervener testimony, November 13, 2012.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Melissa R. Yost

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

FirstEnergy will not provide the complete (non-redacted) version of an audit report that found "the prices bid by FirstEnergy Solutions reflected significant economic rents and were excessive by any reasonable measure."[2] That auditor finding is bad news for customers who pay FirstEnergy's electric bills.

Parties should not have to resort to the discovery process—with the potential for weeks or months of delay due to utility objections and the pleading cycle for motions to compel—to obtain access to a PUCO-ordered audit report in a case that is necessitated by provisions in Ohio law for protecting customers from unreasonable rates. But the PUCO's intentions for discovery should be noted to "encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings."[3] With regard to preparation for this proceeding, the PUCO informed the public that it "set this matter for hearing regarding the content of the

[2] Final Report (REDACTED) Management/Performance Audit of the Alternative Energy Resource Rider (RIDER AER) of the FirstEnergy Ohio Utility Companies for October 2009 through December 31, 2011, prepared by Exeter Associates, Inc., filed on August 15, 2012 in PUCO Case No. 11-5201-EL-RDR at page iv.

[3] Ohio Adm. Code 4901-1-16(A).

management/performance and financial audit reports….”[4]

Despite the PUCO’s rule and the procedural Entry, FirstEnergy’s counsel stated by letter, in response to OCC’s inquiry, that FirstEnergy “cannot release this information consistent with our existing obligations.”[5] In the letter, FirstEnergy asserts that it has “obligations” to others (which seemingly may include its own affiliate) to not disclose the information.

As matters now stand, FirstEnergy is controlling an audit document that is critical of what FirstEnergy spent and charged (or over-spent and over-charged) customers regarding renewable energy. And the document FirstEnergy will not provide is the subject of an upcoming hearing on the matter. This situation is untenable for customers. The PUCO should resolve this issue now.

II. THE PUCO SHOULD PROMPTLY CONVENE A PREHEARING CONFERENCE.

First, the requested prehearing conference is allowed by the PUCO’s rules. Ohio Adm. Code 4901-1-26(A)(1) allows the PUCO to hold a prehearing conference to resolve discovery matters. Ohio Adm. Code 4901-1-26(A)(1)(a) allows the PUCO to hold a prehearing conference to rule on motions to compel and protective orders. Ohio Adm. Code 4901-1-26(A)(7) allows the PUCO to hold a prehearing conference to rule on other procedural matters. Whether the release of the unredacted audit report is considered a procedural issue or a discovery issue, the PUCO’s rule for prehearing conferences provides a process for resolution.

[4] Entry at paragraph 6 (August 22, 2012).

[5] Letter to OCC from FirstEnergy (September 13, 2012) (attached).

Second, there is an impasse that requires resolution by the PUCO. FirstEnergy has definitively answered OCC's inquiry about release of the full audit report, by saying it will not release it. In the attached letter, FirstEnergy's counsel said FirstEnergy will not provide the full audit report because others consider that it contains their confidential information. It is interesting to note that the confidential information FirstEnergy says cannot be disclosed was apparently disclosed already to the auditor. If the information is claimed to be confidential for alleged competitive reasons, it should be noted that OCC is not an electricity provider and that disclosure to OCC is not disclosure to a competitor that could use information to gain a competitive advantage.

Third, it is inappropriate in this PUCO proceeding that the utility under criticism in a PUCO-ordered audit is controlling—and denying—access to the full audit report. The PUCO should have a process, not controlled by the utility, for arranging access to audit reports where the utility claims confidentiality. This motion for a prehearing conference answers the need for an expeditious process. The PUCO, in audit cases, should not countenance this circumstance where the audited utility has access to the full audit report—and thereby has a procedural and substantive advantage for purposes of its case—while no intervening party has access.

Fourth, the document should be made available without delay. To obtain an audit report, parties should not have to await the running of the 20-day time periods (at a minimum) for discovery objections and then await the pleading cycle for motions to compel under Ohio Adm. Code 4901-1-23. In this situation and for the reasons described above, the PUCO should hear arguments now in a prehearing conference on why FirstEnergy should

provide, to parties, the audit report that is at the center of this case. It should be noted that FirstEnergy has been a leading advocate for expediting processes for its own applications.[6]

Fifth, the prehearing conference will serve administrative efficiency. The full audit report is of general interest to the parties in this case because it's a focus of the case. Multiple interveners want access to this document. Also, there is the potential for multiple motions to compel and multiple filings in the pleading cycles. The requested prehearing will serve the process of efficiently hearing and resolving this issue, at one time.

Moreover, FirstEnergy will raise issues of confidentiality. Those issues could be addressed at the prehearing conference. For its part, OCC has been executing with FirstEnergy the form that OCC and FirstEnergy have negotiated for protective agreements in other cases. OCC will be asking the PUCO, at the prehearing conference, to require FirstEnergy to provide the audit report under that same form of protective agreement if one is necessary. This issue could already have been resolved if FirstEnergy would have signed the usual OCC/FirstEnergy protective agreement and provided the full audit report thereunder. But FirstEnergy will not sign that form. And, considering that FirstEnergy knew at some earlier point about the issue of claimed confidentiality and FirstEnergy could have expected that parties would want the full audit report, FirstEnergy could have earlier addressed with parties and/or the PUCO the need to resolve this matter.

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[6] *E.g.*, Motion for Waiver of Rules, Request for Expedited Treatment and Memorandum in Support Thereof (April 13, 2012), PUCO Case No. 12-1230-EL-SSO; Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Recover Phase-In Costs and Financing Costs, Issue Phase-In-Recovery Bonds and Impose and Collect Phase-In-Recovery Charges, and for Tariff and Bill Format Approvals and for Commission Action on an Expedited Basis (May 3, 2012) at page 37, PUCO Case No. 12-1465-EL-ATS.

Sixth, there is precedent for resolving document disputes through the hearing of oral arguments. For example, a group of parties sought oral argument in a case on FirstEnergy's proposed generation rates where FirstEnergy had failed to respond to certain discovery requests. The PUCO granted the motion, scheduling a conference for the PUCO to hear and resolve the issues.[7]

III. REQUEST FOR EXPEDITED RULING

OCC also respectfully requests an expedited ruling, pursuant to Ohio Adm. Code 4901-1-12(C). The Commission should rule on an expedited basis so that the prehearing conference can be scheduled for the week of October 1st. The scheduling of the prehearing conference now is an important step in providing the parties adequate time to analyze the information sought for inclusion in testimony that must be filed by November 13, 2012. OCC is not in a position to certify that no party objects to this request.

IV. CONCLUSION

This Motion for Prehearing Conference should be granted in furtherance of a fair process for customers and those that represent them. The full (unredacted) management/performance audit report should be promptly provided to OCC. For the foregoing reasons, a prehearing conference should be held during the week of October 1st.

[7] *In the Matter of the Applications of FirstEnergy*, Case Nos. 03-2144-EL-ATA et al., Entry at paragraph 9 (November 25, 2003).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's *Motion for Prehearing Conference* was served on the persons listed below, via electronic service, this 26th day of September 2012.

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September 13, 2012

VIA ELECTRONIC MAIL

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Melissa:

Office of the Consumers' Counsel ("OCC") is asking the Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company ("Companies") to agree that the unredacted audit report be released to the OCC. As we discussed during our conversation yesterday, the information OCC is requesting is the confidential and proprietary information of third parties. The information is not the Companies' information to provide. The Companies are under obligations not to disclose competitively confidential information of third parties related to the competitive RFP process and the specific transactions that the Companies entered into with their suppliers. In fact, the Companies have received correspondence from suppliers who are requesting that this information stay protected. Therefore, the Companies cannot release this information consistent with our existing obligations.

If you have any questions, please do not hesitate to contact me.

Very Truly Yours,

Carrie M. Dunn

Carrie M. Dunn

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Summary: Motion Motion for a Prehearing Conference to Obtain the Full (Non-Redacted) PUCO-Ordered Management Audit Report by the Office of the Ohio Consumers' Counsel and Request for Expedited Ruling electronically filed by Patti Mallarnee on behalf of Yost, Melissa Ms.