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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan.	:	Case No. 14-1297-EL-SSO

THE CLEVELAND MUNICIPAL SCHOOL DISTRICT'S MEMORANDUM CONTRA THE COMPANIES' APPLICATION FOR REHEARING

I. INTRODUCTION

The Cleveland Municipal School District ("CMSD"), pursuant to Rule 4901-1-35, Ohio Administrative Code, and the attorney examiner's entry of May 2, 2016, hereby submits its memorandum contra the application for rehearing from the Commission's March 31, 2016 opinion and order in this docket ("Order") filed by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("FirstEnergy" or the "Companies").

CMSD recognizes that, on May 11, 2016, the Commission issued an entry on rehearing that purported to grant all pending applications for rehearing, wherein the Commission stated that "(w)e believe that sufficient reasons have been set forth by the parties to warrant further consideration of the matters specified in the applications for rehearing."[1] The entry acknowledged that the Commission was granting rehearing prior to the due date for memoranda contra the rehearing applications, but indicated that "because of the number and complexity of

[1] Entry on Rehearing dated May 11, 2016, at 3.

the assignments of error raised in the applications for rehearing, as well as the potential for further evidentiary hearings," it was appropriate to grant rehearing at this time to "allow the parties to begin discovery in anticipation of potential further hearings."[2] Thus, unlike the rehearing entries that grant rehearing for the purpose of providing the Commission with additional time to consider the matters raised in the rehearing applications, this entry appears to have granted rehearing to jumpstart discovery, even though the Commission has not defined the scope of any potential evidentiary hearing. To further complicate matters, Commissioner Haque, in discussing the proposed entry on rehearing at the May 11, 2016 Commission meeting prior to the Commission vote, stated that the entry was not intended to discourage parties from filing memoranda contra and that the Commission would consider the memoranda contra in determining the ultimate outcome of this matter. Thus, CMSD has submitted its memorandum contra, notwithstanding the Commission's May 11, 2016 entry appears to have granted rehearing.

Consistent with CMSD's focus throughout this proceeding, this memorandum contra will address only those FirstEnergy grounds for rehearing that relate to the Rider RRS component of ESP IV. Because of the unusual nature of FirstEnergy's final ground for rehearing, which is actually a new Rider RRS proposal, CMSD begins with a discussion of why rehearing on this ground should be denied.

II. ARGUMENT

A. FirstEnergy' Seventh Ground for Rehearing is Flawed in Several Respects and the Commission Should Deny Rehearing on this Ground.

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[2] *Id.*

As its seventh and final ground for rehearing, FirstEnergy asserts that "(t)he Order is unreasonable because it does not reflect the ruling by the Federal Energy Regulatory Commission Order issued on April 27, 2016 in Docket Number EL16-34-000."[3] Normally, one might find the charge that a Commission order is unreasonable because it fails to reflect an event that did not occur until almost a month after the order was issued to be mildly amusing, but, in this instance, the irony is heightened by the fact that FirstEnergy now faults the Commission for doing precisely what FirstEnergy urged the Commission to do. As the Commission well knows, OCC and NOAC argued on brief that the Commission should not approve Rider RRS until FERC acted on the EPSA Complaint, citing the need to protect ratepayers from the consequences of a FERC order rescinding the waiver of corporate affiliate power sales restrictions, a measure that would subject the FES-FE PPA to FERC review.[4] In response, FirstEnergy specifically told the Commission in its reply brief that it "has all of the information it needs to render a decision now, and should not delay its decision any further based on OCC/NOAC's unsupported theory that the Commission should wait for FERC action."[5] CMSD submits that a party should be estopped from seeking rehearing with respect to a Commission finding that is the very finding the party urged the Commission to make.

Leaving aside the fact that it was impossible for the Commission to reflect a FERC ruling in an order that was not issued until almost a month after the order was journalized, the fundamental problem with FirstEnergy's final ground for rehearing is that it is merely a guise for putting an entirely new Rider RRS arrangement before the Commission. Indeed, FirstEnergy

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[3] *See Electric Power Supply Association, et al. v. First Energy Solutions Corporation, et al.,* FERC Docket No. EL-16-34-000, 155 FERC ¶ 61,101 (the "EPSA Complaint").

[4] OCC/NOAC Initial Brief, 24-25.

[5] FirstEnergy Reply Brief, 296.

filed testimony in support of this new arrangement in conjunction with its rehearing application and proposed a procedural schedule for the rehearing without even knowing if rehearing would be granted on this issue. Although FirstEnergy claims that the existing record supports the new proposal, stating that "the underlying record in this case is already replete with supporting evidence and need only be supplemented to describe the differences in modified Rider RRS,"[6] this contention ignores several critical points.

First, the FERC order in the EPSA Complaint was entirely foreseeable because, as numerous intervenors, including CMSD, pointed out on brief, the proposal to require distribution ratepayers to fund the FirstEnergy-FES PPA through Rider RRS clearly intruded upon FERC's jurisdiction. Yet, FirstEnergy elected to press ahead with the Rider RRS proposal. R.C. 4903.10(B) provides that the Commission "shall not, upon rehearing, take any evidence that, with reasonable diligence, could have been offered upon the original hearing." CMSD submits that FirstEnergy knew or, with reasonable diligence, should have known that its proposed Rider RRS arrangement would not pass muster with FERC, and, thus, FirstEnergy should not be permitted to supplement the record with evidence supporting an alternative proposal that could have been included in its application or embodied in a subsequent stipulation modifying the Rider RRS arrangement originally proposed.

Second, although FirstEnergy claims that, under its new Rider RRS proposal, "all the benefits of this Stipulated ESP IV as compared to the MRO that the Commission previously found will remain intact,"[7] this is simply not true. As CMSD suggested in its rehearing application, it was obvious that the Commission's approval of the stipulated Rider RRS

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[6] FirstEnergy Application for Rehearing, 17.

[7] *Id.*

arrangement was driven by its belief that the public interest dictated that the Sammis and Davis-Besse plants remain in service and that the only way to guarantee the future of these plants was to require FirstEnergy distribution customers to subsidize their operation through Rider RRS.[8] Indeed, the Commission specifically stated that "Rider RRS will provide support for the identified generation assets."[9] By proposing a "paper" hedge that eliminates the need for the underlying PPA and, ostensibly, removes FES from the mix, the new Rider RRS proposal also eliminates all the benefits the Commission ascribed to the continued operation of Sammis and Davis-Besse, including ensuring the adequacy and reliability of Ohio electric service,[10] preserving the economic benefits for the regions in which the plants are located,[11] avoiding transmission upgrade costs,[12] and encouraging resource diversity.[13] Without these purported benefits, Rider RRS becomes a pure financial play, and it is not reasonable to blithely assume that the Commission would have forced ratepayers to invest in what is, in essence, a high-risk derivative as a hedge against fluctuations and future increases in the wholesale market price of electricity if there were no other benefits, real or imagined, that would flow from the approval of Rider RRS.

In this connection, CMSD would note that, in its orders in *AEP Ohio ESP III* and *Duke ESP III* cases, the Commission identified certain factors it would weigh if the applicants sought

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[8] CMSD Application for Rehearing, 2.

[9] Order, 88.

[10] Order, 101.

[11] Order, 88, 109.

[12] Order, 87.

[13] *Id.*

to establish a rate for their riders through a subsequent filing. Specifically, the Commission required the filing to address the following factors:

> . . . financial need of the generating plant; necessity of the generating facility, in light of future reliability concerns, including supply diversity; description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state.[14]

Although the Commission indicated that it would "not be bound by these factors," the Commission stated that it "would balance" these factors "in deciding whether to approve the Company's request for cost recovery."[15] Not only is the new Rider RRS proposal no longer a request for "cost recovery," but the factors the Commission indicated it would weigh in determining whether to approve a PPA-based are no longer present under FirstEnergy's new Rider RRS proposal. Moreover, the fact that Sammis and Davis-Besse are no longer in play under the new Rider RRS arrangement pulls the rug from under FirstEnergy's argument that the arrangement qualifies for inclusion in the ESP as an economic development and job retention program under R.C. 4928.143(B)(2)(i) based on the theory that "the *[PPA]* Plants themselves are engines of economic development."[16] Because much of the record evidence cited by the Commission in approving the Rider RRS arrangement is no longer relevant, much more is involved than merely supplementing the existing record to describe the differences in modified Rider RRS as FirstEnergy suggests.

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[14] *AEP Ohio ESP III* Order, 25; *Duke ESP III* Order, 47.

[15] *Id.*

[16] FirstEnergy Brief, 123-124.

Third, R.C. 4928.143(C)(2)(a) provides as follows:

> If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.

This provision offers only two options to an electric distribution utility whose ESP is modified and approved by the Commission. The utility can accept the modified ESP approved by the Commission, or it can withdraw the application, thereby terminating it, and file a new SSO application for either an MRO-based SSO or an ESP-based SSO. The statute does not authorize the utility to utilize an application for rehearing as a vehicle for presenting a new element of an ESP.

Finally, although FirstEnergy claims that removing the "reliance on or existence of a PPA or any other contractual arrangement or other involvement with FES" renders moot many of the arguments advanced by intervenors opposing the Third Supplemental Stipulation,[17] the question that obviously arises is why FirstEnergy continues to pursue a Rider RRS arrangement – a concept that was originally the brainchild of FES – when there will be no revenues to support a net credit to customers, be it the $561 million projected by FirstEnergy or the $256 million projected by the Commission. Indeed, FirstEnergy goes so far as to suggest that it could utilize the revenues generated by Rider RRS in the early years of ESP IV to support the grid modernization initiative,[18] a measure that would leave it in an even deeper hole if and when Rider RRS converts from a charge to a credit. The answer, of course, is that, without the projected net benefit associated with the Rider RRS arrangement, ESP IV will not pass the more-

[17] FirstEnergy Application for Rehearing, 18.

[18] FirstEnergy Application for Rehearing, 17.

favorable-that-an-MRO test. For those reasons previously stated, CMSD continues to object to being forced to gamble the scarce taxpayer-supplied funds that represent its only source of revenue on a speculative, high-risk hedging arrangement that it neither needs nor wants. The Commission should deny rehearing with respect to FirstEnergy's final assignment of error, and should not conduct further evidentiary hearings to permit FirstEnergy to pursue an alternative Rider RRS arrangement.

B. FirstEnergy's Claim that the Order Is Unlawful and Unreasonable Because the Commission Failed to Find that Rider RRS Is Authorized under Section 4928.143(B)(2)(d) of the Ohio Revised Code Because It Relates to Default Service Has No Merit.

As FirstEnergy points out, several of its assignments of error relating to Rider RRS will be moot if the Commission grants rehearing with respect to its final assignment of error. However, FirstEnergy's third assignment of error does not fall into this category. As in its *AEP Ohio ESP III* and *Duke ESP III* orders, the Commission determined in its Order in this case that Rider RRS qualified for inclusion under R.C. 4928.143(B)(2)(d) as a "limitation on shopping," and, thus, did not reach the question of whether Rider RRS also qualified as a charge relating to "default service" FirstEnergy contends in its third ground for rehearing that the Commission's failure to determine that Rider RRS relates to default service is unlawful and unreasonable. This argument is without merit.

As CMSD explained in its reply brief, First Energy's claim that Rider RRS is also eligible for inclusion in ESP IV under R.C. 4928.143(B)(2)(d) because it relates to default service assumes that the legislature, in including the "default service" criterion, intended to equate default service with SSO service. However, as a review relevant statutes will show, default service and SSO service are not one and the same.

R.C. 4928.14 addresses the circumstance in which a competitive retail supplier fails to fulfill its obligation to supply generation service to its customers.

> The failure of a supplier to provide retail electric generation service to customers within the certified territory of an electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer under sections 4928.141, 4928.142, and 4928.143 of the Revised Code until the customer chooses an alternative supplier.

Thus, although SSO service may be fairly said to represent the default service for customers left in the lurch by a CRES provider's failure to perform, this does not mean that the legislature intended that the terms default service and SSO service are interchangeable, as a review of R.C. 4928.141 will quickly show. This statue provides, in pertinent part, as follows.

> Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. (emphasis supplied).

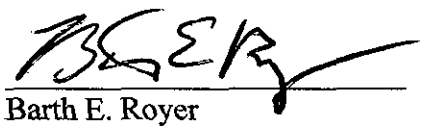
By drawing this distinction between "standard service offer" and "default standard service offer," the legislature clearly signaled that the term "default service" is not, in fact, shorthand for, or interchangeable with, SSO service, as FirstEnergy would have the Commission believe. When the General Assembly included "default service" as a separate eligibility criterion in R.C. 4928.143(B)(2)(d), the intent was to authorize the Commission to include terms and conditions in an ESP that would provide protection to customers in the event of a supplier default by "stabilizing or providing certainty regarding retail electric service," not to clear the way for the Commission to include any type of charge relating to SSO service. In so stating, CMSD is not suggesting that the Commission is prohibited from including terms, conditions, and charges in an ESP that relate to SSO service. Rather, the point, for the purpose at hand, is that the

Commission's authority to include such terms, conditions, or charges must come from somewhere other than the "default service" criterion of R.C. 4928.143(B)(2)(d). Thus, the Commission did not err by failing to find that Rider RRS is eligible for inclusion in ESP IV as a charge relating to default service. Indeed, such a finding would be unlawful. The Commission should deny rehearing on this ground.

III. ADDITIONAL CONSIDERATIONS

As indicated at the outset of this memorandum, the Commission's May 11, 2016 entry cites the potential for further hearings in this matter as the basis for issuing its entry on rehearing before the due date for memoranda contra the pending rehearing applications. Although CMSD believes that FirstEnergy's proposal for further hearings to consider its new Rider RRS proposal should be denied for the reasons stated above, if the Commission does allow this new proposal to proceed, CMSD hereby registers its objection to the aggressive procedural schedule proposed by FirstEnergy and urges the Commission to permit intervenors to have input in establishing a more reasonable schedule.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by electronic mail this 12th day of May 2016.

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