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FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Toledo Edison Company for Approval for An Arrangement With An Existing Customer (McDonald's Corporation)	))))	Case No. 99 – 728 – EL – AEC
In the Matter of the Application of Cleveland Electric Illuminating Company for Approval for An Arrangement With An Existing Customer (McDonald's Corporation)	))))	Case No. 99 – 729 – EL – AEC
In the Matter of the Application of Ohio Edison Company for Approval of an Arrangement With USY/USYACHIYO, Inc.	)))	Case No. 99 – 790 – EL – AEC
In the Matter of the Application of Ohio Edison Company for Approval of an Arrangement With Hildreth Manufacturing, LLC	)))	Case No. 99 – 791 – EL – AEC
In the Matter of the Application of Ohio Edison Company for Approval of an Arrangement With Ashland Conveyor Products	)))	Case No. 99 – 792 – EL – AEC

REPLY OF ENRON ENERGY SERVICES, INC. AND CLINTON ENERGY TO FIRSTENERGY CORP.'S MEMORANDUM CONTRA MOTION TO INTERVENE

Pursuant to Rule 4901-1-12(B)(2), Ohio Administrative Code, Enron Energy Services, Inc. ("Enron") and Clinton Energy ("Clinton") hereby reply to FirstEnergy Corp.'s ("FirstEnergy") September 1, 2000, Memorandum Contra Enron's and Clinton's Motion to Intervene.

FirstEnergy's Memorandum Contra misreads Am. Sub. S.B. 3, unduly narrows the Commission's responsibility under R.C. 4905.31 and improperly inflates the rate cap protection for special contracts under R.C. 4928.34(A)(6). Adoption of FirstEnergy's argument not only would violate the specific mandates and the public policy of Am. Sub. S. B. 3 but also would offend the law of contracts.

As set forth in the Enron and Clinton Memorandum in Support of Motion to Intervene, the contracts which FirstEnergy is asking this Commission to approve in these five cases violate the express requirements of Am. Sub. S. B. 3:

1. R.C. 4928.31(A) requires the unbundling of each of the components of electric utility service. R.C. 4928.34(A) requires the Commission to make specific determinations about such unbundling. R.C. 4928.07 requires the separate pricing and disclosure of those unbundled electric service components. The contracts in these five cases fail to comply with these statutory mandates.

2. R.C. 4928.17, 4928.31(A)(2), and 4928.34(A)(8) require that a utility's non-competitive transmission and distribution services be separated from its competitive generation business. The proposed contracts ignore these statutory obligations for corporate separation and a code of conduct.

3. R.C. 4928.01(A)(30) and (33), 4928.02(C), 4928.37(A)(2)(b), 4928.61 through 4928.63, 4928.67, and 5727.81 promote distributed and small generation facilities and confer special benefits upon customer generators and self-generators. See also R.C. 5709.61(C) in recently adopted Sub. H.B. 27. However, Section 5.1 of the contracts proposed in Cases Numbers 99-728 and 99-729 contradict these statutory mandates.

4. The proposed contracts violate Ohio's electric competition policy at R.C. 4928.02.

FirstEnergy argues that R.C. 4905.31, which sets forth the Commission's responsibility to approve special contracts, ". . . was not affected by the passage of S. B. 3." See FirstEnergy's Memorandum Contra, bottom of page 3, below middle of page 4 and bottom of page 5. But that is like saying that a robin is not affected by the change of the seasons.

R.C. 4905.31 cannot be read in a vacuum. The opening paragraph of the statute requires that any utility service arrangement must be "reasonable." Clearly, an arrangement is not "reasonable" if it violates the mandates and contradicts the public policy of this state, as promulgated by the Ohio General Assembly in Am. Sub. S. B. 3 and Sub. H. B. 27.

Not only does FirstEnergy's argument contradict common sense and the express provisions of Am. Sub. S. B. 3, it also would carve out an enormous hole in the Commission's jurisdiction and powers under R.C. 4928.16 and 4928.18 of Am. Sub. S. B. 3. Those sections empower the Commission to determine whether an electric utility has violated or failed to comply with any provision of R.C. 4928.01 to 4928.15 and 4928.17. FirstEnergy erroneously argues that these statutory mandates do not affect the Commission's determination of reasonableness under R.C. 4905.31.

FirstEnergy then argues at the middle of page 5 of its Memorandum Contra that the public policy of this state at R.C. 4928.02 means nothing and cannot be enforced unless the contracts in question violate other specific provisions of Am. Sub. S. B. 3. But that is not what Am. Sub. S. B. 3 says. R.C. 4928.16(A)(2) expressly authorizes complaints under R.C. 4905.26 for any violation or failure to comply with R.C. 4928.01 to 4928.15, which includes the public policy of this state set forth at R.C. 4928.02:

> The commission also has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or

> initiative of the commission on or after the starting date of competitive retail electric service, to determine whether an electric utility has violated or failed to comply with any provision of sections 4928.01 to 4928.15. . .

The General Assembly did not except R.C. 4928.02 from this right of the public and the Commission to prosecute violations or failure to comply. R.C. 4928.16(A)(2) authorizes the public and the Commission to enforce the public policy set forth in R.C. 4928.02. That public policy took effect July 6, 1999. FirstEnergy ignores this statutory authority.

The Supreme Court of Ohio has made it clear that the Public Utilities Commission may approve an arrangement under R.C. 4905.31 "only if authorized by statute." Pike Natural Gas Co. v. Pub. Util. Comm. (1981), 68 Ohio St. 2d 181, at 183. The court declared that ". . . the Public Utilities Commission is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute." Pike Natural Gas, at page 183, citations omitted. After reviewing the Revised Code, the court concluded that the General Assembly had not conferred any authority upon the Commission to approve an excise tax adjustment clause and expressed concern about the impact of approving such a clause upon other provisions of the public utility code. Pike Natural Gas, page 185. If the Commission cannot approve an arrangement that lacks statutory authority, surely it cannot approve an arrangement that violates statutory authority.

The other branch of FirstEnergy's argument is that the rate cap protection of R.C. 4928.34(A)(6) insulates the contracts in these five cases from all of the other requirements of Am. Sub. S. B. 3. See FirstEnergy's Memorandum Contra at bottom of page 3, top of page 4, below the middle of page 4, and bottom of page 5. Below the middle of page 4 of its Memorandum Contra, FirstEnergy improperly inflates this rate cap insulation conferred by R.C. 4928.34(A)(6) to include insulation from the statute's corporate separation and code of conduct

requirements. FirstEnergy even concludes that the limited rate cap language of the statute insulates all special contracts entered into prior to January 1, 2001, from being "abrogated or otherwise affected during their term as a result of S. B. 3 or the Commission rules." FirstEnergy's Memorandum Contra, top of page 4.

An examination of R.C. 4928.34(A)(6) demonstrates the error of FirstEnergy's argument. The rate cap language in question is confined to the Commission's transition plan approval authority under division (A) of R.C. 4928.34:

> For the purpose of this division, the rate cap applicable to a customer receiving electric service pursuant to an arrangement approved by the commission under section 4905.31 of the Revised Code is, for the term of the arrangement, the total of all rates and charges in effect under the arrangement.

This rate cap protection does not extend to any other division of R.C. 4928.34, let alone to any other section of Am. Sub. S. B. 3. Thus, it has no application to the separate pricing and price disclosure requirements of R.C. 4928.07, the corporate separation and code of conduct requirements of R.C. 4928.17, the distributed and small generation benefits of R.C. 4928.37(A)(2)(b), 4928.61 through 4928.63, 4928.67, 5709.61(C), or 5727.81, or the public policy mandates of R.C. 4928.02.

Approval of the contracts proposed by FirstEnergy would also violate the law of contracts. Any contract which violates a statute is unlawful and void. See generally, 17 O. Jur. 3d, Contracts, Sections 90-100; e.g., Ohio v. Buttles (1854), 3 Ohio St. 309. Similarly, contracts which are contrary to public policy are illegal and void. 17 O. Jur. 3d, Contracts, Section 94; e.g., Key v. Vattier (1823), 1 Ohio 132. The Key case involved an action to recover on a contract for champerty and maintenance -- matters then considered to be offensive to public policy. The court so concluded and dismissed the claim. Counsel for the plaintiff argued that

the common law was not a sufficient basis to support the court's determination of public policy for invalidating the contract and that the legislature's failure to speak on the subject foreclosed the court's decision, but the court rejected the argument. Of course, in these five contract cases before the Commission, the General Assembly has expressly declared the public policy which took effect July 6, 1999, and which requires the Commission to reject these five contracts.

These principles of contract law apply generally to all contracts and particularly to contracts in restraint of trade - like those before the Commission in these five cases. The common law of this state declares that contracts in restraint of trade are opposed to public policy and are not encouraged. 17 O. Jur. 3d, Contracts, Section 113. This principle applies to public utilities and even to contracts approved by the Public Utilities Commission. See Ohio-Midland Light and Power Company v. Columbus and Southern Ohio Electric Company (1954), Franklin County C.P. Court, 69 O. L. Abs. 56. Whereas the Ohio-Midland case involved merely common law public policy, the five contract cases here before this Commission violate express statutory mandates and declarations of public policy by the Ohio General Assembly.

FirstEnergy erroneously contends that the special contracts in these five cases may ignore Am. Sub. S. B. 3 because they were entered into before the July 6, 1999, effective date of the Act. See FirstEnergy's Memorandum Contra, bottom of page 3 and below middle of page 4. The contract law of Ohio rejects that argument.

> Where a contract is legal when made, and subsequently such contract or its performance is prohibited by statute, performance thereof after the time when such prohibitive law becomes effective is illegal, and neither party can recover for breach of the contract.

17 O. Jur. 3d, Contracts, Section 92. See Massillon Savings & Loan Co. v. Imperial Finance Co. (1926), 114 Ohio St. 523, first paragraph of syllabus. While the Massillon case's holding did not

have practical consequence in that case, its discussion of the law of contracts is instructive. The court cited Williston on Contracts for the principle that,

> Where the contract was originally legal, but because of a change . . . in the law, performance of the acts contracted for on one side or the other has become illegal, any subsequent performance of such acts is against public policy. . .

Massillon, at page 527; 3 Williston on Contracts, Section 1759. The court also noted the U.S. Supreme Court's discussion of the principle in Louisville & N.R. Co. v. Mottley (1911), 219 U.S. 467:

> This impossibility of enforcement exists, whether the agreement is illegal in its inception, or whether being valid when made, the illegality has been created by a subsequent statute.

Massillon, at page 528; see Hooker v. DePallos (1874), 28 Ohio St. 251.

Conclusion

FirstEnergy's Memorandum Contra proceeds upon a mistaken reading of Am. Sub. S. B. 3, an undue narrowing of R.C. 4905.31, an improper inflation of the rate cap protection of R.C. 4928.34(A)(6), and a disregard of the principles of contract law.

R.C. 4905.31 does not exist in a vacuum. The Commission's determination under the statute of whether a proposed contract is reasonable must take into account the statutory mandates and declaration of public policy promulgated by the Ohio General Assembly. Furthermore, unlike most statutes, Am. Sub. S. B. 3 expressly provides that its July 6, 1999, declaration of public policy is enforceable by the public and the Commission. The Public Utilities Commission of Ohio is bound by these express mandates and declarations of public policy by the Ohio General Assembly.

WHEREFORE, Enron Energy Services, Inc. and Clinton Energy respectfully request admission as full parties of record in these proceedings and denial of the contracts proposed for approval by the Commission in these five cases.

Respectfully submitted,

M. Howard Petricoff (0008287)
Sheldon A. Taft (0003996)
Stephen M. Howard (0022421)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216 -1008
(614) 464-5414

Janine L. Migden (0002310)
Regional Director of Government Affairs
Enron Corp.
400 Metro Place North
Dublin, Ohio 43017
(614) 718 - 6335

Counsel for Enron Energy Services, Inc.
and Clinton Energy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 8, 2000, a copy of the foregoing Reply of Enron Energy Services, Inc. and Clinton Energy to FirstEnergy Corp.'s Memorandum Contra Motion to Intervene was served electronically or by telefax upon Arthur E. Korkosz, Esq., James W. Burk, Esq., Kurt E. Turosky, and Mike Fransko, FirstEnergy Corp., 76 South Main Street, Akron, Ohio 44308.

Sheldon A. Taft