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 Increase Rates for Distribution Service, Modify Certain Accounting Practices and For Tariff Approvals	)))))))	Case Nos. 07-551-EL-AIR 07-552-EL-ATA 07-553-EL-AAM 07-554-EL-UNC

INITIAL BRIEF OF CONSTELLATION NEWENERGY, INC. AND INTEGRYS ENERGY SERVICES, INC.

I. BACKGROUND

Constellation NewEnergy, Inc. ("CNE") and Integrys Energy Services, Inc. ("Integrys") are each individually a party of record in the above styled proceeding. In accordance with OAC 4901-1-11-(A)(2) CNE and Integrys consolidated the presentation of their positions. CNE and Integrys pursued just two issues at the hearing which are the subject of this Initial Brief. The first was to oppose the proposed treatment of deferred fuel costs. In its application, the FirstEnergy Corp. operating companies[1] ("FirstEnergy") proposed charging all the deferred fuel charges authorized by the Commission in the Rate Stabilization Plan and subsequently in the Rate Certainty Program[2] as part of the distribution fee to be amortized with carrying costs over 25 years and paid by Choice customers as well as standard service customers. During the pendency of this proceeding the Supreme Court remanded the Rate Certainty Plan on the issue of the recovery of fuel deferrals. In response, FirstEnergy amended its position to charge the fuel deferral as a fuel rider, but to extend the fuel rider to

[1] The Toledo Edison Company, the Ohio Edison Company and the Cleveland Electric Illuminating Company.
[2] In Re FirstEnergy, Case Nos. 05-704-EL-ATA and 05-1125-EL-ATA

both standard service customers who purchased energy as well as Choice customers who did not buy energy from FirstEnergy[3]. Finally, in addition to taking the new position in the matter at bar, FirstEnergy filed virtually the same plan for the 2006 – 2007 fuel deferrals which was docketed as Case No. 08-124-EL-ATA et. al and is scheduled for hearing on May 19, 2008.

The second issue raised in this proceeding by Integrys and Constellation NewEnergy addressed the availability of Residential Distribution Credit and the Business Distribution Credit. FirstEnergy extended credits to customers of certain current rate schedules that are being eliminated as part of the Application to phase in what would otherwise be a large increase. The Application in the matter at bar however did not address whether these phase in credits would be available to retail customers if they obtained their energy from a Competitive Retail Electric Supplier ("CRES") as opposed to taking the bundled standard service. Testimony in this case clarified that the credits would be made available regardless of whether the retail customer took generation from the utility or a CRES.

II. ARGUMENT

A. The Commission should not grant authorization to FirstEnergy to recover 2006-2007 deferred fuel costs through a non bypassable rider.

As part of the Rate Certainty Program, Ohio Edison, Cleveland Electric Illuminating, and Toledo Edison deferred fuel costs for subsequent collection through non by-passable distribution charges. While these deferrals were authorized by the Commission in Case No. 05-704-EL-ATA and 05-1125-EL-ATA, the Ohio Supreme Court in *Elyria Foundry v. Public Utilities Commission* 114 Ohio St. 3d 305 (2007) , 2007 – Ohio 4164 found the practice of collecting fuel expenses through distribution charges to be a violation of Section 4928.02(G)

[3] See Company Exhibit 1 C – Rebuttal Testimony of William Ridman

Revised Code. The holding in *Elyria Foundry* established a bright line test between collection for competitive services which by statute included generation[4] and non competitive services. As the provider of last resort under Section 4928.14 (A), Revised Code FirstEnergy had to supply a bundled service of both non competitive wire service and competitive generation service[5]. The Supreme Court though found that when FirstEnergy was supplying the competitive generation service it had to be discrete in its allocations and collections so that only the customers taking generation paid for the generation.

> ¶ 50 Generation service is a competitive retail electric service under R.C. 4928.03 and 4928.14(A), and distribution service is a noncompetitive service under R.C. 4928.15(A). R.C. 4928.02(G) prohibits public utilities from using revenues from competitive generation-service components to subsidize the cost of providing noncompetitive distribution service, or vice versa. "In short, each service component was required to stand on its own." *Migden-Ostrander v. Pub. Util. Comm.,* 102 Ohio St.3d 451, 2004-Ohio-3924, 812 N.E.2d 955, ¶ 4.

The Court in *Elyria Foundry* then remanded the fuel deferral issue back to the Commission to amend the Rate Certainty Plan to take the fuel out of the non competitive charges. Since the *Elyria Foundry* decision the Ohio Supreme Court has twice revisited the bright line test between competitive and non competitive services. *In Ohio Consumers' Counsel v. Pub Util Com*, 114 Ohio St. 3d 340, 2007-Ohio-4276, the Court ruled that the Commission erred by allowing the Dayton Power and Light Company to recover fuel or other generation costs through its distribution-service tariffs and affirmed the *Elyria Foundry* decision by name. Two weeks ago in *Industrial Energy Users v. Public Utilities Commission* Slip Opinion 2008-Ohio 990 (March 13, 2008) the Ohio Supreme Court relying on the *Elyria*

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[4] Section 4928.03, Revised Code

[5] The statutory language is a requirement on the utility to provide on a "comparable and nondiscriminatory basis" all competitive services "including a firm supply of generation". Section 4928.14(A), Revised Code.

Foundry and *Ohio Consumers' Counsel* cases found that on its face a generation study appeared to violate the bright line test which:

> "....prevent[s] an electric distribution utility from using revenues from non competitive distribution service to subsidize the cost of providing a competitive generation-service component;"[6]

FirstEnergy witness Wagner acknowledged that in the *Elyria Foundry* case, the Supreme Court ruled that the deferred fuel costs should not be recovered in a distribution rate and should be recovered in another manner. TR. I, 65. In light of the above referenced Supreme Court decisions, no fuel deferral may be included either as a component of base rate or as a separate collection rider if it is collected from customers taking only non competitive service. The Staff Report appropriately applied this decision. See the "Other Rate Base Items" section at Staff Report (for all three operating companies), p. 8.

Since the filing of the Staff Report, the Commission issued its January 9, 2008 Finding and Order in Case Nos. 07-1003-EL-ATA, which was the remand proceeding of the *Elyria Foundry* decision. The Commission authorized a rider for incremental fuel costs for the current year - 2008. The new fuel rider will be paid only by customers purchasing bundled, competitive generation service and FirstEnergy was permitted to file tariff amendments to immediately start collecting the incremental fuel costs as of January 1st of this year. The Commission's January 9, 2008 Order however did not accept FirstEnergy's request to collect the deferred fuel costs from 2006 and 2007. In Finding 9, the Commission explains that FirstEnergy's plan to collect two years worth of deferred fuel back in a year would unreasonably increase rates too much and requested FirstEnergy to file within thirty days a plan to collect its deferred fuel costs over a longer period of time. The Order did not

[6] Slip opinion ¶4 p. 2

authorize FirstEnergy to change the nature of the deferred fuel rider applied for in the remand proceeding – namely a bypassable generation rider.

In the matter at bar, through Mr. Ridman's rebuttal testimony (Company Ex. 1 C), the Company proposed to recover the 2006-2007 deferred fuel costs through a Deferred Fuel Costs Rider. Tr. IX, 141. This proposal is for a non by-passable charge that would be paid for by all customers including not only bundled service customers buying generation, but Choice customers taking only non competitive wire services. TR. IX, 142.

Thus, the issue before the Commission now is whether or not FirstEnergy can recover 2006-2007 deferred fuel costs through a non bypassable rider imposed upon all distribution customers. The *Elyria Foundry* case and the *Ohio Consumers Counsel* case mandate that the answer is negative. The Supreme Court in *Elyria Foundry* directly held:

> Fuel is an incremental cost component of generation service. Thus, by allowing that generation-cost component to be deferred and subsequently recovered in a distribution rate case, or alternatively allowing FirstEnergy to apply generation revenues to reduce distribution expenses, the commission violated R.C. 4928.02(G). (Emphasis added)

There is no factual dispute as to the nature of the 2006 – 2007 deferred fuel costs. As the name implies, these were fuel expenditures. As noted above, fuel is a generation expense which under the bright line test is a competitive service and thus cannot be charged to customers only taking non competitive service. FirstEnergy's cosmetic change of name from a "distribution charge" applied to non competitive service customers to a "fuel rider" applied to non competitive service customers is a distinction without significance. No matter the name, both fail the *Elyria Foundry* bright line test of charging a non competitive service customer competitive costs. Thus, the Commission in this proceeding should reject the portion of the Application requesting collection of the deferred 2006-2007 fuel costs. The

Commission should go forward with its proceeding in docket 08-124-EL-ATA to establish the proper amount of time and the carrying costs for the deferred fuel and should affirm that as with the 2008 fuel rider all collection of generation fuel costs must be assessed only on customers purchasing competitive generation service.

B. The Residential Distribution Credit and the Business Distribution Credit must be applied in a non-discriminatory manner.

In the application in the matter at bar, FirstEnergy is consolidating some 35 rate schedules including several rates that gave incentives to customers with electric water heaters and electric boilers into a few rate schedules distinguished by voltage and substation equipment. The consolidation creates a number of rate anomalies in which individual customers, particularly those on incentive rates, would face dramatic rate increases. The Commission has long had a policy of rate gradualism, which permits a utility when making fundamental rate design changes to phase in increases so as to avoid rate shock. Each of the three FirstEnergy operating companies have a few rate schedules under which the former customers need to be protected from rate shock. The mechanism to prevent the rate shock presented in the Application is distribution credits. Thus for example, residential customers of the three operating companies who were on the incentive water heater rate will receive the Residential Distribution Credit which for all three operating companies is a separate rider. There is also a Business Distribution Credit for similarly situated business customers.

Integrys and Constellation NewEnergy do not oppose the Residential Distribution Credits or the Business Distribution Credits and believe that given the size of the rate increase the size of the credits are appropriate. In order to comply with Section 4928.02(G), Revised Code however the Residential Distribution Credits and the Business Distribution Credits must be administered in a competitively neutral fashion as between customers who purchase energy

as part of the bundled Standard Service Offer and those customers who purchase energy from a competitive retail electric service provider. The question of whether the credits would apply equally to shopping and non shopping customers alike was a level of detail not covered in the Application. Thus, the issue was raised by Integrys and Constellation NewEnergy.

FirstEnergy witness Hussing and Staff witness Fortney agreed that if a customer was taking electric service under one of the rate schedules indicated in the credit riders as of December 31, 2008, that customer will receive the credit beginning January 1, 2009 and will continue to receive the credit even if the customer chooses to "shop" for its generation. TR. II, 91 and Staff Ex. 18, p. 13. Thus, at this time it appears that all parties agree that the Residential Distribution Credits and the Business Distribution Credits are available to all customers. Constellation NewEnergy and Integrys request that this clarification be included in the Opinion and Order so that it need not be visited again later.

III. Conclusion

The Commission should not authorize FirstEnergy to recover the 2006-2007 deferred fuel costs through any non bypassable rider, but rather should decide the proper recovery mechanism in Case No. 08-124, et al. Further, the Commission should direct that the Residential Distribution Credit and the Business Distribution Credit be applied in a competitively neutral manner consistent with the requirements of Section 4928.02(G), Revised Code.

Respectfully submitted,

VORYS, SATER, SEYMOUR AND PEASE LLP

/s/

M. Howard Petricoff
Stephen M. Howard
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
Tel: (614) 464-5414
Fax: (614) 719-4904
E-mail: mhpetricoff@vorys.com

Attorneys for Constellation NewEnergy, Inc.
And Integrys Energy Services, Inc.

Cynthia A. Fonner
Constellation Energy Group, Inc.
550 W. Washington St., Suite 300
Chicago, IL 60661
(312) 704-8518 (phone)
(312) 795-9286 (fax)
E-mail: Cynthia.A.Fonner@constellation.com

Attorneys for Constellation NewEnergy, Inc.

Bobby Singh (0072743)
Senior Attorney
Integrys Energy Services, Inc.
300 West Wilson Bridge Road, Suite 350
Worthington, OH 43085
(614) 844-4340 (phone)
(614) 844-8305 (fax)
E-mail: bsingh@integrysenergy.com

Attorneys for Integrys Energy Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Brief was served upon the following persons by electronic mail, where indicated, and by first class mail, postage prepaid, this 28th day of March, 2008:

/s/
M. Howard Petricoff
Stephen M. Howard

Kathy Kolich
Stephen L. Feld
76 South Main Street
Akron, OH 44308
kjkolich@firstenergycorp.com
felds@ firstenergycorp.com

David Boehm
Michael Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202-4454
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com

Richard Reese
Office of Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
reese@occ.state.oh.us

Garrett A. Stone
Brickfield, Burchette, Ritts & Stone
1025 Thomas Jefferson Street, N.W.
8th Floor, West Tower
Washington, DC 20007
gstone@bbrslaw.com

Glenn Krassen
Bricker & Eckler LLP
1375 East Ninth Street, Suite 1500
Cleveland, OH 44114-1718
gkrassen@bricker.com

Joseph Meissner
Cleveland Legal Aid Society
1223 West Sixth Street
Cleveland, OH 44113
jpmeissn@lasclev.org

Arthur Korkosz
First Energy
76 South Main Street, 18th Floor
Akron, OH 44308-1890
korkosza@firstenergycorp.com

Mark S. Yurick
Chester Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, OH 43215
myurick@cwslaw.com

Leslie A. Kovacik
City of Toledo
420 Madison Avenue, Suite 100
Toledo, OH 43614-1219
leslie.kovacik@ci.toledo.oh.us

Ebony L. Miller
First Energy Corp.
76 South Main Street
Akron, OH 44308
millere@firstenergycorp.com

Mark Hayden
First Energy Corp.
76 S. Main
Akron, OH 44308
haydenm@firstenergycorp.com

Mark A. Whitt
Jones Day
P. O. Box 165017
Columbus, OH 43216-5017
mawhitt@jonesday.com

Samuel C. Randazzo
Lisa McAlister
McNees, Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
sam@mwncmh.com
lmcalister@mwncmh.com

James Burk
First Energy Service Corp. Company
76 South Main Street
Akron, OH 44308
burkj@firstenergycorp.com

John Bentine
Chester, Willcox & Saxby LLP
65 East State Street, Suite 1000
Columbus, OH 43215-4259
jbentine@cwslaw.com

Thomas O'Brien
Bricker & Eckler
100 S. Third Street
Columbus, OH 43215
tobrien@bricker.com

Tim Walters
Consumers for Fair Utilities Rates
4115 Bridge Avenue
Cleveland, OH 44113

Edward A. Pancoast
Utility Workers Union of America
325 Franklin Avenue
Cuyahoga Falls, OH 44221-1819

Michael K. Lavanga
Brickfield, Burchette, Ritts & Stone
1025 Thomas Jefferson Street, N.W.
8th Floor, West Tower
Washington, DC 20007
mlavanga@bbrslaw.com

Jeffrey Small
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
small@occ.state.oh.us

Thomas Froehle
McNees, Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215-4228
tfroehle@mwncmh.com

David T. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 W. Lima St., P.O. Box 1793
Findlay, OH 45839-1793
drinebolt@aol.com
cmooney2@columbus.rr.com

Empowerment Center of Cleveland
3030 Euclid Ave., Unit 100
Cleveland, OH 44115

Rev. Mike Frank, Co-chair
Neighborhood Environmental Coalition
5920 Engle Road
Cleveland, Oh 44127

Paul S. Goldberg
City of Oregon Law Director
6800 West Central Avenue
Toledo, OH 43617-1135
pgoldberg@ci.oregon.oh.us

Lance Keiffer
Assistant Prosecuting Attorney
711 Adam Street, 2nd Floor
Toledo, OH 43624-1680
lkeiffer@co.lucas.oh.us

Peter D. Gwyn
City of Perrysburg Law Director
110 West Second Street
Perrysburg, OH 43551
pgwyn@ci.perrysburg.oh.us

Paul Skaff
Leatherman, Witzler, Dombrey & Hart
353 Elm Street
Perrysburg, OH 43551
palskaff@justice.com

Brian J. Ballenger
City of Northwood Law Director
3401 Woodville Road, Suite C
Toledo, OH 43619
ballengerlawbjb@sbcglobal.net

David Fein
Senior Regulatory Counsel
Constellation New Energy, Inc.
550 West Washington Blvd., Suite 300
Chicago IL 60661
david.fein@constellation.com

Cynthia A. Fonner
Senior Counsel
Constellation Energy Group, Inc.
550 W. Washington t., Suite 300
Chicago IL 60661
Cynthia.A.Fonner@constellation.com

James E. Moan
City of Sylvania Law Director
4930 Holland-Sylvania Road
Sylvania, OH 43560
jimmoan@hotmail.com

Robert Triozzi
Director of Law
City of Cleveland
601 Lakeside Avenue, Room 196
Cleveland, OH 44114
rtriozzi@city.cleveland.oh.us

Sheilah H. McAdams
City of Maumee Law Director
Marsh & McAdams
204 West Wayne Street
Maumee, OH 43537
sheilahmca@aol.com

Thomas R. Hayes, Solicitor
3315 Centennial Road
Suite A-2
Sylvania, OH 43560
hayslaw@buckeye-express.com

Summary: Brief Initial Brief of Constellation NewEnergy, Inc. and Integrys Energy Services, Inc. electronically filed by Stephen M Howard on behalf of Constellation NewEnergy, Inc. and INTEGRYS ENERGY SERVICES INC (RETURNED MAIL)