

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	
Illuminating Company, and The Toledo)	Case No. 08-124-EL-ATA
Edison Company for Authority to Modify)	Case No. 08-125-EL-ATA
Certain Accounting Practices and for)	
Tariff Approvals.)	

**MEMORANDUM CONTRA FIRSTENERGY'S
MOTION TO SUSPEND PROCEEDINGS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

Pursuant to Ohio Adm. Code 4901-1-12(B)(1), the Office of the Ohio Consumers' Counsel ("OCC") submits this Memorandum Contra in response to Ohio Edison Company's, The Cleveland Electric Illuminating Company's, and The Toledo Edison Company's Motion to Suspend the procedural schedule ("Motion" by "FirstEnergy" or by the "Company") filed on August 8, 2008 in the above-captioned cases. The Company previously filed a similar motion on June 3, 2008, which OCC opposed on June 9, 2008 and the Commission denied on June 11, 2008. Given that the Commission has already denied such a motion once, *the matter is res judicata* and the Commission should not consider it again.

The Company filed an application in these cases on February 11, 2008 as the Commission directed it to do in a January 9, 2008 Finding and Order in Case No. 07-1003-EL-ATA. In the Finding and Order the Commission found that the Company

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should file a separate application for deferred fuel costs that had already been accrued.¹ Additionally, the Commission found that the Company's proposal to recover the deferred fuel costs in one year would cause rates to increase too much.² At the time of its application, the Company requested that the recovery mechanism for these cases commence with the first June 2008 billing cycle, and in no event later than the first January 2009 billing cycle, continuing through the date that would allow full recovery of the amounts to be recovered through the rider.³

The Staff ("Staff") of the Public Utilities Commission of Ohio ("PUCO" or "Commission") subsequently issued a Report ("Staff Report") in the above-captioned cases on June 4, 2008. In that Staff Report the Staff recommends that the Company not collect \$9.1 million of the approximately \$200 million it has applied to collect from customers.

II. ARGUMENT

A. The Commission Should Not Suspend the Procedural Schedule in these Cases to Incorporate the Cases Into the Future Electric Security Plan ("ESP") Case.

FirstEnergy states that because SB 221 allows for the recovery of deferred fuel costs, the Commission's consideration of the deferred fuel costs in this case would almost completely overlap with the fuel costs in the electric security plan that FirstEnergy plans

¹ In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals. Case Nos. 07-1003-EL-ATA and 07-1004-EL-ATA, Finding and Order (January 9, 2008) ("07-1003 Finding and Order") at 3.

² *Id.*

³ *Id.* Application at 1.

to file under SB 221. The fuel costs under consideration in this case are those incurred during 2006 and 2007.⁴

The ESPs are described by the General Assembly in R.C. 4928.143(B).

An electric security plan shall include provisions relating to the supply and pricing of electric generation service * * *

(2) The plan may provide for or include, without limitation any of the following:

(a) Automatic recovery of any of the following costs of the electric distribution utility, provided the cost is **prudently incurred**: the cost of fuel used to generate the electricity supplied under the offer * * *

Although the ESP proceeding that FirstEnergy intends to initiate may address fuel costs, the General Assembly did not contemplate that ESP proceedings would review the prudence of costs incurred before the ESP was submitted. Rather the ESP proceeding will address the **plan** that an electric distribution utility (“EDU”) proposes that may allow the EDU to collect fuel costs from customers. Thus, the ESP is prospective in nature and does not contemplate recovery of fuel costs that existed prior to the promulgation of the legislation. The prudence of fuel costs incurred after the effective date of the legislation would be evaluated under the **plan** that will be approved by the Commission in the ESP proceeding.

R.C. 4928.141(A) directs the utility to provide consumers a “standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers.” This is similar to the rate stabilization plans (“RSP”) established under R.C. 4928.14(A), which provided:

⁴ Id.

An electric distribution utility in this state shall provide consumers on a comparable and nondiscriminatory basis within its certified territory, a market based standard service offer.

In ordering the electric distribution utilities in Ohio to file rate stabilization plans the Commission stated:

The Commission is concerned that the competitive retail market for electric generation has not developed as rapidly as was anticipated when it issued its opinion and order [in] the ETP case. We have previously stated that we encourage electric utilities to consider the establishment of plans which will stabilize prices following the termination of their MDPs, and will allow additional time for competitive electric markets to grow.⁵

When the Commission approved FirstEnergy's RSP filing it did not establish the prudence of FirstEnergy's fuel procurement costs. Instead, that proceeding was deferred to these cases and 08-1003-EL-UNC. Just as the FirstEnergy RSP filing did not set fuel rates, neither should its ESP proceeding. In accordance with the laws, the ESP proceeding should only establish a plan and a procedure for determining the prudence of fuel costs which will later be subject to audit, verification and potentially, refund.. Accordingly, the current fuel deferral case will not be over-lapping with the ESP proceeding and should not be suspended to be incorporated into the ESP case.

B. The Commission Should Not Eliminate the Record Already Established in these Cases If It Grants FirstEnergy's Motion to Suspend Because The Staff And Other Parties Have Already Invested Significant Time and Effort In These Cases and Judicial Economy Requires That the Record Be Retained.

Many parties have already invested time and effort in these cases and these cases should not be suspended in a manner that would waste that time and effort.

⁵ *In the Matter of the Application of the Cincinnati Gas & Electric Company to Modify Its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Opinion Subsequent to the Market Development Period.* Case No. 03-93-EL-ATA, Entry (December 9, 2003) at 5.

Rather, the Commission should not suspend these cases. However, in the event of a suspension, the PUCO should retain the record that has already been made in these cases and incorporate it into the record that the Commission will establish for a later case.

Already, Constellation New Energy and Integrys Energy Services,⁶ Ohio Partners for Affordable Energy,⁷ Ohio Energy Group,⁸ Nucor Steel Marion, Inc.,⁹ the Industrial Users of Ohio¹⁰ and OCC¹¹ have intervened in this case. Additionally the Ohio Energy Group filed comments¹² and OCC has conducted discovery. Most significantly, the Staff has already audited the 2006 and 2007 fuel procurement practices and costs and has made many and substantial recommendations.¹³ The efforts and time of the parties, especially those of the Staff, should not be lost through a Commission Entry granting FirstEnergy's Motion to Suspend. Judicial economy¹⁴ requires that if the Commission does grant the Motion to Suspend, it should retain the record of facts already established in these cases and incorporate it into whatever future docket the Commission opens to facilitate FirstEnergy's motion without having to conduct a repetitive investigation of the issues. Moreover, the parties to this case may not be the same in all cases as the parties to the ESP, making consolidation of these matters more cumbersome and burdensome for them.

⁶ Motion to Intervene, March 28, 2008.

⁷ Motion to Intervene, April 28, 2008.

⁸ Motion to Intervene, February 19, 2008.

⁹ Motion to Intervene, March 13, 2008.

¹⁰ Motion to Intervene, February 13, 2008.

¹¹ Motion to Intervene, February 26, 2008.

¹² Motion to Intervene, March 17, 2008.

¹³ Staff Report, June 4, 2008.

¹⁴ *Knoop v. Orthopedic Consultants*, Slip Copy, 2007 WL879675, Ohio App 12 Dist. 2007 (March 26, 2007); *State v. Dunkins*, 10 Ohio App. 3d 72 (June 8, 1983).

In the event that the Commission grants FE's Motion, which OCC urges it not to do, then the Commission should not require the Staff to reinvestigate FirstEnergy's fuel procurement practices but accept the record as it stands with the recommendation for a \$9.1 million reduction. Collateral estoppel would preclude such a re-investigation.¹⁵

Most importantly, the Commission and the Commission Staff should not consider the Staff recommended \$9.1 million reduction in FirstEnergy's collection of fuel costs as a beneficial trade-off in exchange for what FirstEnergy wants in its SSO plan. The reduction of fuel costs in this case has nothing to do whatsoever with what comprises FirstEnergy's SSO on a going forward basis. Accordingly, if the issue is to be consolidated into the SSO case, the issue and the related dollar amounts should be kept separate in both orders by the Commission or stipulations negotiated by the Staff.

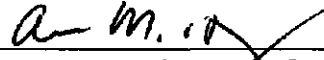
III. CONCLUSION

The Commission should not suspend the review of FirstEnergy's deferred fuel costs in these cases to incorporate the cases into the ESP proceeding because the cases do not overlap the consideration of fuel costs in FirstEnergy's ESP proceeding. Rather, the ESP proceeding will establish a plan for reviewing the prudence of fuel costs. If the Commission does grant FirstEnergy's request to suspend these cases and incorporate them into another future docket, it should retain the record already established in these cases for the sake of judicial economy.

¹⁵ *Carver v. Mack*, Slip copy, 2008 WL 2572752, 2008-Ohio-2911, Ohio App. 5 Dist., (June 11, 2008); *Bell v. Ohio State Bd. Of Trustees*, Slip Copy, 2007 WL 1640968, 2007-Ohio App. 10 Dist. (June 7, 2007)

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra of the Office of the Ohio Consumers' Counsel was served via electronic transmission to the persons listed below, on this 14th day of August, 2008.


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