

**FILE****FAX**

**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 Approval of a Market Rate Offer )  
To Conduct a Competitive Bidding Process )  
For Standard Service Offer Electric Generation )  
Supply, Accounting Modifications Associated )  
With Reconciliation Mechanism, and Tariffs )  
For Generation Service. )

Case No. 08-936-EL-SSO

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**POST-HEARING BRIEF OF  
OHIO PARTNERS FOR AFFORDABLE ENERGY**

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**Introduction**

On May 1, 2008, Governor Strickland signed Am. Sub. SB 221 (SB 221), significantly modifying the method of regulating electric utilities in Ohio. As a part of this legislation, public utilities are required to file a Standard Service Offer (SSO) in the form of an Electric Security Plan (ESP) and/or a Market Rate Option (MRO). The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company (collectively "FirstEnergy" or "the Companies") chose to file both options. Because of the timelines for review of SSO proposals established in SB 221, the Commission is required to rule on whether FirstEnergy is eligible to establish an MRO and whether the MRO proposed complies with statutory requirements.

Ohio Partners for Affordable Energy (OPAЕ) hereby submits this Post-Hearing Brief in the above-referenced matter.

**Argument****I. FirstEnergy fails to meet the statutory criteria for an MRO.**

SB 221 establishes a series of criteria which a public utility must meet in order to utilize an MRO as the mechanism to meet its obligation to provide an SSO to non-shopping customers. The initial three criteria are as follows: (1) the electric distribution utility or its transmission service affiliate belongs to at least one regional transmission organization (RTO) that has been approved by the Federal Energy Regulatory Commission (FERC); (2) the RTO has a market-monitoring function capable of identifying and mitigating market power or the distribution utility's market conduct; and, (3) there is a public source of information available which provide pricing information for on- and off-peak energy products for at least two years from the date of publication and is regulatory updated. R.C. Sec. 4928.142.(B) FirstEnergy fails to meet its burden of proving that its proposal meets these requirement, and fails to meet two of the three criteria. *Id.*

OPAE concedes that FirstEnergy's affiliate, American Transmission Services Inc. (ATSI) is a member of a FERC-approved RTO, the Midwest Independent System Operator (MISO). However, serious questions have arisen about the ability of MISO to mitigate market power or the distribution utility's market conduct. FirstEnergy Witness Warvell could cite no instances where MISO has acted to mitigate market power, nor could he provide any evidence that such authority has been used with respect to ATSI. Vol. 1 at 67. Absent a showing that market power mitigation has

occurred, FirstEnergy has failed to meet its burden to establish that the statutory criterion has been met.

The Companies also fail to meet their burden of proving that public sources of information providing forward prices are available as contemplated by the statute. While Mr. Warvell contends that there are several services that provide such prices, he offers no sense of the volume of trading associated with these indices. It is all well and good that entrepreneurs have started publishing numbers, but absent a showing that these publications represent pricing for the volume of capacity and energy necessary to meet the load of the Companies, the publications are not adequate to meet the need to establish a transparent price to provide SSO service going forward.

R.C. Sec. 4928.142.(A) also requires that the MRO be determined through a competitive bidding process that meets the following criteria: (1) the competitive solicitation is open, fair and transparent; (2) there is a clear product definition; (3) the bid evaluation criteria is standardized; and, (4) the bidding is overseen by an independent third party that shall design the solicitation, administer the bidding; and ensure compliance with above-referenced criteria. Again, the Companies have the burden of proving compliance with these statutory requirements.

As a threshold issue, the MRO plan must demonstrate compliance with the policies of the State of Ohio enumerated in R.C. Sec. 4928.02(A) to (N). Among these critical policies are the following: (1) ensure the availability of

...reasonably priced retail electric service; (2) ensure diversity of electric suppliers and encourage the development of distributed and small generation facilities; (3) encourage market access for cost-effective supply- and demand-side resources; (4) protect customers against unreasonable sales practices, market deficiencies and market power; (5) provide incentives to technologies that can adapt successfully to potential environmental mandates; and, (6) protect at-risk populations. R.C. 4928.02(A), (C), (D), (I), (J), and (L). This is also a requirement in the implementing rules that have been submitted the Joint Committee on Agency Rule Review (JCARR). See O.A.C. Sec. 4901:1-35(B)(2)(n).

FirstEnergy does not even attempt to meet its burden of demonstrating compliance with these requirements. First, the testimony demonstrates that the Companies failed to evaluate any other options than a full-requirements bidding process, similar to that used unsuccessfully in other states and ultimately rejected. Direct Testimony of Barbara R. Alexander at 26-27. Given state policy to ensure "reasonably priced" generation service, this is a fatal flaw.

FirstEnergy Witness Warvell makes clear that no other approaches to bidding were considered. Vol. 1 at 70. FirstEnergy Witness Reitzes makes clear that the Company looked at no other alternatives than a declining clock auction, nor did it consider an integrated portfolio management approach using a mix of multi-year, short-term and medium-term products. Vol. 1 at 21. Mr. Reitzes acknowledged that they did not consider utilizing

other bidding options. Vol. I at 24. There was no assessment that the proposal would result in the lowest cost outcome. Vol. I at 29.

The record is silent on any component of the MRO proposal that would encourage a diversity of suppliers or promote distributed and small-scale generation. Apparently, the requirement of meeting these state policies would default to the bidders though the proposal provides no mechanism to evaluate compliance given the lack of transparency in the bidding process. Vol 1 at 25.

The proposal is silent as to the promotion of cost-effective supply- and demand-side resources as noted by FirstEnergy Witness Warvell. Vol. I at 75. According to Mr. Warvell, the "company didn't believe that there was a requirement in filing the MRO that those items (renewable energy, energy efficiency, or demand response) be included in the MRO process. Vol. I at 74-75. The regulations submitted to JCARR for approval make clear that these are requirements that apply to the MRO filing. See O.A.C. Sec. 4901:1-35(B)(2)(n).

The proposal is equally silent regarding the protection of market deficiencies and market power, providing incentives for technologies that can adapt to potential environmental mandates, and protect at-risk customers from cost increases produced by the proposed MRO.

**II. FirstEnergy's proposal fails to utilize an integrated portfolio management approach to achieve a least-cost outcome.**

FirstEnergy and its consultant admit that they did not consider alternative approaches to defining the product that would be the focus of the competitive bid, nor did they conduct any analysis that would support the conclusion that a descending clock auction for a full requirements product would result in the lowest cost SSO. Other alternatives do exist and have been adopted in other jurisdictions such as those utilized in Montana, Maryland, Delaware, and Illinois. Alexander at 14, 23-25, 27-32. The fatal flaw in the FirstEnergy proposal is that it failed to even consider any options other than a descending clock auction for full-requirements service or a Request for Proposal for the same product. Vol. I at 21 (Reitzes).

**III. FirstEnergy's propose Reconciliation Rider CRT should be rejected.**

The Companies propose Rider CRT (Cost Recovery True-up Rider) to collect a wide variety of costs it asserts are associated with providing SSO generation service. The rider would collect, (1) differences between SSO generation service revenues and SSO supply costs; (2) competitive bidding fees not recovered through SSO supplier fees; (3) a working capital adjustment to account for revenue lag between the incurrence of SSO supply costs and collection of customer revenues; (4) the delta revenue associated with differences between the SSO prices and revenues from customers served under economic development schedules, energy efficiency schedules, reasonable arrangements, governmental special contracts, or

other special contracts, and (5) costs to comply with alternative energy resource standards. The FirstEnergy proposal would make this rider non-bypassable.

The proposed Ride includes no mechanism for the Commission, Staff, customers, or other interested parties to review the prudence of the costs proposed to be collected under the Rider; it is a blank check in every sense of the term. Direct Testimony of John T. Courtney at 7. The Companies fail to explain why revenues would not equal the cost of the service since the bidding for full requirements service implies that all costs are internalized in the bid and would be billed to FirstEnergy. The application also fails to explain why costs associated with the SSO auction would not or could not be recovered through the bidding process. The Companies also fail to provide statutory support for the collection of delta revenues associated with special contracts. Special contracts are only referenced under R.C. Sec. 4928.143; no language in the MRO component of the statute even mentions special contracts. See R.C. Sec. 4928.412. Moreover, the Companies provide no legal basis for the continuation or creation of special contracts under the MRO approach.

The FirstEnergy proposal to collect the costs of compliance with the Ohio's alternative resource standard are also inappropriate since the standards deal with supply side resources which should be included in the SSO generation supply bid, not as a separate generation component. Likewise, it is unclear as to what delta revenues result from energy efficiency



and demand response investments. Since these reduce the need for generation procured through the bidding process, there is no delta revenue associated with these measures, only revenue foregone by the generation supplier that does not have to serve the reduced load.

Fundamentally, an MRO-based SSO does not have a revenue target, it is a service that has a cost only to the extent the service is required to meet SSO requirements. In essence, FirstEnergy is auctioning off an option to purchase a certain amount of generation. Whether or not the generation is purchased is determined by customer actions, including energy efficiency and demand response. It is not auctioning off a right for marketers to collect a certain amount of revenue. Moreover, since generation rates are a pass-through under an MRO, there is no revenue target affecting the distribution company; there is simply a cost.

The Companies also require the rider be non-bypassable for reasons that are unclear. If a customer chooses to leave SSO service, its supplier must comply with the alternative resource standard, so there is no cost to FirstEnergy and thus nothing to recover. There is no delta revenue to recover since the rates are what the tariffs say they are; again, there is no revenue target by which to ascertain what the shortfalls that constitute delta revenues are.

The proposed Rider CRT is simply not justified in any way. The 'costs' it contains are not costs incurred by the Company. Alternative resource requirements can be met through the SSO itself. None of the proposed

schedules result in delta revenue that can be defined. There is no reason why SSO auction participants cannot pay the entire cost of the auction. And there is no reason why SSO costs should not equal revenue. Finally, there is no justification for making the Rider non-bypassable since customers that shop are not causing any costs. Rider CRT should be rejected.

**IV. The FirstEnergy SSO acquisition process should reflect the needs of individual customer classes.**

All customer classes are not created equal; load factors vary, migration risk varies, and small customers require price stability. Alexander at 33. FirstEnergy proposes an auction for a slice of system, which fails to factor in the characteristics of each customer class. The only mechanism in the proposal that reflects any variation among the classes is the tariff-based adjustment for losses based on the voltage of the service taken by the end-user. The load shape of residential and small commercial customers is fairly consistent, creating the opportunity to match capacity purchases to the load. Likewise, changes in seasonal usage support a customized procurement strategy that matches the load characteristics of the customers. It is unclear what migration risk exists associated with small customers. The large aggregations that have operated in FirstEnergy service territory have been served in recent years by FirstEnergy Services (FES). It is uncertain if FES would continue to compete for aggregated customers under an MRO and no testimony from the Company quantifies this risk. Finally, price stability of clearly necessary for small customers and has been recognized as a critical issue by both the Commission and the General Assembly. The Companies'

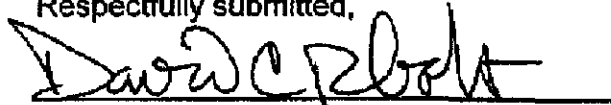
failure to recognize the inherent differences among customer classes in the bidding process places price stability at severe risk.

### **Conclusion**

The MRO proposal advanced by FirstEnergy to meet the SSO requirements imposed by SB 221 on distribution companies which have been regulated as monopolies for a century fails to meet the requirements of the statute. The Companies fail to meet their burden of proof in a host of areas. There is no showing that the proposal will result in reasonable prices or meet any of the other state policies promulgated by the General Assembly. There is no showing that the proposal meets the statutory requirements for an MRO. There is no showing that FirstEnergy considered any product other than a full-requirements product, which has been rejected in other states. There is no indication that FirstEnergy ever reviewed the option of acting as a portfolio manager to oversee procurement that would satisfy state policy. Statutory requirements for alternative energy, energy efficiency, and demand response are ignored in the design products to be procured through the auction. The differences among customer classes and the discrete needs of customers are likewise ignored.

FirstEnergy's MRO proposal fails to comply with SB 221 and should be rejected.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David C. Rinebolt", is written over a horizontal line.

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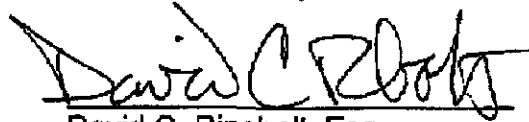
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**On Behalf of Ohio Partners for  
Affordable Energy**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Motion to Intervene, Memorandum in Support, and Motion to Practice *Pro Hac Vice* were served electronically upon the parties of record identified below on this 3rd day of September, 2008.



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