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**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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. 08-0936-EL-SSO |

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# REPLY BRIEF OF THE OHIO HOSPITAL ASSOCIATION

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## INTRODUCTION

By Entry dated September 15, 2008, the Ohio Hospital Association ("OHA") was granted intervention in the above-captioned proceeding. Initial briefs were filed on October 6, 2008 by: Ohio Energy Group; Ohio Partners for Affordable Energy; the Office of the Ohio Consumers' Counsel, Citizen Power, Lucas County, The City of Toledo, and The Northwest Ohio Aggregation Coalition; Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc.; City of Cleveland; the Staff of the Public Utilities Commission of Ohio ("PUCO" or "Commission"); and by FirstEnergy.

OHA is a private, nonprofit trade association with 178 hospitals and 40 healthcare system members that have more than 700 electricity accounts statewide. Collectively, OHA members annually spend well in excess of $150 million for electric services. A significant amount of that expenditure is for electric service provided by Ohio Edison Company, the Cleveland Electric

Illuminating Company and the Toledo Edison Company ("FirstEnergy") to the approximately 62 hospitals in FirstEnergy's service areas.

OHA submits this Reply Brief on behalf of its members with facilities located in the FirstEnergy service territories.

**ARGUMENT**

OHA agrees with those parties arguing that FirstEnergy's market rate offer ("MRO") application is fatally deficient and should be rejected by the Commission at this time.

The Commission Staff ("Staff") and the Industrial Energy Users-Ohio ("IEU-Ohio") both provide compelling arguments that FirstEnergy's MRO application should be rejected because the current MISO market monitoring function does not have the demonstrated ability to take actions to identify *and mitigate* market power or the electric distribution utility's market conduct, as required by Ohio Revised Code Section ("R.C.") 4928.142(B)(2).

Staff points out that FirstEnergy's MRO application falls short in meeting the requirements of R.C. 4928.142(B)(2) because FirstEnergy is sufficiently vague and ambiguous in delineating what entity is responsible for mitigating market power. Staff Post-Hearing Brief, at p. 10. The Staff notes that the question of where mitigation authority properly resides is currently an open question before the Federal Energy Regulatory Commission ("FERC"). Id. Until this question is finally settled, and FirstEnergy appropriately updates its MRO application, the application remains fatally flawed.

In this same vein, IEU-Ohio cogently argues that the FERC's acceptance of MISO's market monitoring and mitigations measures should not be determinative of whether FirstEnergy's affiliation with MISO satisfies the requirements of R.C. 4928.124(B)(2). IEU-Ohio explains why the FERC's view of market power and the concomitant steps necessary to mitigate the exercise of market power do not necessarily conform to the requirements of Ohio law or, for that matter, common sense. Initial Brief of Industrial Energy Users-Ohio at pp. 8-11.

The fact that FirstEnergy has not demonstrated that its MRO will provide adequate protections from abuses of market power is reason alone for the Commission to reject the application as filed.

A number of parties have shown that FirstEnergy's proposed competitive bidding process ("CBP") fails for a variety of reasons.

The most glaring flaw is FirstEnergy's use of the descending clock/reverse auction format that has been shown repeatedly to produce needlessly excessive rates. The Ohio Energy Group ("OEG") persuasively argues that the descending clock format is prone to the exercise of market power by FirstEnergy's generation affiliate, FES. Brief of OEG, at pp. 6, 8-9. The OHA strongly agrees with the OEG that the descending clock format proposed by FirstEnergy should be replaced with a sealed bid process conducted by an independent third-party portfolio manager. Id. at pp. 9-10. As noted by OEG, the goal of the CBP should be to produce the least cost portfolio of wholesale generating resources to supply SSO customers. Id. The Ohio Partners for Affordable Energy ("OPAE") note that FirstEnergy failed to evaluate any other options other than the descending clock format (Post-Hearing Brief of OPAE, at pp. 5-6) in direct contravention of pending Ohio Administrative Code ("O.A.C.") Rule 4901:1-35-03(B(2)(a).

The descending clock auction format is not the only flaw in FirstEnergy's CBP. The OEG (at pp. 13-14) and IEU-Ohio (at pp. 18-20) make the point that FirstEnergy's selected CBP manager, the Brattle Group, did not independently design the proposed solicitation and that it may not possess the necessary independence.

The OHA also agrees with Nucor Steel (Initial Brief of Nucor Steel Marion, Inc., at pp. 12-18) regarding the glaring omission of time-differentiated and interruptible load. It is clear that FirstEnergy must demonstrate how its proposed plan is consistent with the Commission's rules, specifically at O.A.C. 4901:1-35-03(B)(2)(d) and (e).

Those rules provide that FirstEnergy's justification for its CBP plan must include, among other things:

> (d) Detailed description of how the CBP plan ensures an open, fair, and transparent competitive solicitation that is consistent with and advances the policy of this state as delineated in divisions (A) to (N) of section 4928.02 of the Revised Code.

Ohio Revised Code Section 4928.02(D) states that it is the policy of this state to "[e]ncourage innovation and market access for cost-effective supply and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure[.]" FirstEnergy's proposed CBP fails to adequately explain how its omission of any consideration of time-of-day pricing or interruptible load features comports with the Commission's rules and state policy. It is quite apparent that the Commission's rules were designed to encourage CBPs that accommodate these rate features:

> (e) Detailed descriptions of the customer loads(s) to be served by the winning bidder(s), and any known factors that may affect such customer loads. The descriptions shall included, but not be limited to, load subdivisions defined for bidding purposes, load and rate class descriptions, customer load profiles that include historical hourly load data for each load and rate class for at least the two most recent years, applicable tariffs, historical shopping data, and plans for meeting targets pertaining to load reductions, energy efficiency, renewable energy, advanced energy, and advanced energy technologies. If customers will be served pursuant to time-differentiated or dynamic pricing, the descriptions shall include a summary of available data regarding the price elasticity of the load. Any fixed load profiles to be served by winning bidder(s) shall be described.

Yet FirstEnergy's application gives short shrift to this required information. Hospitals, by virtue of their required on-site generation facilities are poised to contribute to system load reduction and peak shaving. FirstEnergy's CBP proposal denies to hospitals any opportunity to take advantage of these benefits.

OHA concurs with Staff's argument that FirstEnergy's MRO application does not comply with the Commission's new competitive bidding rules because FirstEnergy failed to provide detailed customer load information as part of its MRO application. At best FirstEnergy offered to provide some of the information on its website data room by October 31, 2008, which would probably be after the Commission has issued its decision. Staff, at p. 6. OHA also agrees with Staff that FirstEnergy must bring its application into compliance with the new O.A.C. Rule 4901:35 and R.C. 4928.02. Id.

FirstEnergy has proposed a cost-recovery true-up rider ("Rider CRT") to recover from all customers: (1) expenses associated with the competitive bidding process not recovered through tranche fees; (2) uncollectible amounts associated with generation service; (3) delta revenues; and (4) future costs related to alternative energy resources. OHA supports Staff's argument that FirstEnergy failed to support the recovery of items (1) and (2) (Staff, at p. 7) and that the recovery of the delta revenue should be subject of a separate application at which time the Commission can determine the appropriate level of recovery. Id., at p. 8.

Since FirstEnergy witnesses Norris and Ridmann acknowledged that Rider CRT is generation related, OHA agrees with Staff's recommendation that the remaining costs to be recovered through Rider CRT should be avoidable for customers who take their generation service from a CRES provider. Id. The OEG (at pp. 14-15), Nucor Steel (at p. 27), OPAE (at pp. 7-10), Constellation New Energy (at pp. 7-8) and Dominion Retail, Inc. (at pp. 4-6), all urge the Commission to reject Rider CRT a proposed by FirstEnergy.

SB 221 requires EDUs to: provide 25% of the total kWh sold from alternative energy resources; implement energy efficiency programs; and implement reduction in peak demand. These requirements may be met with the use of customer-sited capabilities. FirstEnergy's MRO application fails to provide any information as to how FirstEnergy intends to meet any of the alternative energy resource, demand-response, and energy efficiency and peak demand requirements except for the cost recovery mechanism for renewable credits. IEU-Ohio argues that without information regarding how FirstEnergy will comply with these requirements under the MRO, the Commission will not have enough information to make an informed comparison of the ESP to the MRO. IEU-Ohio Brief at pp. 22-23.

Along with IEU-Ohio, OHA urges the Commission to address in this proceeding how these requirements will be satisfied in general and with specific regard to customer-sited capabilities. Id. at p. 23. Furthermore, OHA also agrees with IEU-Ohio that FirstEnergy should be directed to refile its application to include the necessary detail as to how FirstEnergy will meet its renewable portfolio requirements. Id.

**CONCLUSION**

OHA respectfully requests that the Commission reject the application of FirstEnergy for the forgoing reasons.

Respectfully submitted on behalf of
OHIO HOSPITAL ASSOCIATION

Richard L. Sites
General Counsel and Senior Director of Health Policy
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
(614) 221-7614

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Brief was served *via electronic mail* upon the parties of record this 14th day of October 2008.

Richard L. Sites

James Burk
Mark Hayden
FirstEnergy
76 South Main Street
Akron, OH 43308-1890
burkj@firstenergycorp.com
haydenm@firstenergycorp.com

Mark A. Whitt
Andrew J. Campbell
Jones Day
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215-2673
mawhitt@jonesday.com
ajcampbell@jonesday.com

Samuel C. Randazzo
Lisa G. McAlister
Daniel J. Neilsen
Joseph Clark
McNees, Wallace & Nurick
21 East State Street, 17th Floor
Columbus, OH 43215
sam@mwncmh.com
lmcalister@mwncmh.com
dneilsen@mwncmh.com
jclark@mwncmh.com

Colleen L. Mooney
David Rinebolt
Ohio Partners for Affordable Energy
231 W. Lima Street
Findlay, OH 45389-1793
Cmooney2@columbus.rr.com
drinebolt@aol.com

Jeffrey L. Small
Jacqueline Roberts
Richard C. Reese
Gregory J. Poulos
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
small@occ.state.oh.us
reese@occ.state.oh.us
poulos@occ.state.oh.us
roberts@occ.state.oh.us

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

Barth Royer
Bell & Royer
33 South Grant Avenue
Columbus, OH 43215-3927
barthroyer@aol.com

Gary A. Jeffries
Senior Counsel
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburgh, PA 15212-5817
gary.a.jeffries@dom.com

David L. Fein
Cynthia A. Fonner
Constellation Energy Group, Inc.
550 West Washington Blvd., Suite 300
Chicago, IL 60661
David.fein@constellation.com
cynthia.a.fonner@constellation.com

John W. Bentine
Mark S. Yurick
Chester, Wilcox & Saxbe
65 E. State Street, Suite 1000
Columbus, OH 43215
myurick@cwslaw.com
jbentine@swslaw.com

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008
mhpetricoff@vssp.com
smhoward@vssp.com

Henry Eckhart
50 West Broad Street, Suite 2117
Columbus, OH 43215-3301
henryeckhart@aol.com

Craig G. Goodman
President
National Energy Marketers Association
3333 K Street, N.W., Suite 110
Washington, D.C. 20007
cgoodman@energymarketers.com

Langdon D. Bell
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927
lbell@aol.com

Nolan Moser
Trent A. Dougherty
Air & Energy Program Manager
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
nolan@theoec.org
trent@theoec.org

Garrett A. Stone
Michael K. Lavanga
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, N.W.
8th Floor West Tower
Washington, D.C. 20007
gas@bbrslaw.com
mkl@bbrslaw.com

Leslie A. Kovacik
Senior Attorney, City of Toledo
420 Madison Ave., Suite 100
Toledo, Ohio 43604-1219
lesHe.kovacik@toledo.oh.gov

Sheilah M. McAdams
Marsh & McAdams
204 West Wayne Street
Maumee, Ohio 43537
sheilahmca@aol.com

Paul S. Goldberg, Law Director
Phillip D. Wurster, Asst. Law Dir.
5330 Seaman Road
Oregon, Ohio 43616
pgoldberg@ci.oregon.oh.us

Paul Skaff, Assistant Village Solicitor
Leatherman, Witzler
353 Elm Street
Perrysburg, Ohio 43551
paulskaff@justice.com

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

Brian J. Ballenger
Ballenger & Moore
3401 Woodville Rd., Suite C
Toledo, Ohio 43619
ballengerlawbjb@sbcglobal.net

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

Thomas R. Hays,
3315 Centennial Road, Suite A-2
Sylvania, Ohio 43560
hayslaw@buckeye-express.com

Joseph P. Meissner
The Legal Aid Society of Cleveland
1223 West 6th Street
Cleveland, OH 44113
jpmeissn@lasclev.org

Sean W. Vollman
David A. Muntean
Assistant Law Directors
161 S. High Street, Suite 202
Akron, OH 44308
vollmse@ci.akron.oh.us
menteda@ci.akron.oh.us

Larry Gearhardt
Chief Legal Counsel
Ohio Farm Bureau Federation
280 North High Street
PO Box 182383
Columbus, OH 43218-2383
lgearhardt@ofbf.org

Damon E. Xenopoulos
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Tomas Jefferson Street, N.W.,
8th Floor, West Tower
Washington, D.C. 20007
dex@bbrslaw.com

Steve Millard
President and Executive Director
The Council on Small Enterprises
The Higbee Building
100 Public Square, Suite 201
Cleveland, OH 44113
smillar@cose.org

Craig I. Smith
Attorney at Law
2824 Coventry Road
Cleveland, OH 44120
wis29@yahoo.com

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

Douglas M. Mancino
Gregory K. Lawrence
Grace C. Wung
McDermott Will & Emery LLP
2049 Century Park East, Suite 300
Los Angeles, CA 90067-3218
dmancino@mwe.com
glawrence@mwe.com
gwung@mwe.com

Eric D. Weldele
Nicholas C. York
Tucker Ellis & West LLP
1225 Huntington Center
41 South High Street
Columbus, OH 43215
eric.weldele@tuckerellis.com
Nicholas.york@tuckerellis.com