

**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

REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

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**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

REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

Initial Briefs were filed in this proceeding on October 6, 2008 by Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("TE") (collectively, "Companies" or "FirstEnergy"), Industrial Energy Users-Ohio ("IEU-Ohio"), and Staff of the Public Utilities Commission of Ohio ("Commission"), among others. There does not appear to be any disagreement on the appropriate standard of review set forth in Section 4928.142, Revised Code. However, only FirstEnergy argues that it has met its burden of proof with respect to the requirements in that section. As noted in its Initial Brief, should the Commission find that FirstEnergy has not met its burden of proof, it must instruct FirstEnergy on how to remedy any deficiencies. Section 4928.142(B)(3), Revised Code. For the reasons set forth below, IEU-Ohio urges the Commission to find FirstEnergy's market rate offer ("MRO") Application failed to meet the requirements of Section 4928.142, Revised

Code, and instruct the Companies to refile the Application to remedy the deficiencies as identified in the Initial Brief and herein.

I. CLEAR PRODUCT DEFINITION

Section 4928.142(A)(1)(b), Revised Code, requires that the competitive bidding process ("CBP") provides for clear product definition. FirstEnergy describes the three "products" that will be bid upon as "an hourly load-following full requirements tranche of SSO Load for the aggregate system load of the Companies." Initial Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 13 (hereinafter "FirstEnergy Initial Brief"). IEU-Ohio argues that the slice-of-system tranches, as they are presently designed, are not clearly defined products and, thus, the MRO Application fails to meet this threshold requirement. See IEU-Ohio Initial Brief at 12. In response to IEU-Ohio's argument, FirstEnergy asserts that the standard service offer ("SSO") supplier responsibility share is a clearly defined fixed percentage of the Companies' SSO load. FirstEnergy also attempts to rebut IEU-Ohio's argument by stating: 1) Constellation witness Mr. Fein testified at the hearing that without load forecasting information from FirstEnergy, Constellation would still have an understating of what it is supposed to supply;¹ 2) IEU-Ohio witness Mr. Murray acknowledged at hearing that load-following requirements would not differ under "IEU's or the Companies' procurement proposal";² 3) Mr. Murray understood all of the concepts and terms describing FirstEnergy's description of its proposed product and tranche definitions;³ and, 4) if the fact that Midwest Independent Transmission System

¹ *Id.* at 13.

² FirstEnergy Brief at 14.

³ *Id.*

Operator ("MISO") or the Federal Energy Regulatory Commission ("FERC") rules may change in the future makes it "difficult to conceive how any product definition could pass statutory muster."⁴ Few of these assertions address IEU-Ohio's argument at all, let alone sufficiently rebut it.

First, it is important to note, as the record makes clear, that IEU-Ohio did not make any procurement proposals.⁵ Second, the fact that Mr. Murray understands how FirstEnergy's Application describes the slice-of-system tranches may indicate that FirstEnergy has clearly set forth the meaning of these words, but is irrelevant to IEU-Ohio's argument that the product itself is not clearly defined. The product upon which potential suppliers will bid must have some reasonable and fixed limits in order to be a clearly defined product. As Mr. Murray's testimony describes, the product proposed by FirstEnergy does not have such limits as the requirements are either not defined (such as the actual amount of load to be served), or subject to change. As a result, when prospective bidders are requested to bid on a full requirements tranche, bidders are effectively asked by FirstEnergy's proposal to assume an obligation to do whatever it takes to supply FirstEnergy's SSO load, and internalize all operational and performance risk. This lack of product definition fails to meet the clear intention of Section 4928.142(A)(1)(b), Revised Code.

FirstEnergy's second assertion, that Mr. Murray acknowledged that load-following requirements would not differ under "IEU's or the Companies' procurement proposal" is factually incorrect and does not address IEU-Ohio's argument regarding

⁴ *Id.*

⁵ Tr. Vol. III at 58. Mr. Murray states, "again, in the example I gave in here was as a – as an example, I didn't propose this as an alternative to the companies' application."

product definition. Mr. Murray's testimony described an alternative CBP approach that includes fixed block tranches in addition to load-following tranches as an example to demonstrate that a third party could have designed the CBP in such a way that not every tranche required load-following. In the discussion referenced by FirstEnergy in its brief, Mr. Murray simply acknowledged that whether the product is structured as either 100% load-following or a portion of load-following and fixed block requirements, the overall volumetric requirements would not change.⁶ However, the fact that the overall volumetric requirements may be identical under two alternative scenarios does not demonstrate that the volumetric requirements have been clearly defined. In fact, as discussed *infra*, Constellation witness Mr. Fein testified that in the absence of specific volumetric requirements, prospective suppliers would be incapable of formulating a bid. FirstEnergy's argument is irrelevant and should be disregarded.

FirstEnergy's assertion that "the only complaint of uncertainty Mr. Murray could identify with respect to the CBP concerned potential changes to MISO or FERC rules" which would render every product definition unlawful, is similarly factually and otherwise incorrect. First, as discussed above and as the record demonstrates, IEU-Ohio and Mr. Murray identified multiple concerns that cause the slice-of-system tranches, as they are presently designed, to be not clearly defined products. More importantly, IEU-Ohio described, and FirstEnergy acknowledged, several of the multitude of decisions regarding MISO's markets and changes to both resource adequacy requirements and potentially ancillary services that are currently unresolved and underway. These do not represent some hypothetical future potential for changes that may affect the product as defined by FirstEnergy. They present uncertain risks to suppliers of full requirements

⁶ Tr. Vol. III at 59.

service today. Thus, when prospective bidders are requested to bid on a full requirements tranche, subject to whatever requirements MISO has or may put in place, it is not a clearly defined product. While IEU-Ohio has acknowledged that some of these problems are beyond FirstEnergy's control, and may exist irrespective of whether an MRO or electric security plan ("ESP") is under consideration, that does not mean they can be ignored. The statute requires that a clearly defined product exist as a precondition as to whether a competitive bid can proceed. This requirement exists irrespective of whether the circumstances limiting the ability to create a clearly defined product are within the direct control of an electric distribution utility ("EDU").

Finally, FirstEnergy asserts that suppliers have enough information to understand what they are bidding on and cites a response by Constellation witness Mr. Fein that without load forecasting information from FirstEnergy, Constellation would still have an understanding of what it is supposed to supply. This is simply an incomplete and misleading use of the record. The fact is that without either a FirstEnergy load forecast or other information that may become available on a website, there is not enough information for suppliers to formulate a bid, which is what Mr. Fein stated later in his cross-examination.⁷ Bidders need some information and none is currently available as FirstEnergy does not ever intend to provide load forecast information and, as noted by Staff, the website with historical usage data will not be available until at least the end of

⁷ In fact, Mr. Fein described the Constellation employees formulating the bids as "data geeks" who want as "much data and information as possible to help formulate their bids, so all of that sort of information in our view is helpful and necessary to doing the best job you can because you want to get the business, and you want to submit an appropriate bid." Tr. Vol. IV at 52. (IEU-Ohio believes that the transcript erroneously quoted Mr. Fein as saying "our folks want, you know, their data gates" when he actually said, "they're data geeks.")

October.⁸ Thus, FirstEnergy is not currently providing information necessary for bidders to formulate a bid. While this deficiency may be cured, at the present time FirstEnergy has not satisfied the statutory criteria necessary to allow a competitive bid to proceed at this time.

II. MARKET MONITOR

One of the threshold requirements that FirstEnergy must demonstrate is that the regional transmission organization ("RTO") to which it belongs has a market monitor function and the ability to take actions to identify and mitigate market power or the EDU's market conduct.⁹ FirstEnergy argues that because FERC granted MISO RTO status and found that Module D of MISO's tariff complied with its policy statement on market monitoring units that MISO's market monitor has the ability to take actions to identify and mitigate market power.¹⁰ Further, FirstEnergy takes the position that the General Assembly could not and did not authorize the Commission to do what is recommended by IEU-Ohio, which is to make an independent assessment of whether MISO's market monitoring actually mitigates market power and to not rely on FERC's determination.¹¹

IEU-Ohio has already addressed FirstEnergy's first claim and will not repeat the argument here. FirstEnergy's assertion that FERC has exclusive jurisdiction over wholesale markets and, therefore, the Commission may not undertake any activities associated with wholesale market oversight and the determination of whether the prices

⁸ Post Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio at 6 (citing Company Exhibit 3 at 8).

⁹ See Section 4928.142(B), Revised Code.

¹⁰ FirstEnergy Brief at 20-21.

¹¹ *Id.* at 21. See also, IEU-Ohio Brief at 7-11.

produced by such market are just and reasonable or may have been influenced by market power misses the point. An examination of market power and market power mitigation by the Commission is not for the purposes of usurping matters subject to FERC jurisdiction. The Commission is required to consider market power as a precondition for determining whether an EDU can proceed with the CBP, which is a matter solely within the jurisdiction of the Commission.¹² The issue is not whether the Commission can direct MISO, its independent market monitor or some other entity to undertake additional measures to remedy what the Commission may identify as shortcomings in monitoring and mitigating market power. The real issue is whether the Commission may make a determination that a CBP cannot proceed because the requirements of Section 4928.142(B)(2), Revised Code, have not been met.

IEU-Ohio demonstrated that MISO's market monitor does not have the ability to take actions to mitigate market power or the EDU's market conduct despite FERC's findings, which do not rely on traditional definitions of market power to begin with. IEU-Ohio called upon the Commission to make its own determination, based upon its judgment, as to whether MISO's market monitoring actually mitigates market power, for the purpose of determining whether FirstEnergy can proceed with its CBP. This is a matter entirely within the Commission's jurisdiction, and not within FERC's.

III. PUBLISHED SOURCE OF INFORMATION

Section 4928.142(B)(3), Revised Code, requires FirstEnergy to demonstrate that a published source of information is available publicly or through subscription that identifies pricing information for traded electricity on- and off-peak energy products that

¹² Section 4928.142(B), Revised Code.

are contracts for delivery beginning at least two years from the date of the publication and is updated on a regular basis. FirstEnergy has failed to meet its burden of proof to meet this threshold requirement.

FirstEnergy argues that the record demonstrates that pricing information is available.¹³ As Mr. Murray testifies, although a number of sources publish pricing information, many of these sources appear to be broker quotes, rather than transactions reflecting actual contracts as required under Section 4928.142(B)(3), Revised Code. FirstEnergy counters that the record demonstrates that the Intercontinental Exchange ("ICE") publishes actual contracts.¹⁴ In fact, during his cross-examination, FirstEnergy witness Mr. Warvell stated that ICE was the only published information source that publishes actual contracts.¹⁵ Mr. Warvell stated that he believed the ICE data goes out about four years.¹⁶ The statement that ICE publishes contract data does not establish that such data reflects two years of forwarding trading. Mr. Warvell could not speak to the volume of trades reported by ICE.¹⁷ That is because the evidence in this case demonstrates that there are no reported trades for two years forward in the Cinergy Hub or other MISO hubs.¹⁸ If such ICE data did exist, FirstEnergy clearly had an opportunity to present evidence demonstrating as much. It did not, because it could not. The data published by ICE, the only website that lists contracts, does not reflect "traded electricity on- and off-peak energy products that are contracts for delivery beginning at least two

¹³ FirstEnergy Brief at 23.

¹⁴ FirstEnergy Brief at 23 (citing Tr. Vol. I at 89).

¹⁵ Tr. Vol. I at 89.

¹⁶ *Id.* at 68.

¹⁷ *Id.*

¹⁸ IEU-Ohio Exhibit 1 at 15.

years from the date of publication and updated on a regular basis.” Again, however, IEU-Ohio recognizes that this is a deficiency that FirstEnergy could remedy.

IV. DELTA REVENUE RECOVERY

The City of Cleveland, the Commission Staff and the Ohio Energy Group (“OEG”) argue that FirstEnergy should not be permitted to recover 100% of the delta revenue without adequate Commission review and approval.¹⁹ IEU-Ohio agrees that the Commission’s authority includes making the policy, legal, and factual call about whether reasonable arrangements are appropriate.²⁰ It does not appear that FirstEnergy is requesting otherwise. It is IEU-Ohio’s understanding that the delta revenue for which FirstEnergy is seeking recovery in this case is associated with reasonable arrangements that have already been approved by the Commission, or may be approved in the future.

Several parties also argue that delta revenue recovery should be bypassable.²¹ Those parties that argue that delta revenue recovery should be bypassable are making the implicit assumption that all delta revenue is or will be generation related. There has been no demonstration that this is true. Thus, there is a fundamental flaw in the premise assumed by these parties. Further, it is important to recognize that one of the objectives of such reasonable arrangements is to promote economic development and energy efficiency that ultimately benefits the utilities and all customers through job

¹⁹ City of Cleveland Brief at 5-6; OEG Brief at 15; Post Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio at 8.

²⁰ IEU-Ohio would note that in the case of the reasonable arrangements that have been identified in this proceeding, which are legacy agreements between Cleveland Electric Illuminating Company and some of its customers, the Commission has already made this determination.

²¹ Initial Brief of Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. at 7-8; Initial Brief of Dominion Retail, Inc. at 3; Initial Brief of Nucor Steel Marion, Inc. at 27.

growth and retention. Thus, there are policy considerations that may warrant allowing delta revenue recovery from all customers.

Finally, several parties argue that FirstEnergy should not be permitted to recover all or some portion of the delta revenue that results from reasonable arrangements.²² These recommendations are contrary to law as a result of SB 221. Section 4905.31(E), Revised Code, states that in the case of a schedule or reasonable arrangement:

such other financial device may include a device to recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program; any development and implementation of peak demand reduction and energy efficiency programs under section 4928.66 of the Revised Code; any acquisition and deployment of advanced metering, including the costs of any meters prematurely retired as a result of the advanced metering implementation; and compliance with any government mandate.

This section applies regardless of whether the SSO is priced through an ESP or an MRO. Thus, if there is delta revenue to be recovered as the result of a Commission-approved arrangement, the Commission cannot limit or foreclose the EDU's ability to recover the delta revenue.

²² Initial Post-Hearing Brief by the Office of the Ohio Consumers' Counsel, Citizen Power, Lucas County, the City of Toledo, and the Northwest Ohio Aggregation Coalition at 9; Post-Hearing Brief of Ohio Partners for Affordable Energy at 7-8; Initial Brief of the Kroger Co. at 8-9.

V. CONCLUSION

The Commission cannot lawfully approve an MRO application without finding that it meets all of the threshold requirements in SB 221. FirstEnergy's Application fails to meet those requirements and suffers from additional deficiencies as well. Accordingly, the Commission should reject the Application as deficient and instruct FirstEnergy on how to cure the deficiencies as identified in IEU-Ohio's Initial Brief.

Respectfully submitted,



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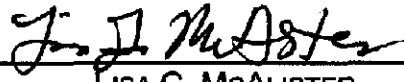
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Brief of Industrial Energy Users-Ohio* was served upon the following parties of record this 14th day of October 2008, *via* electronic transmission, hand-delivery or first class mail, postage prepaid.



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