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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 Rider FUEL and Related Accounting Authority.	)))))	Case No. 09-21-EL-ATA Case No. 09-22-EL-AEM Case No. 09-23-EL-AAM

APPLICATION FOR REHEARING
BY
THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

January 26, 2009

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The undersigned members of the Ohio Consumer and Environmental Advocates ("OCEA"), pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A), apply for rehearing of the Finding and Order ("Rider Order") issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") on January 14, 2009 in the above-captioned case. The Order addressed an application ("Application") filed by Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy" or "Companies") on January 7, 2009 for the approval of a proposed Rider FUEL, and directed FirstEnergy to file tariffs at higher rates than were previously authorized by the Commission in Case Nos. 08-935-EL-SSO, et al.

The approval of the increased rates in the Rider Order was unjust, unreasonable, and unlawful, and this Commission erred in the following particulars:

A. The Commission Erred by Granting Rate Increases Based Upon Alleged Purchased Power Expenses that are Not Provided for in the Default Provisions for Pricing Generation Service.

B. The Commission is a Creature of Statute, and Erred When it Set Generation Rates Based Upon a Constitutional Interpretation Instead of Upon the Default Provisions for Pricing Generation Service that is Stated in R.C. Chapter 4928.

C. The Commission Erred When it Approved Deferrals, Thereby Providing FirstEnergy with Benefits Above and Beyond the Compensation Required to Meet FirstEnergy's Alleged Requirements for Obtaining Wholesale Generation Service.

D. The Commission Erred When it Initiated a Proceeding to Inquire Into the Prudence of FirstEnergy's Wholesale Purchases of Power Without Explicitly Making Additional Revenues Obtained by FirstEnergy "Subject to Refund."

E. The Commission Erred When it Failed to Order FirstEnergy to File a New Application to Provide Standard Service Offers.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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TABLE OF CONTENTS

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On January 9, 2009, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or "Companies") filed an Application for the approval of their proposed Rider FUEL. This case stems from developments in cases that involved standard service offers ("SSOs"), Case No. 08-935-EL-SSO (electric security plan, or "ESP," reviewed in the "*FirstEnergy ESP Case*") and Case No. 08-936-EL-SSO (market rate option, "MRO," reviewed in the "*FirstEnergy MRO Case*") that dealt with the establishment of standard service offers for the Companies' customers. In particular, the Commission issued an order on January 7, 2008 ("Interim Rate Order") that set standard service offers to address the circumstances where FirstEnergy withdrew its application in the FirstEnergy ESP Case.[1] The default provisions for standard service offers provided for under R.C. 4928.143 and R.C. 4928.141 address this factual situation. The Application seeks rate increases above the default standard service offers provided for under R.C. Chapter 4928 and above those stated in the Commission's Interim Rate Order.

[1] The Interim Order in the *FirstEnergy ESP Case* is referred to in the Application in connection with the Companies' filing. Application at 4, ¶3.

On January 13, 2009, OCEA members filed a Motion to Dismiss. The OCEA members also sought, in the alternative, expedited discovery and a hearing under circumstances where the Commission did not dismiss the Application.

On January 14, 2009, the Commission issued the Order to which the instant pleading seeks rehearing. The Order on January 14, 2009 directed FirstEnergy to file tariffs at higher rates than were previously authorized in the *FirstEnergy ESP Case*. The Order does not reveal that OCEA's pleading on January 13, 2009 was considered by the PUCO in reaching its decision.

II. ARGUMENT

A. The Commission Erred by Granting Rate Increases Based Upon Alleged Purchased Power Expenses that are Not Provided for in the Default Provisions for Pricing Generation Service.

The Revised Code provides for the contingencies involved in the event the electric distribution utility withdraws its ESP application, and the Commission's Rider Order misapplies Ohio law. In the event that the Commission modifies the ESP proposal of the utility, as is the case in the above-captioned proceeding, the Revised Code provides for that contingency under R.C. 4928.143(C)(2)(a):

> If the commission modifies and approves an application . . . the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section [4928.143 ESP] or a standard service offer under section 4928.142 [MRO] of the Revised Code.

This is the statutory provision cited by FirstEnergy in its letter docketed on December 22, 2008 that notified the Commission and parties about the Companies' withdrawal of its application.[2]

[2] *In re FirstEnergy ESP Proceeding*, Case No. 08-935-EL-SSO, Letter (December 22, 2008).

The Revised Code also provides, again under R.C. 4928.143(C)(2)(b), for rates in conjunction with FirstEnergy's withdrawal/termination of its ESP application:

> If the utility terminates an application pursuant to (C) (2) (a) of this section . . . the commission shall issue such order as is necessary to continue the provisions, terms, and condition of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.141 of the Revised Code, respectively.

The Companies argued in the *FirstEnergy ESP Case* that the default pricing provisions in R.C. 4928.143 do not apply, and that pricing in early 2009 should continue according to the default pricing stated in R.C. 4928.141.[3] The Companies position in the *FirstEnergy ESP Case* was apparently argued to support the continued charging of transition charges that are not permitted if a "[s]tandard service offer [is set] under section . . . 4928.143 of the Revised Code."[4] FirstEnergy's argument changed in the Application, and now the Companies support the use of R.C. 4928.143 for default pricing because it includes a provision for charging "fuel costs." The Companies argue that "fuel cost adjustments include purchased power costs."[5] However, the Companies do not own generating units, and therefore they do not have fuel costs.[6]

No adjustments for "fuel costs" should be made to the current rates. The Commission appears to have inappropriately adopted FirstEnergy's latest argument that

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[3] *FirstEnergy ESP Case*, FirstEnergy Application for Rehearing at 4-7 (January 9, 2009). R.C. 4928.141 would have been the controlling statute for establishing rates if the Commission had not rendered a decision by the end of December, 2008. The Commission rendered a decision based on the evidence presented after approximately two weeks of hearings. Upon the occurrence of that event, R.C. 4928.143 became the controlling statute.

[4] R.C. 4928.141(A).

[5] Application at 13, ¶21.

[6] See, e.g., Application at 9, ¶13.

"fuel costs" in R.C. 4928.143(C)(2)(b) really means "fuel costs and purchased power costs"[7] based upon law that pre-dates enactment of the above-quoted R.C. 4928.143(C)(2)(b).[8] The Rider Order does not base its statutory analysis on the primary legal authority for such analysis: *R.C. 4928.143 itself* and related provisions regarding SSO setting enacted by S.B. 221.[9]

The key SSO setting provisions within S.B. 221 are located in R.C. 4928.14-4928.145. R.C. 4928.143(B)(2)(a) refers to automatic recovery of the following costs as part of an ESP:[10]

> . . . the *cost of fuel* used to generate the electricity supplied under the offer; the *cost of purchased power* supplied under the offer . . . and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes.

Correspondingly, the Commission's rules require the filing of information regarding "the automatic recovery of fuel, purchased power, and certain other specific costs."[11] R.C. 4928.142(D) regarding MROs refers to changes to a standard service offer for four costs by an electric distribution utility:[12]

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[7] Such a combination of words is not found in S.B. 221.

[8] Order at 5 ("history of considering and reviewing electric fuel components and purchased power costs concurrently"). The PUCO argued that the OCC's appeal of Case Nos. 03-93-EL-ATA, et al., should be dismissed because the "General Assembly has completely restructured this [rate setting] statutory mechanism" with passage of S.B. 221. *Ohio Consumers' Counsel v. Public Util. Comm.*, S.Ct. Case No. 08-367, PUCO Motion to Dismiss at 5 (January 2, 2009). Whether a decision should hinge on S.B. 221's changes to R.C. Chapter 4928 depends upon whether the changes are important to the legal issue.

[9] FirstEnergy, on the other hand, offers repealed provisions from S.B. 3 and rescinded rules in support of its arguments. Application at 14.

[10] Emphasis added.

[11] Ohio Adm. Code 4901:1-35-03(C)(9)(a), approved *In re SSO Rules*, Case No. 08-777-EL-ORD, Order at 3-5 (September 17, 2008). The rules remain pending, on rehearing, at the Commission.

[12] Emphasis added.

> (1) . . . prudently incurred *cost of fuel* used to produce electricity;
> (2) . . . prudently incurred *purchased power costs*;
> (3) . . . prudently incurred costs of satisfying the supply and demand portfolio requirements of this state . . . ;
> (4) . . . costs prudently incurred to comply with environmental laws and regulations.

Fuel and purchased power costs in S.B. 221's SSO provisions are clearly distinct and separate costs.[13] Where R.C. 4928.143(C)(2)(b) provides for fuel cost adjustments, the exclusion of purchased power costs from the adjustments must be interpreted as purposeful. Statutory construction requires the interpretation that the exclusion of purchased power from the default pricing provision in R.C. 4928.143 means that the General Assembly intended this result (i.e. the legal doctrine of *expressio unius est exclusio alterius* applies[14]). The purchased power costs sought by FirstEnergy, and approved in the Rider Order, were unlawful.

Default pricing without the adjustments proposed by the Application is the result reached in the Commission's Interim Rate Order.[15] According to the Commission's earlier interpretation of the default provisions for standard service offers under R.C. 4928.143, the Companies' request for approval of Rider FUEL may not be approved. FirstEnergy's arguments in its Application should have been rejected according to the

[13] Other than references to "fuel cells," S.B. 221 added the word "fuel" to R.C. Chapter 4928 in only one other instance. R.C. 4928.01(A) states that a renewable energy resource includes "fuel derived from solid waste . . . through fractionation, biological decomposition, or other process that does not principally involve combustion . . . ." Again, the reference to "fuel" does not include purchased power.

[14] See, e.g., *Weaver v. Edwin Shaw Hospital*, 104 Ohio St. 3d 390, 2004-Ohio-6549.

[15] Interim Rate Order at 9, ¶(18). OCEA's interpretation of the default pricing provisions recognizes that a "standard service offer under section . . . 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs. . . ." R.C. 4928.141(A). The standard service offer in the instant circumstances is provided for under R.C. 4928.143, in the form of the PUCO's directive regarding default rates as provided in R.C. 4928.143(C)(2)(b). Although this interpretation is different than that stated by the Commission, the results in this particular situation are the same and do not affect the argument in the instant pleading.

rate results in the Commission's Interim Rate Order. On rehearing, the result stated in the Interim Rate Order should be restored and the Application in the above-captioned case should be dismissed.

FirstEnergy was clearly unhappy with Commission orders that would provide fewer revenues than desired by the Companies. The Companies' decision to purchase power from their affiliate in a bidding process that has not been approved by the Commission is a blatant attempt by FirstEnergy to evade the Commission's regulation in order to collect more revenues from captive customers than the Commission determined was reasonable.

B. The Commission is a Creature of Statute, and Erred When it Set Generation Rates Based Upon a Constitutional Interpretation Instead of Upon the Default Provisions for Pricing Generation Service that is Stated in R.C. Chapter 4928.

The Rider Order's increase in rates above those previously approved in the Interim Rate Order appears driven by the PUCO's concern to "avoid a confiscatory result" that FirstEnergy might argue as part of a constitutional claim.[16] The Commission is a creature of statute, and is required to follow Ohio law.[17] The Commission has the duty to set default rates according to the default provisions contained under Ohio law. As stated above, the provisions of R.C. Chapter 4928 provide for default pricing under the current factual circumstances.

[16] FirstEnergy's claim is somewhat different. FirstEnergy relies upon the "filed rate doctrine" for its argument that the Commission is compelled to pass along the cost of the Companies wholesale power costs to avoid complications that involve violation of the U.S. Constitution. Application at 15-16, ¶26.

[17] *Time Warner AxS v. Public Util. Comm.* (1996), 75 Ohio St.3d. 229, 234; *Canton Storage & Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St. 3d 1, 4.

Ohio's statutes, which the PUCO is required to follow, are presumed to be constitutional.[18] In contrast, the Rider Order appears to presume that the default rate provisions contained in R.C. 4928.143 (and upon which the PUCO relied in the Interim Rate Order) are unconstitutional. Administrative bodies in Ohio such as the PUCO do not have the authority to violate Ohio law based upon constitutional interpretations.[19] The Commission itself has recognized this statement of Ohio law in its decisions.[20] The reliance placed by the PUCO on *Monongahela Power Co. v. Schriber*, 322 F. Supp.2d 902[21] is inopposite because the Commission undertook its review -- after "*finding that it lacked jurisdiction to resolve Mon Power's constitutional claims*"[22] -- at the direction of a federal court. The Commission should follow Ohio law regarding rates deemed therein to reasonable compensate the Companies for their expenses.[23]

An important feature of the present circumstances is that FirstEnergy *chose* to withdraw its ESP Application and place itself under the default provisions of Ohio law. This choice was presumably made with consideration for the default provisions contained

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[18] *State v. Cook*, 83 Ohio St.3d 404, 409, 1998 Ohio 291 ("strong presumption of constitutionality").

[19] See, e.g., *Derakhshan v. State Med. Bd.*, 2007 Ohio 5802 at ¶26 (Ohio App. 10th Distr.) ("administrative bodies have no authority to interpret the Constitution"); also *Grant v. Ohio Dept. of Liquor Control* (1993), 86 Ohio App.3d 76, 83 ("constitutional issues cannot be determined administratively"); also *Cleveland Gear Co. v. Limbach*, 35 Ohio St. 3d 229,231 ("an administrative agency, a creature of statute, . . . is without jurisdiction to determine the constitutional validity of a statute").

[20] See, e.g., *In re Panhandle Eastern Pipe Line Company v. Public Util. Comm.*, PUCO Order (October 19, 1997), reviewed in *Panhandle Eastern Pipeline Co. v. Public Util. Comm.*, 56 Ohio St. 2d 334, 336 ("commission also indicated that because it was an administrative body with its powers specifically delineated by statute, it had no authority to declare the application of the statutory scheme to be unconstitutional").

[21] Rider Order at 6, ¶(9).

[22] *Monongahela Power Co. v. Schriber*, 322 F. Supp.2d 902, 906 (emphasis added).

[23] The Companies noticeably ignored purchase options that parties to the FirstEnergy ESP Proceeding deemed lower cost than the results from the Companies' RFP process. See, e.g., *In re FirstEnergy ESP Proceeding*, OCC Brief Regarding a Short-Term ESP at 8 (October 31, 2008).

under Ohio law. Even the tariffs submitted by the Companies on December 22, 2008 in the ESP Case (i.e. ordered modified on January 7, 2009) did not include the rate adjustments now claimed by FirstEnergy in its Application. FirstEnergy has made no claim that the Commission's order modifying the Companies' ESP Application was unlawful in any respect -- including any confiscatory result -- and the resulting default rates were chosen by FirstEnergy over those originally approved by the Commission. The Commission should reject FirstEnergy's newest arguments which contradict its earlier submissions in the ESP Case.

C. The Commission Erred When it Approved Deferrals, Thereby Providing FirstEnergy with Benefits Above and Beyond the Compensation Required to Meet FirstEnergy's Alleged Requirements for Obtaining Wholesale Generation Service.

The Rider Order unlawfully provides benefits to FirstEnergy in excess of those required to compensate the Companies' wholesale suppliers as that compensation is stated in the Application. For CEI, the Rider Order states:[24]

> With regard to CEI, we conclude that Rider FUEL should be established at an amount equal to the difference in the costs incurred by the Companies to purchase power for customers receiving generation service pursuant to the Companies' power supply agreement and the unbundled generation revenues for CEI's customer classes as set out in the Companies' current rate plan. *Additionally, we find that CEI should be granted the appropriate accounting authority to defer, with carrying costs, any amount for such purchased power that exceeds the authorized amount in Rider FUEL for future recovery* plus the current unbundled generation revenues for CEI's customer classes as set out in the Companies' current rate plan.

Thus, the Commission authorized deferrals for CEI in addition to increasing customer rates sufficiently to pay FirstEnergy's claimed cost of its purchased power.

[24] Rider Order at 6-7, ¶(11) (emphasis added).

Neither the Commission's most recent (and errant) statutory interpretation nor its rationale for higher rates based upon an (inappropriate) interpretation of the U.S. Constitution justifies the award of the additional deferrals. The Commission is obligated to apply the default pricing provided in R.C. 4928.143. The additional deferrals are not provided for by statute, and are not required even by the Commission's interpretation of its obligations to avoid a confiscatory result in its default pricing decision.[25]

The Commission's Rider Order deflects from the immediacy of the unlawful award of additional deferrals by stating that "deferrals do not constitute ratemaking."[26] Deferrals that violate Ohio law cannot lawfully be collected in a future proceeding. The Rider Order does not provide for further deliberation on the issue presented by the additional CEI deferrals in this docket. Therefore, this issue should be resolved by the elimination of the unlawful deferrals on rehearing.[27] Deferring the fuel costs for later recovery from CEI customers will only exacerbate an already burdensome situation faced by FirstEnergy's customers.

D. The Commission Erred When it Initiated a Proceeding to Inquire Into the Prudence of FirstEnergy's Wholesale Purchases of Power Without Explicitly Making Additional Revenues Obtained by FirstEnergy "Subject to Refund."

The Rider Order states that the Commission will examine the Companies' purchased power costs in a proceeding, but fails to explicitly state that the increases in

[25] Nothing in this Application for Rehearing should be interpreted to argue for rates higher than those stated in the Rider Order. Rates should be set by statute. Arguing in the alternative, the additional deferrals for CEI should be eliminated. Neither result would increase rates for CEI's customers.

[26] Rider Order at 7, ¶(12).

[27] The Ohio Supreme Court has held that orders allowing accounting procedure changes can harm consumers and are final appealable orders. *See Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶24-25 (2006).

rates above those discussed in the Interim Rate Order are "subject to refund." The availability of refunds in the event the Commission's proceeding determines lack of prudence on the part of the Companies appears implicit in the Interim Rate Order. This matter should be clearly stated, however, since FirstEnergy can be expected to argue that there is no mechanism that will permit the retroactive refund of overpayments by customers where customer payments are not made subject to refund.[28] The practice of collecting rates subject to refund is not foreign to the Commission's experience.[29] Therefore, the Rider Order should be clarified by the PUCO such that the possibility of refunds is explicit.

The Rider Order states that the Commission "must examine the Companies' proposal to recover purchased power costs."[30] Also according to the Rider Order, the Commission will "conduct a prudency review of the costs incurred in purchasing power . . . pursuant to the Companies' power supply agreement" and will "consider whether the recovery of such costs is necessary to avoid a confiscatory result."[31] The Rider Order leaves implicit that the "prudency review" will result in refunds to customers in the event that the Commission determines that the Companies' purchased power expenses were imprudently incurred. An explicit statement could avoid later argument, under the

[28] See, e.g., *Keco Indus. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957), par. 2 of the syllabus. FirstEnergy might also engage in dilatory tactics if it perceives that refunds are not available. The OCC has already encountered difficulty in gaining FirstEnergy's approval of a protective agreement in the instant proceeding under the same terms that were agreed to in the FirstEnergy MRO and ESP Cases.

[29] See, e.g., *In re Zimmer Power Plant*, Case No. 83-1058-EL-AIR, Entry at 1 (November 17, 1982); also *In re Rate Case for the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry at 2 (June 7, 1978).

[30] Rider Order at 6, ¶(9).

[31] Id. at 7, ¶(13).

circumstances that the Commission finds imprudently incurred costs, that the PUCO is merely engaged in an evaluation for some use other than providing refunds to customers.

The Companies seek higher prices as the result of conducting a wholesale power procurement process that they pursued outside the Commission's scrutiny. The Companies' affiliate, FirstEnergy Solutions ("FES"), is the announced provider of seventy-five percent of the wholesale purchases under the Companies' procurement process.[32] Thus, the Companies have agreed with their affiliate to obtain wholesale power at an increased price. The resultant increase in rates ordered in the Rider Order above those stated in the Interim Rate Order should be "subject to refund" in the event that the Commission does not grant this Application for Rehearing by OCEA members with respect to eliminating the fuel charges. On rehearing, the Commission should make this matter explicit.

E. The Commission Erred When it Failed to Order FirstEnergy to File a New Application to Provide Standard Service Offers.

The Rider Order is silent on the subject of the means by which SSOs for FirstEnergy's customers will be set on a basis more permanent than the end of March 2009. The Commission should have addressed the Companies' failure to meet its obligation to apply for approval of their standard service offer. R.C. Chapter 4928 provides:[33]

> Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all

[32] United State Securities and Exchange Commission, SEC File Nos. 333-21011, 333-145140-01, 1-2578, 1-2323, and 1-3583, combined Form 8-K filing by FirstEnergy Corp., FES, and the Companies at 2 (January 2, 2009) ("FirstEnergy Solutions Corp. (FES), a wholly owned subsidiary of FirstEnergy and an affiliate of the Ohio Companies, was the successful bidder for 75 of the available tranches up for bid. Each tranche equals approximately 1% of the total load of the Ohio Companies.").
[33] R.C. 4928.141(A) (emphasis added).

> competitive retail electric service necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility *shall apply to the public utilities commission to establish the standard service offer* in accordance with section 4928.142 or 4928.143 of the Revised Code . . . .

FirstEnergy has *failed to apply to the PUCO* to gain approval for its SSO.

The Companies' MRO proposal, pursuant to R.C. 4928.142, was rejected by the Commission.[34] The Companies withdrew their ESP application.[35] The Companies, therefore, have no application before the PUCO to provide their SSOs even though they are not providing service pursuant to an approved SSO application. The Commission's Rider Order should have ordered the Companies to submit a SSO application for review by the Commission to prevent FirstEnergy from continuing operations outside full regulatory review.

The Commission states in its Rider Order that FirstEnergy's Application was "consider[ed] . . . immediately" because "it is evident that the request was not filed . . . as a substitute for permanent rate relief."[36] The Rider Order approved increased rates and additional deferrals in the absence of any existing process that seeks before-the-fact approval by the Commission regarding the means FirstEnergy uses to purchase wholesale power to provide generation service to customers. FirstEnergy should submit a SSO application, having due regard for the Commission's decisions in the fully litigated MRO and ESP cases regarding deficiencies in the Companies' previous SSO applications. In the absence of a SSO application by FirstEnergy, it is not evident that FirstEnergy intends

[34] *FirstEnergy MRO Case*, Order (November 25, 2008).

[35] *FirstEnergy ESP Case*, FirstEnergy Letter at 1 (December 22, 2008).

[36] Rider Order at 4, ¶(6).

to conduct itself within the bounds of R.C. Chapter 4928 in the near or distant future. The Commission should have ordered FirstEnergy to submit a SSO application for consideration by interested stakeholders as well as review and decision by the Commission.

On rehearing, it is imperative that the Commission order FirstEnergy to file for approval of its SSOs (i.e. either an ESP or a MRO proposal, or both) so that the current period of rate uncertainty -- which is solely FirstEnergy's creation -- ends.

III. CONCLUSION

The Order fails to follow the provisions contained in R.C. Chapter 4928 for the determination of standard service offers. The default provisions for standard service offers are provided by R.C. Chapter 4928 under circumstances where the Commission authorized a rate plan that extends beyond December 31, 2008 but the electric utility withdraws its electric security plan application under R.C. 4928.143(C)(2)(a). This circumstance currently applies for the determination of standard service offers for customers of the Companies. The Application sought rate increases and other benefits above those default standard service offers, and the PUCO should not have approved such benefits.

The Commission's consideration of the Application included a prudence review, and promised a procedural schedule for additional consideration of the Application. The Rider Order should have explicitly made the revenues that result from increases in rates above those approved by the Commission in its Interim Rate Order "subject to refund." The Rider Order should also have instructed FirstEnergy, according to Ohio law, to submit another application for approval of the Companies' standard service offers. The Companies have neither approved

rates pursuant to a MRO or ESP application nor an application before the Commission to set such rates subject to the PUCO's regulatory process. FirstEnergy's failures in this regard should be corrected, and the Rider Order should have instructed the Companies to comply with Ohio law.

On rehearing, the Commission should correct its errors in accordance with the arguments set forth above.

Respectfully submitted,

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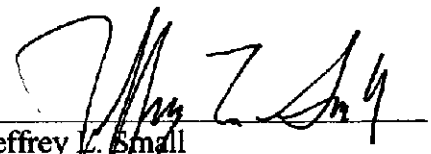
CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Application for Rehearing* was served on the persons stated below, via First Class U.S. Mail, postage prepaid (also electronically), this 26th day of January, 2009.



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