

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Protocols for the)
Measurement and Verification of Energy) Case No. 09-512-GE-UNC
Efficiency and Peak-Demand Reduction)
Measures.)

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**MEMORANDUM CONTRA APPLICATION FOR REHEARING OF THE
FIRSTENERGY COMPANIES
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION AND STATEMENT OF THE CASE

On October 15, 2009, the Public Utilities Commission of Ohio ("Commission") issued a Finding and Order ("Order") in this case dealing with the development and application of a technical reference manual for energy efficiency and peak demand reduction calculations. Applications for rehearing were filed by the FirstEnergy electric distribution utilities on November 13, 2009. Applications for rehearing were filed by the Office of the Ohio Consumers' Counsel ("OCC") and by the Industrial Energy Users – Ohio on November 16, 2009. All three applications were granted for the purpose of providing the Commission additional time to consider them.¹ All three applications were denied by Commission Entry dated June 16, 2010.²

The FirstEnergy electric distribution utilities (collectively, "FirstEnergy") filed an additional application for rehearing on July 19, 2010 ("July Pleading"). FirstEnergy repeats earlier arguments that would deny customers the benefit of *real* energy efficiency

¹ Entry (December 11, 2009).

² Entry on Rehearing at 7 (June 16, 2010).

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and peak demand reductions that are required by changes in R.C. Chapter 4928 as the result of the enactment of Sub. S.B. 221. The July Pleading states that FirstEnergy seeks rehearing regarding the Commission's June 16, 2010 Entry. The arguments, however, relate to the Commission's October 15, 2009 Order.

II. ARGUMENT

The arguments contained in FirstEnergy's July Pleading raise matters that the Commission has previously addressed, and FirstEnergy's repetitive arguments are not permitted by Ohio law. The July Pleading states that it is filed pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35.³ Neither permits FirstEnergy's July Pleading. R.C. 4903.10 and Ohio Adm. Code 4901-1-35 provide that applications for rehearing must be submitted within thirty days of the Commission order that is the subject of the applications.⁴ However, FirstEnergy's July Pleading contains an assignment of error that relates to the Order issued on October 15, 2009 (and which was the subject of the OCC's application for rehearing filed in November 2009). Also, FirstEnergy raises, as part of its out-of-time application, an argument based upon the U.S. Constitution that the Commission may not hear.

FirstEnergy argues that it has made its "argu[ment] in several other dockets, which are incorporated . . . by reference."⁵ FirstEnergy's arguments relate to the

³ July Pleading at 1 (July 19, 2010).

⁴ Extension beyond thirty days, not applicable to FirstEnergy's July Pleading, is possible if the due date falls on a day when the Commission's offices are not open.

⁵ July Pleading at 5 (July 19, 2010). FirstEnergy cites its arguments in the Commission's rulemaking, Case No. 08-888-EL-ORD. *Id.* The arguments have already been heard.

“baseline for calculating savings toward statutory benchmarks.”⁶ Those benchmarks were set by the October 15, 2009 Order at “the highest of state or federal standards, or current market practices.”⁷ The Commission’s finding regarding such benchmarks in its October 15, 2009 Order was the subject of the OCC’s timely-filed Application for Rehearing related to that Order.⁸ FirstEnergy’s July Pleading repeats its previous argument concerning R.C. 4928.66, but does so in an untimely attack upon the Order. FirstEnergy’s July Pleading is repetitive and untimely (an attack on a Commission order that is nine months old), in contravention of R.C. 4903.10.

FirstEnergy devotes most of its most recent pleading to arguments based upon the U.S. Constitution.⁹ The Commission is not a court, and it is well settled that the Commission (an administrative agency) does not hear constitutional arguments.¹⁰ In the event that the Commission considers FirstEnergy’s untimely attack upon the Order, it may not hear the arguments offered in FirstEnergy’s Application for Rehearing.

FirstEnergy’s untimely and repetitive attacks on the Commission’s Order should be ignored. In the alternative, they should be rejected.

⁶ Id. at 3-4.

⁷ Order at 9 (October 15, 2009).

⁸ OCC Application for Rehearing at 2-3 (November 16, 2009).

⁹ July Pleading at 5-8 (July 19, 2010).

¹⁰ See, e.g., *In re Columbia Gas Infrastructure Replacement Program and Accounting Treatment*, Case Nos. 07-478-GA-UNC, et al., at 23 (April 9, 2008) (“traditional constitutional law questions are beyond our authority to determine”); *In re Residents of Struthers and Customers of Ohio Water Service Company*, Case No. 88-215-WW-CMR, Entry at 4 (March 8, 1988) (“it is not generally the province of the Commission to decide constitutional questions”).

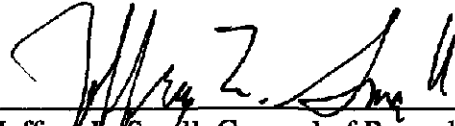
III. CONCLUSION

FirstEnergy's July Pleading re-argues matters already decided in the Commission's Order and rejected in the June 2010 Entry on Rehearing. The July Pleading is an untimely attack on the Commission's Order issued in October 2010. FirstEnergy's July Pleading should be ignored.

In the event that the July Pleading is considered an application for rehearing, its repeated argument on matters that have been rejected by the Commission should again be rejected. FirstEnergy's constitutional arguments may not be heard. FirstEnergy's Application for Rehearing, if even entertained by the Commission, should be denied.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
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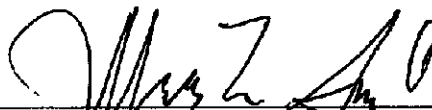


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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below by regular U.S. Mail, postage prepaid, on this 26th day of July 2010.



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