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 Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan.	)))))))	Case No. 12-1230-EL-SSO

INITIAL BRIEF OF THE ENVIRONMENTAL LAW & POLICY CENTER

INTRODUCTION

The Public Utilities Commission of Ohio has before it the application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively "FirstEnergy" or "Companies") for regulatory authority to provide a standard service offer ("SSO") pursuant to Ohio Revised Code ("ORC") § 4928.141. As their SSO, the Companies propose an electric security plan ("ESP") pursuant to ORC § 4928.143 and Ohio Administrative Code ("OAC") § 4901:1-35. On April 13, 2012, the Companies filed their ESP application ("Application"), which included a stipulation with attachments that contained the substance of the ESP proposal ("Stipulation", the Companies' plan is hereinafter referred to as "ESP 3"). The Application fails to meet the requirements of OAC § 4901:1-35-03(C) and is therefore incomplete and invalid. The Companies' desire to rush approval of this Application so as to avoid any financial risk – no matter how small – to themselves despite their obligation to serve customers does not exempt the Companies from their legal requirement to provide full justification for their proposed ESP 3 or reduce the need for a thorough

vetting of the Application by the Commission. Environmental Law & Policy Center ("ELPC") requests that the Commission deny FirstEnergy's application with leave to file a complete application for consideration by the Commission, under a timeline that will provide all parties an opportunity to properly respond and allow the Commission to make a thoughtful decision.

LAW

ORC § 4928.141 requires electric distribution companies to provide a standard service offer. Utilities can satisfy this requirement with a market-rate offer ("MRO") pursuant to ORC § 4928.142 or with an ESP pursuant to ORC § 4928.143. ORC § 4928.141(A). ORC § 4928.143(C)(1) places the burden of proof squarely on the electric distribution utility and gives the Commission up to 275 days to complete its review of the application. The Administrative Code requires a utility meeting its SSO requirement through an ESP to file a "complete description of the ESP and testimony explaining and supporting **each aspect of the ESP**." OAC § 4901:1-35-03(C)(1) (emphasis added).

FACTS

On April 13, 2012, FirstEnergy filed a five-page Application for an ESP with an accompanying Stipulation – signed by some of the parties to this case – that contained the substance of ESP 3. FirstEnergy supported the Application with the 20-page testimony of FirstEnergy Service Company Vice President of Rates and Regulatory Affairs William R. Ridmann and four attachments, including redlined tariffs. The only other testimony filed by the Companies was Mr. Ridmann's eight pages of supplemental testimony on April 23, 2012. In addition to Mr. Ridmann's testimony, FirstEnergy included a single sentence in the Application requesting that "the Commission take administrative notice of the

evidentiary record established in the Companies' current ESP, Case No. 10-0388-EL-SSO [hereinafter "ESP 2"], and thereby incorporate by reference that record for the purposes of and use in this proceeding." Application, at page 5. FirstEnergy did not raise this request again until the start of the hearing.

On the first day of the hearing, the Attorney Examiner denied FirstEnergy's oral motion for the Commission to take administrative notice of the entire ESP 2 docket, and directed it to limit its motion to a document-by-document request. Tr. Vol. 1, at pages 26-29 (June 4, 2012). On the third day of the hearing, the Attorney Examiner took administrative notice of specific documents from the ESP 2 docket and Case No. 09-0906-EL-SSO [hereinafter "MRO Case"], an SSO case from 2009. Tr. Vol. 3, at 170-73. This was the first time that the parties had notice of what was going to be admitted.

When FirstEnergy first filed its Application on April 13, 2012, it contained a request for expedited approval of the Application by May 2, 2012, 20 days after the filing. Application, at page 3. In the alternative, the company requested approval no later than June 20, 2012, 69 days after the filing. Id. FirstEnergy claimed that Commission approval by May 2, 2012 would allow the Companies to potentially bid energy efficiency and demand response resources into the May 7, 2012 PJM Base Residual Auction ("BRA"). Id. Alternatively, FirstEnergy argued that the June 20, 2012 approval date, while too late to bid energy efficiency and demand response into the BRA, would still give FirstEnergy time to change its competitive bidding processes for procurement of wholesale generation resources (an entirely different auction from the BRA auction involved in the May 2, 2012 deadline) from a one-year bid period to a three-year period. Application, at pages 2-3. FirstEnergy argues that this change will smooth out generation

prices and mitigate generation pricing volatility for customers through May 31, 2016. Id. at page 2. This alternative proposed schedule shrinks the statutory limit of 275 days down to 20-69 days.

The procedural schedule for this case will not meet either of FirstEnergy's requested deadlines for approval of its Application. The BRA occurred as scheduled on May 7, 2012, with the results made public at the end of the day on May 17, 2012, only a few days before the deadline for filing direct testimony on May 21, 2012. Despite missing the May 2, 2012 deadline for Commission approval, the Companies bid 36 MW of energy efficiency into the auction. See Tr. Vol.1, at pages 301:11-24 (June 4, 2012). The briefing schedule set by the Attorney Examiner on June 8, 2012 sets the deadline for initial post-hearing briefs at June 22, 2012 and the deadline for reply briefs at June 29, 2012. Tr. Vol. 4, at page 156:3-7 (June 8, 2012). Therefore, the Commission will not issue a decision on this Application before FirstEnergy's proposed June 20, 2012 deadline. The Companies have not withdrawn their Application, despite the refusal of the Commission to adopt their proposed abbreviated procedural schedule.

ARGUMENT

Ohio law places the burden in proceedings for approval of ESPs on electric distribution utilities ("EDU"), ORC § 4928.143(C)(1), and requires the EDUs to comply with any rules the Commission promulgates regarding an ESP application. ORC § 4928.143(A). The Commission rules require, under OAC § 4901:1-35-03(C)(1), that any EDU seeking approval of a proposed ESP include an application with a "complete description of the ESP and testimony explaining and supporting each aspect of the ESP." FirstEnergy failed to provide sufficient support for its ESP 3 in the Application, and the

testimony that the Attorney Examiner took notice of on June 6, 2012 does not make FirstEnergy's Application complete because the information is irrelevant as applied to ESP 3 and administrative notice was inappropriate.

FIRSTENERGY DID NOT FILE A PROPER ESP APPLICATION

As noted above, FirstEnergy provided very little support for proposed ESP 3. Mr. Ridmann's testimony comes to a mere 28 pages and provides support for only a handful of differences between the two-year old ESP 2 and the proposed ESP 3, which is not needed until ESP 2 expires in 2014. Mr. Ridmann explicitly states that his testimony is "not all inclusive" and only provides an "overview of a number of features of the Stipulation." Direct Testimony of Mr. Ridmann, at page 3 at lines 16-17. Mr. Ridmann's supplemental testimony sheds no more light on those features of the Stipulation that he failed to explain or support in his initial testimony. Rather, the supplemental testimony merely expands on the limited information provided in Mr. Ridmann's initial testimony regarding the benefits of bidding energy efficiency into the BRA, the qualitative benefits of the three-year blending process, and the alleged benefits of the WRR Attachment 1. Supplemental Testimony of Mr. Ridmann, at page 1:13-22. Because Mr. Ridmann's testimony supports only a few aspects of ESP 3, it fails to satisfy the requirement that the Companies file testimony that explains and supports "each aspect of the ESP."

To put FirstEnergy's failure to properly support its Application in perspective, on July 31, 2008, FirstEnergy filed a substantial application in Case No. 08-0935-EL-SSO. Along with its application in that case, FirstEnergy filed three volumes of attachments, rate impacts, testimony, and schedules, including over 250 pages of testimony by eight witnesses. On October 20, 2009, FirstEnergy filed the MRO Case pursuant to ORC §

4928.142. Again, FirstEnergy's application contained multiple volumes, including over 100 pages of testimony by six witnesses.

FirstEnergy's previous SSO applications are not unique for providing substantial testimony in multiple volumes to support an SSO application. On March 30, 2012, two weeks before FirstEnergy filed its Application, the Dayton Power and Light Company filed an application for an MRO. Case No. 12-0426-EL-SSO [hereinafter "Dayton MRO"]. As in the above SSO applications, the Dayton MRO application included several volumes, including over 150 pages of testimony by eight witnesses. Additionally, Duke Energy Ohio, on June 20, 2011, filed an application for an ESP that included over 1000 pages of documents detailing every aspect of its plan, including 17 witnesses. Case No. 11-3549-EL-SSO. Several other examples exist from just the past few years.[1]

FirstEnergy acknowledged the Application's deficiencies when it requested administrative notice of evidence from the MRO Case and ESP 2. FirstEnergy's counsel, Mr. Kutik, explicitly stated in his motion for administrative notice of portions of the MRO Case that the records in that case "contain, among other things, the various competitive bid process supporting documents, the master service supply agreement, communication protocols, and the credit requirements and other things that are **basic nut and bolts** of what will go into what – what is widely regarded as a highly successful process." Tr. Vol. 3, at page 18:14-21 (June 6, 2012) (emphasis added). FirstEnergy failed to include basic components of the proposed ESP 3 in the Application, and instead

[1] See e.g. 11-0348-EL-SSO (ESP by Columbus Southern Power Company and Ohio Power Company); 10-2586-EL-SSO (MRO by Duke Energy Ohio); 08-1094-EL-SSO (ESP by Dayton Power and Light Company).

of relying on this Application, seeks justify its proposal using outdated materials from cases over two years old.

FirstEnergy's reliance on portions of the MRO Case and ESP 2 records is deficient in two respects: (1) The Attorney Examiner erroneously took administrative notice of those documents, and therefore FirstEnergy cannot rely on them to support its application, and (2) The materials in the MRO Case and ESP 2 are irrelevant to this case, and therefore do not provide sufficient explanation and support of each part of ESP 3 as required by Ohio law.

ADMINSTRATIVE NOTICE OF THE IRRELEVANT MRO CASE AND ESP 2 DOES NOT CURE THE DEFICIENCIES IN FIRSTENERGY'S APPLICATION

FirstEnergy attempts to justify its failure to provide supporting documents and testimony for its Application by insisting that ESP 3 is simply an extension of ESP 2 and therefore it can rely on the hundreds of pages of testimony from the MRO Case and ESP 2 to support its Application. See Ridmann Direct Testimony at pages 9, 11-13; Stoddard Rebuttal Testimony at pages 2-3. ESP 3, however, is a new proposed ESP meant to replace an ESP 2 that does not expire for two more years. ESP 3 would go into effect in 2014 under very different circumstances than those surrounding the MRO Case and ESP 2.

The Companies base their request for administrative notice of portions of the proceedings in the MRO Case and ESP 2 on the claim that "nearly all of the terms and conditions contained in the ESP 3 Stipulation have already been considered and approved by the Commission as part of the Companies' existing ESP." Application, at pages 4-5. Mr. Kutik elaborated the need during the hearing, stating:

> Your Honor, as noted, this ESP is an extension, in essence, of the last ESP. The bases for this ESP are the benefits that it provided are not only demonstrated in this record, but, your Honor, we think it's supplemented by the benefits and the costs that were discussed in the prior record, and that's the basis for our motion."

Tr. Vol. 1, at page 28:15-22 (June 4, 2012). ELPC does not dispute that much of the language in ESP 3 was addressed in the previous cases, but context is everything in this case, and that context has changed dramatically since late 2009 and early 2010.

FirstEnergy argues that it was appropriate for the Attorney Examiner in this case to take administrative notice of prior proceedings because the Attorney Examiner's opinion "mirrors a ruling made by the Attorney Examiner in the Companies' prior ESP application case." Memorandum Contra the Consumer Advocates' Interlocutory Appeal from the June 6, 2012 Ruling Regarding Administrative Notice, 12-1230-EL-SSO, at page 1 (June 14, 2012). However, the Companies ignore the considerable difference between the facts in this case and those of the MRO Case and ESP 2. The dockets for old cases were intimately related in a way that is absent between the MRO Case/ESP 2 and ESP 3.

FirstEnergy filed ESP 2 four months after the MRO Case in an effort to satisfy the same SSO requirement that the MRO Case would have satisfied. When FirstEnergy filed the ESP 2, its MRO Case was still pending. In fact, the ESP 2 filing was prompted by a Commission Staff recommendation – which was itself prompted by a Commission directive to Staff – that FirstEnergy consider an ESP rather than an MRO to meet its SSO requirement. See Entry On Rehearing, Case No. 10-0388-EL-SSO, at paragraphs 2-3 (May 13, 2010). The market conditions framing the MRO Case were very similar to those framing ESP 2, and so were relevant in helping the Commission determine whether ESP

2 met the test of being "more favorable in the aggregate," ORC § 4928.143(C)(1), than an MRO.

In this case, the facts surrounding the previous MRO Case and ESP 2 are largely irrelevant to ESP 3 due to the drastically different markets of 2012 compared to 2009/2010 and the uncertainty of the markets going forward through 2014 and beyond. As Mr. Kutik pointed out in his cross-examination of Mr. Wilson, the uncertainties faced by bidders of generation in 2009 were so different from those uncertainties they face in 2012 that "you just never know" what to expect going forward. Tr. Vol. 2, at pages 151-53 (June 5, 2012); see also Tr. Vol. 2, at page 148:22-23 (June 5, 2012) (Mr. Kutik asking Mr. Wilson, "And perhaps we could say that a certainty about uncertainty is uncertainty, correct?").

Things change quickly in the world of electricity markets and getting the best deal for ratepayers requires careful examination of the facts today, not reliance on facts from two and a half years ago. For example:

- While it was assumed that gas prices would rise from 2009-2012, they have in fact fallen. See Tr. Vol. 2, at pages 156-157 (June 5, 2012) (citing Direct Testimony of James F. Wilson, attachment JFW-1).
- In late 2009 the ATSI zone was not even a part of PJM, See OCC Exhibit 9 at page 4, and now it not only has joined PJM, but is a constrained zone with a net load price approximately double the prices in other PJM zones. See Company Exhibit 6.

- Environmental regulations have dramatically impacted the energy market in Ohio and in FirstEnergy's territory in particular, with FirstEnergy Solutions closing coal plants when confronted with the possibility of required retrofits. See Tr. Vol. 2, at pages 49-50 (June 5, 2012).

The above examples of changes in the electricity markets between late 2009 and early 2012 are neither exhaustive nor intended to say anything about whether or not the Commission should require FirstEnergy to implement an ESP or an MRO, but are merely examples of how much the world has changed since the MRO Case and ESP 2. While it may have been reasonable for the Commission to consider the facts of the MRO Case when deciding the closely related ESP 2, it does not follow that stale facts should be considered in this case simply because there are few language changes between ESP 2 and ESP 3. By law, the Commission must concern itself with whether or not ESP 3 is preferable to an MRO today, not in early 2010. FirstEnergy must support each element of the ESP 3 with persuasive testimony, and it fails to meet that requirement.

The Commission should require FirstEnergy to file additional support for its Application to bring it into compliance with Ohio law, and allow parties to address those supporting documents before the Commission makes a decision on the merits.

THE ATTORNEY EXAMINER ERRONEOUSLY TOOK ADMINSTRATIVE NOTICE OF 09-0906 AND 10-0388

While ELPC does not believe that the Attorney Examiner's administrative notice of the MRO Case and ESP 2 allows FirstEnergy to meet its burden of proof for ESP 3 under OAC § 4901:1-35-03(C), even if those additional exhibits and testimony would bring FirstEnergy into compliance, the Attorney Examiner erroneously took

administrative notice of them and they must be excluded from the record. As noted above, though the Companies continue to insist that ESP 3 is merely a continuation of ESP 2, the record does not support this argument. The two cases are separated by years and circumstances. The Commission must determine whether or not ESP 3, is preferable to an MRO, and the facts from the MRO Case and ESP 2 are outdated and do not meet that burden.

The Attorney Examiner's June 6, 2012 ruling relied primarily on two pieces of case law: the May 10, 2010 Entry on Rehearing referenced above from ESP 2 and the Ohio Supreme Court's decision in Canton Storage and Transfer Co. v. PUCO, 72 Ohio St.3d 1 (Ohio 1995) (citing Allen v. PUCO, 40 Ohio St.3d 184 (Ohio 1988)). Tr. Vol. 3, at pages 172-73 (June 6, 2012). In Canton, the Court held that administrative notice of a prior docket is not proper unless "the complaining party had prior knowledge of, and had an opportunity to explain and rebut, the facts administratively noticed." 72 Ohio St.3d at 8. While the Attorney Examiner found that this two-factor test was met in ESP 2, the facts of this case differ significantly and the test cannot be met. Here, the intervenors had no prior knowledge of the facts administratively noticed and have not been provided with the opportunity to respond to those facts.

1. Intervenors had no prior knowledge of the facts administratively noticed until the third day of the evidentiary hearing

As noted above, FirstEnergy made a sweeping mention of incorporating the ESP 2 docket in its Application, Application, at page 5, but the Attorney Examiner did not rule on the request prior to the deadline for filing testimony or prior to the hearing. Parties had no way of knowing which facts from ESP 2 would be administratively noticed and relied

on. FirstEnergy itself contends that the single sentence contained at the end of its Application only "put [parties] on notice that portions of the ESP 2 and MRO case records *might* be relied on." Memorandum Contra the Consumer Advocates' Interlocutory Appeal, at page 7 (emphasis added). However, FirstEnergy did not present its list of items to be administratively noticed until the third day of the evidentiary hearing on June 6, 2012, Tr. Vol. 3, at pages 10-12 (June 6, 2012), which included the items from the MRO Case, which was not the subject of the FirstEnergy motion on the first day of the hearing on June 4, 2012. Tr. Vol. 1, at pages 26-29 (June 4, 2012). Intervenors, therefore, were in no position to know what parts of the MRO Case and ESP 2 dockets would be administratively noticed until just before the end of the hearing and well after the opportunity for testimony and cross-examination had passed. The Attorney Examiner's ruling, therefore, fails the first prong of the test.

2. Intervenors had no opportunity to explain and rebut the administratively noticed facts.

The Attorney Examiner did not take administrative notice of portions of the MRO Case and ESP 2 dockets until after intervenors filed testimony and the hearing was nearly over, and the Examiner did not extend the procedural schedule to allow for explanation or rebuttal of the noticed facts. FirstEnergy's request in its Application did not trigger the obligation for intervenors to respond to the facts of the MRO Case and ESP 2 because there were no facts to respond to until the Attorney Examiner made his ruling on June 6, 2012. Additionally, the request to take notice of facts in the MRO Case was not made until the morning of June 6, 2012. The Attorney Examiner's ruling, therefore, also fails the second prong of the test.

Even if the Commission finds that inclusion of the facts from the MRO Case and ESP 2 would complete FirstEnergy's Application, the Attorney Examiner erroneously took administrative notice of the facts near the end of the hearing, well after parties filed their testimony and cross-examination was no longer possible. Administrative notice, therefore, was inappropriate and the Companies cannot complete their Application using materials from those previous cases.

FIRSTENERGY AND RATEPAYERS WILL NOT BE HARMED IF THE COMMISSION REJECTS THE EXPEDITED APPLICATION AND REQUIRES FIRSTENERGY TO FILE A COMPLETE APPLICATION

Despite FirstEnergy's request to have its Application on a 20 to 69-day approval schedule rather than the 275 days allowed by law, it does not appear that missing either artificial deadline has appreciable consequences. FirstEnergy managed to bid in 36 MW of energy efficiency despite limiting its bids to resources that it was able to secure by reaching out to individual customers who participated in the lighting program, and only in the month leading up to the BRA. See Tr. Vol. 1, at page 301:11-24 (June 4, 2012). While the Companies did not bid in any demand response, their failure to take advantage of the auction was not for lack of ability. As Mr. Ridmann testified, PJM would allow FirstEnergy to bid future peak demand reductions into the BRA , see Tr. Vol. 1, at pages 328-329 (June 4, 2012), without FirstEnergy having an approved ESP. See Tr. Vol. 1, at page 289:13-17 (June 4, 2012). The Companies did not fail to bid in any demand response because of any preclusion by the Commission or PJM, but merely because they wanted to avoid taking on any risk – no matter how small – where there was no profit in it for them. Mr. Ridmann put it succinctly when, after acknowledging that the Companies have done no paper analysis of the risks of bidding demand response into the BRA

without approval of the ESP, he stated, "Again, we look at it from the standpoint of there is no profit to be made in this activity by the companies, and we're not willing to make any - - take any risks associated with bidding it in and being penalized". Tr. Vol. 1, at page 330:1-19 (June 4, 2012). The Companies were not prejudiced by the Commission's refusal to approve their Application within 20 days of filing.

Nor does it appear that FirstEnergy will be harmed by missing its requested June 20, 2012 approval deadline. As noted above, the Attorney Examiner set the briefing schedule for this case to end on June 29, 2012, over a week after the Companies' requested deadline. Tr. Vol. 4, at page 156:3-7 (June 8, 2012). The Companies have not made any protest to the briefing schedule and have made no announcements that the proposed ESP 3 will be ineffective should it be approved what will now surely be weeks after the June 20, 2012 deadline. In fact, the Companies have thus far not provided any reasons for why June 20, 2012 was such a hard deadline. OCC Exhibit 1 includes a timeline by the Companies for its October 2012 bids. OCC Exhibit 1, at page 3. The first part of the bid application is not due until September 5, 2012. Id. In his cross-examination, Mr. Ridmann could not even confirm that whether or not the auction will be for a one-year, two-year, or three-year product will have any bearing on what the bidders include in that first part of the application. Tr. Vol. 1, at page 196-97 (June 4, 2012). The second part of the application is not due until October 10, 2012. See OCC Exhibit 1, at page 3. The Companies were not prejudiced by the Commission's refusal to approve their Application within 69 days of filing.

Pursuant to ORC § 4928.143(C)(1), the burden of proof is on the Companies. Clearly, the Companies have not proven that an extremely attenuated timetable from 275

days to as few as 20 days is necessary. The Commission should require FirstEnergy to complete its Application pursuant to OAC § 4901:1-35-03(C) and allow a full vetting of this important proposed SSO.

CONCLUSION

Ohio law requires FirstEnergy to fully explain and support each element of its proposed ESP 3. FirstEnergy's Application fails to provide such support and therefore cannot be approved in its current form. The Attorney Examiner improperly took administrative notice of previous dockets, and even if the Commission allows that testimony into the record, that support for ESP2 is outdated and stale. Relying on facts and testimony from previous SSO cases is insufficient for FirstEnergy to meet its obligation. The Commission should reject FirstEnergy's stipulation for ESP 3 and require FirstEnergy to file a properly supported Application.

Dated: June 22, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Initial Brief** submitted on behalf of the Environmental Law & Policy Center of the Midwest, was served by electronic mail, upon the following Parties of Record, this 22nd day of June, 2012.

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