

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

**PETITION FOR REHEARING OF
THE ENVIRONMENTAL LAW AND POLICY CENTER**

Pursuant to Ohio Revised Code § 4903.10 and Ohio Administrative Code Chapter 4901:1-35, the Environmental Law and Policy Center hereby applies for rehearing of the Opinion and Order issued in the above-captioned case on July 18, 2012 ("Order"). As explained in more detail in the attached Memorandum in Support, the Order in this case is unreasonable and unlawful on the following grounds:

A. The Order improperly finds that Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "Companies") filed a complete application pursuant to Ohio Administrative Code 4901:1-35-03(C)(1).

B. The Order improperly finds that the attorney examiners were correct in taking administrative notice of evidence from prior market rate offer and electric security plan cases.

For the foregoing reasons, as demonstrated in the Memorandum in Support of this Application, attached hereto, the Commission should grant this Application for Rehearing.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF APPLICATION OF REHEARING OF THE
ENVIRONMENTAL LAW AND POLICY CENTER**

I. INTRODUCTION

The Commission erred in approving the April 13, 2012 application ("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") in the form of an electric security plan ("ESP 3"). The Companies failed to meet the requirement of Ohio Administrative Code ("OAC") Chapter 4901:1-35-03(C)(1) that they include with their Application a "complete description of the ESP and testimony explaining and supporting each aspect of the ESP." The Application is therefore incomplete and invalid. The Commission erred in approving with modification FirstEnergy's Stipulation and Recommendation ("Stipulation") without first requiring the Companies to complete their Application.

The Commission also erred in upholding the attorney examiners' decision to take administrative notice of specific evidence from the Companies' current ESP, Case No. 10-0388-EL-SSO [hereinafter "ESP 2"] and Case No. 09-0906-EL-SSO [hereinafter "MRO Case"], an

SSO case from 2009. The Commission did not give administrative notice of the evidence until after all testimony was filed and most of the witnesses had been cross-examined. Without notice of what evidence would be recognized by the Commission, parties were not in a position to prepare testimony rebutting the evidence or cross-examine witnesses from the prior cases. It is unreasonable for the Commission to expect intervening parties to rebut evidence from prior cases before the Commission takes notice.

The Commission's approval of ESP 3 without FirstEnergy filing a proper application sets a dangerous precedent and subjects ratepayers to an SSO that was approved based on an incomplete record. Further, the Commission's administrative notice of testimony from prior cases without providing opposing parties an appropriate opportunity to rebut or even cross-examine witnesses further denies ratepayers a full vetting of the Application and Stipulation and sets a bad precedent for future cases. The Environmental Law and Policy Center ("ELPC") respectfully requests a rehearing of the Opinion and Order.

II. ARGUMENT

A. The Order improperly finds that FirstEnergy filed a complete Application pursuant to OAC 4901:1-35-03(C)(1).

The Commission erroneously states that ELPC has not identified any provision of OAC 4901:1-35 that the application fails to meet where such provision was not already waived by the Commission. Order at 46. In both its Initial Post-Hearing Brief and its Reply Brief, ELPC argued that FirstEnergy has not filed a proper application because it failed to include in its Application a "complete description of the ESP and testimony explaining and supporting each aspect of the ESP" pursuant to OAC 4901:1-35-03(C)(1). *See e.g.*, ELPC Initial Post-Hearing Brief at 2, 4; ELPC Reply Brief at 4. While the Commission waived several requirements of OAC 4901:1-35-

03(C), provision (C)(1) was not one of them. By failing to meet this requirement, the Companies failed to file a proper application and therefore the Commission should not have approved the proposed ESP 3.

FirstEnergy submitted with its Application brief testimony by only one witness, Mr. Ridmann, who stated 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. Though ELPC does not suggest that there is some minimum length for an ESP application, the limited testimony filed by the Companies cannot meet the requirement to provide "testimony explaining and supporting each aspect of the ESP." The Companies are under an obligation to explain each aspect of the ESP, and to date they have not done so.

In its Order, the Commission lists thirty-eight provisions of the Stipulation and notes that this list is not complete. Order at 6-16. Yet even limiting inspection to those thirty-eight provisions and their subparts, the testimony filed by the Companies touches on only a handful, often mentioning merely that the provisions exist rather than "explaining and supporting" each one. For example:

- Mr. Ridmann's testimony makes no mention of the seasonality factors identified by the Commission on page 8 of the Order.
- Mr. Ridmann's testimony makes no mention of the flat rate structure of rate schedule RS identified by the Commission on page 8 of the Order.
- Mr. Ridmann's testimony does not explain why the Generation Cost Reconciliation Rider will be avoidable by some customers, a feature noted by the Commission on page 9 of the Order.

- Mr. Ridmann's testimony states the existence of time-differentiated pricing concepts in ESP 3, an aspect of the Stipulation noted by the Commission on page 16 of the Order, but does nothing to support them.

The above are only a few examples of the dozens of aspects of ESP 3 that are not explained or supported in the brief testimony filed by the Companies.

The OAC places the burden on FirstEnergy to explain and support each aspect of the ESP, not just some of them. The Commission erred by allowing FirstEnergy to rely on the fact that "most of the provisions of the proposed ESP 3 are similar to the provisions in the current ESP 2, and, thus, are known to the parties in this proceeding." Order at 46. While it is true that the text of ESP 3 is similar to that of ESP 2, this fact does not allow the Companies to ignore the requirements of OAC 4901:1-35-03(C)(1). The state of the world today differs significantly from the state of the world in 2009 and 2010, when the evidence in the MRO Case and ESP 2 was first litigated. 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?"). The Commission cannot simply point to the similarities between the texts of the two ESPs and assume that justifications for ESP 2 continue to be relevant to ESP 3. The OAC explicitly requires explanation of each provision of an ESP, and the Companies have not provided explanations for the majority of provisions in ESP 3. The Commission erred by finding that FirstEnergy filed a complete Application.

B. The Order improperly finds that the attorney examiners properly took administrative notice of evidence from the MRO Case and ESP 2 case.

While it is true that FirstEnergy included in its Application one sentence requesting administrative notice of the entire evidentiary record of ESP 2, Application at 5, the attorney examiners did not rule on the request until after the hearing began, well after testimony was due. Further, that broad request is separate from the administrative notice of specific documents from ESP 2 and the MRO Case granted by the attorney examiners on June 6, 2012. It is unreasonable for the Commission to require intervening parties to file testimony, take depositions, and prepare witnesses rebutting evidence before it has been noticed by the Commission and before the Companies have even revealed which evidence they seek recognition of by the Commission.

On June 4, 2012, the first day of the ESP 3 evidentiary hearing, Attorney Examiner Price, in the face of objections by opposing parties, denied FirstEnergy's request for administrative notice of the ESP 2 record in its entirety, stating that he was "uncomfortable incorporating wholesale the entire record of [ESP 2]." Tr. Vol. 1, at page 29 (June 4, 2012). Attorney Examiner Price went on to explain that the examiners would be willing to entertain document-by-document requests if the Companies chose to make them. Id. On June 6, 2012, FirstEnergy moved for administrative notice of specific evidence from not only the ESP 2 docket, but also from the MRO Case. FirstEnergy did not circulate in advance to parties the list of documents for the Commission to notice in this new motion. Parties had no opportunity to prepare rebuttal testimony or to secure cross-examination of the witnesses from the prior cases. The attorney examiners granted FirstEnergy's motion over objections by ELPC and other parties.

The Commission erred in finding that the attorney examiners' decision meets the two-factor test from Canton Storage and Transfer Co. v. PUCO, 72 Ohio St.3d 1 (Ohio 1995). 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. As described above, parties had neither knowledge of which facts were to be noticed nor the opportunity to rebut those facts once the Commission took notice on day three of the hearing. Opposing parties appropriately and successfully objected to FirstEnergy's wholesale request for notice of the entire record of ESP 2 and should have been given an opportunity to rebut the specific pieces of evidence noticed by the Commission through the opportunity to file more testimony and cross-examine witnesses in another round of hearings.

In addition to prejudicing parties in this case, the Commission's finding creates a dangerous precedent for future PUCO proceedings. In the wake of the Commission's Order, whenever a party seeks wholesale admission of evidence from multiple prior cases, opposing parties are under an obligation to explain and rebut every piece of evidence, even during an already expedited schedule. This will result in a waste of resources by all parties. It should be incumbent upon the party seeking notice to specify within a reasonable period of time in advance of the deadline for filing testimony which pieces of evidence it seeks to have in the record so that opposing parties can devote appropriate resources to prepare appropriate rebuttal. The Commission erred in granting administrative notice of evidence from ESP 2 and the MRO Case.

III. Conclusion

For the reasons set forth above, ELPC respectfully requests that the Commission grant rehearing.

August 17, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Rehearing submitted on behalf of the Environmental Law & Policy Center of the Midwest, was served by electronic mail, upon the following Parties of Record, this 17th day of August, 2012.

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Summary: App for Rehearing electronically filed by Mr. Justin M Vickers on behalf of
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