

**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	)	Case No. 14-1297-EL-SSO
Edison Company for Authority to Provide	)	
for a Standard Service Offer Pursuant to	)	
R.C. 4928.143 in the Form of an Electric	)	
Security Plan	)	

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**REPLY BRIEF OF INTERSTATE GAS SUPPLY, INC.**

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**I. INTRODUCTION**

On December 1, 2015, Ohio Edison Company, Toledo Edison Company, and Cleveland Electric Illuminating Company (collectively “FirstEnergy”) and a diverse group of parties, submitted a Joint Stipulation and Recommendation (“Stipulation”) to resolve the outstanding issues presented in this proceeding. On January 14, 2016, Interstate Gas Supply, Inc. (“IGS”) joined the Stipulation as a signatory party. On February 16, 2016, IGS submitted its initial brief recommending that the Commission approve the Stipulation, as well as a placeholder retail incentive rider (“Incentive Rider”) set at zero, which shall be the subject of a future FirstEnergy application.

The Office of the Ohio Consumers’ Counsel (“OCC”), the Ohio Manufacturers’ Association Energy Group (“OMAEG”), Constellation New Energy, Inc. and Exelon Generation Company LLC (“Exelon”), and the Retail Energy Supply Association (“RESA”) take issue with IGS’s support of Stipulation. These parties claim that the existence of the separate Competitive Market Enhancement Agreement (“Enhancement Agreement”)—an agreement designed to improve the competitive

market—between IGS and FirstEnergy is evidence that the Stipulation was not the product of serious bargaining between knowledgeable and capable parties. As discussed below, these parties are incorrect.

## **II. BACKGROUND AND ARGUMENT**

RESA and Exelon claim that FirstEnergy and IGS hid the Enhancement Agreement; announced it after several parties had completed cross-examination; and that the stipulation resulted from an exclusionary process in violation of the precedent set forth in *Time Warner AXS v. Pub. Util. Comm'n of Ohio*, 75 Ohio St.3d 229, footnote 2 (1996).<sup>1</sup> Similarly, OCC claims that there could not have been serious bargaining around the Stipulation because the Enhancement Agreement exists only between FirstEnergy and IGS.<sup>2</sup> Likewise, OMAEG claims that because the terms of the Enhancement Agreement were not disclosed to the parties during the bargaining process, it raises serious questions regarding the transparency of the bargaining process.<sup>3</sup> Each of these similar claims lacks merit.

RESA's and Exelon's claim that the Enhancement Agreement was "hidden" is completely incorrect. The parties announced the addition of IGS as a signatory party while the ink was still drying. FirstEnergy expeditiously served on parties to the proceeding that same day, despite the fact that the Commission's rules would have

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<sup>1</sup> RESA Brief at 42-44; Exelon Brief at 63-66.

<sup>2</sup> OCC Brief at 42.

<sup>3</sup> OMAEG Brief at 75-76.

allowed FirstEnergy to wait five business days to supplement its response to a discovery related to agreements associated with the proceeding.<sup>4</sup>

Contrary to RESA's claim, all parties were permitted to cross-examine FirstEnergy witness Mikkelsen regarding the Enhancement Agreement. Indeed, RESA's and Exelon's counsel (the parties are represented by the same law firm) was permitted to cross-examine Ms. Mikkelsen *on two separate days* to ensure that those parties had an opportunity to discuss the Enhancement Agreement with FirstEnergy.<sup>5</sup>

Moreover, RESA's and Exelon's claim that the Enhancement Agreement is "akin to exclusionary settlement discussions"<sup>6</sup> mischaracterizes the issue under consideration in this case as well as the *Time Warner* holding.<sup>7</sup> First, it is important to note that the Commission is evaluating the Stipulation—not the Enhancement Agreement. Whether other parties attended the negotiation of an agreement not presently before the Commission is simply irrelevant; all parties attended the negotiations that impacted the substance of the Stipulation. The Enhancement Agreement had no bearing on the substance of the Stipulation.

Second, *Time Warner* is inapplicable. In that case, the Court expressed concern when the "stipulation arose from settlement talks from which an entire customer class

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<sup>4</sup> Under 4901-1-16(E) provides that "[t]he supplementation of responses required under paragraphs (D)(1) to (D)(3) and (D)(6) of this rule shall be provided within five business days of discovery of the new information." In this case, FirstEnergy supplemented its response on the date that it learned of new information.

<sup>5</sup> See Tr. Vol. XXXVI at 7672-7757; Tr. Vol. XXXVII at 7917.

<sup>6</sup> Exelon Brief at 65; see also RESA Brief at 43.

<sup>7</sup> OMAEG's similarly raises a concern that no party was aware of or participated in the negotiation of the Enhancement Agreement. OMAEG Brief at 75.

was intentionally excluded.”<sup>8</sup> Here, no class of customer or intervenor was excluded from negotiations *related to the Stipulation*. Indeed, the exact opposite is true—every party had a seat at the table. Thus, *Time Warner* supports the seriousness of the bargaining over the Stipulation.

Finally, OCC attacks the substance of the portion of the Enhancement Agreement which relates to the Incentive Rider. OCC claims that the provision would result in an unreasonable price to consumers by falsely inflating the SSO price. OCC at 43. As IGS indicated in its testimony and Initial Brief, while competition has developed well for the industrial class of customers in FirstEnergy’s service territory, most of the residential switching has occurred as the result of municipal aggregation.<sup>9</sup> Thus, Mr. White stated that “it can be concluded that the Ohio competitive electric markets have done a good job encouraging opt-out aggregation in the FirstEnergy service territory, but have done a poor job at encouraging customers to affirmatively enroll in a competitive product or otherwise engage in the competitive market.”<sup>10</sup> Mr. White further recommended that the Commission modify FirstEnergy’s ESP to address this shortcoming.

FirstEnergy witness Mikkelsen testified, the Incentive Rider “would potentially create greater supplier interest in participating in the competitive market for the companies and, in turn, provide . . . a more robust competitive environment for the

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<sup>8</sup> *Time Warner* at footnote 2.

<sup>9</sup> IGS Exs. 11 and 12 at 3, 5-6, Ex. MW-4 (Aug. 18, 2015) (Ex. 11 contains the public version of Mr. White’s Supplemental Direct Testimony).

<sup>10</sup> *Id.* at 17.

customers of the companies.”<sup>11</sup> A similar proposal is currently under consideration as part of the stipulation and recommendation submitted in Ohio Power Company’s supplemental purchase power agreement proceeding, which is supported by the Commission Staff.

Moreover, IGS has identified that the standard service offer avoids costs that are necessary to provide retail electric service.<sup>12</sup> Authorizing a placeholder Incentive Rider will provide FirstEnergy with an opportunity to submit a proposal to increase the comparability of the default rate and retail products in the market and otherwise incentivize shopping. The Commission will ultimately render a determination on the appropriateness of including a charge in the Incentive Rider in a separate proceeding and OCC will have an opportunity to participate in that process. Thus, OCC’s arguments are premature and can be considered at a later date.

### **III. CONCLUSION**

While many parties have tried to shift the focus of this proceeding to the Enhancement Agreement, the fact is that the Enhancement Agreement did not impact the substance of the Stipulation. The Commission is not currently evaluating the substance of the Enhancement Agreement or the process through which it was entered—that agreement will be the subject of future proceedings and additional due process. Thus, it is clear that the Stipulation was the product of serious bargaining and should be approved.

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<sup>11</sup> Tr. Vol. XXXVII at 7927-28.

<sup>12</sup> See generally *In the Matter of the Commission’s Investigation of Ohio’s Retail Electric Service Market*, Comments of Interstate Gas Supply, Inc. at 3-4 (Mar. 1, 2014) (Administrative notice taken in Tr. Vol. XLI at 8578).

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Reply Brief of Interstate Gas Supply, Inc.* was served this the 26th day of February 2016 via electronic mail upon the following:

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