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September 22, 2000

Docketing Division
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180 East Broad Street
Columbus, Ohio 43215

Re: Case Nos. 99-1212-EL-ETP, 99-1213-EL-ATA, and 99-1214-EL-AAM

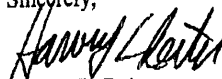
To Docketing:

Please accept the enclosed Application for Rehearing of Citizen Power, Inc. in the above-named cases. Twenty-seven copies are also included.

Please file this original and twenty-seven copies of the Application in the above-named cases.

Thank you for your assistance and cooperation.

Sincerely,



Harvey L. Reiter

William M. Ondrey Gruber - Trial Attorney

Enclosure

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of FirstEnergy) Corp. on Behalf of Ohio Edison Company, The) Cleveland Electric Illuminating Company and) The Toledo Edison Company for Approval for) Their Transition Plans and for Authorization) To Collect Transition Revenues.)	Case No. 99-1212-EL-ETP
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In the Matter of the Application of FirstEnergy) Corp. on Behalf of Ohio Edison Company,) The Cleveland Electric Illuminating Company) And The Toledo Edison Company for Tariff) Approval.)	Case No. 99-1213-EL-ATA
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In the Matter of the Application of FirstEnergy) Corp. on Behalf of Ohio Edison Company, The) Cleveland Electric Illuminating Company and) The Toledo Edison Company for Certain) Accounting Authority.)	Case No. 99-1214-EL-AAM
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**Application of Citizen Power, Inc. for Rehearing
of the Commission's September 13, 2000 Entry on Rehearing**

Citizen Power, an intervenor in the above-captioned cases, hereby respectfully applies to the Public Utilities Commission of Ohio ("Commission") for rehearing of the Commission's Entry on Rehearing issued September 13, 2000 in the above-captioned cases ("Opinion and Order"). As set forth below, Citizen Power submits that the Commission's decision to deny rehearing because the rehearing application was "procedurally deficient" was arbitrary and therefore unreasonable.

On August 18, 2000 Citizen Power and UWUA each filed by facsimile an application for rehearing of the Commission's July 19, 2000 order in the above-referenced docket. Subsequently, FirstEnergy filed a motion to strike the applications as

untimely filed. Thereafter, Citizen Power and UWUA each filed a timely answer to FirstEnergy's motion and an accompanying request for waiver and FirstEnergy filed its response.

In its September 13, 2000 order, the Commission stated that it agreed with FirstEnergy that the rehearing applications submitted by facsimile by Citizen Power and UWUA "were not timely filed." "Accordingly," it concluded, "the rehearing applications filed by Citizens [sic] Power and UWUA are denied." Entry on Rehearing at 2.¹

In ruling as it did on FirstEnergy's motion to strike, the Commission failed even to acknowledge, much less address in a reasoned response, the points contained in Citizen Power's September 5, 2000 memoranda contra answering FirstEnergy's motion and in its accompanying motion requesting waiver of the same date. Citizen Power hereby incorporates by reference and adopts as part of this rehearing the points contained in its September 5, 2000 memoranda contra and motion for waiver and urges the Commission to respond to those arguments on rehearing.² The Commission's failure to do so in its Entry on Rehearing was arbitrary and capricious, did not reflect reasoned decisionmaking and hence was "unreasonable" within the meaning of Section 4903.10 of the Revised Code.

CONCLUSION

For the reasons stated above, Citizen Power respectfully requests that the Commission grant rehearing of its September 13, 2000 Order and accept Citizen Power's


¹ The Commission's order is contradictory as to the action it is taking on our rehearing. On the one hand, it asserts in the above-quoted text that our rehearing is denied. In the ordering paragraphs, however, it states that FirstEnergy's motion to strike the filing is granted. The Commission should clarify its intention on this point.

² Copies of the September 5, 2000 filings are attached to this pleading and made a portion thereof for the Commission's convenience.

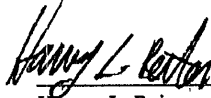
rehearing application as timely filed. Granting such rehearing would be particularly appropriate in light of the Commission's decision to address the merits of the rehearing application in that same September 13, 2000 order. Because of the important issues that must be resolved by the January 1, 2000 restructuring implementation date, Citizen Power urges the Commission to act on this rehearing at the earliest possible date.

Respectfully submitted,

CITIZEN POWER, INC.



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ATTACHMENT A

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September 5, 2000

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Re: Case Nos. 99-1212-EL-ETP, 99-1213-EL-ATA, and 99-1214-EL-AAM


To Docketing:

Please accept the enclosed original and twenty-eight copies of the Memorandum of Citizen Power Contra the Motion to Strike in the above-named cases.

Please file the original and twenty-seven copies in the above-named cases, and send a time-stamped copy to me in the enclosed self-addressed envelope.

Thank you for your assistance and cooperation.

Sincerely,


William M. Ondrey Gruber

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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Toledo Edison Company for Certain Accounting)
Authority.)

Memorandum of Citizen Power
Contra the FirstEnergy Motion to Strike
its Application for Rehearing
and
Motion of Citizen Power to Allow Facsimile Filing
of its Application for Rehearing

Citizen Power, an intervenor in the above-captioned cases, hereby responds to FirstEnergy's Motion to Strike the Application for Rehearing filed by Citizen Power in this matter ("Motion").¹ For the reasons discussed below, good cause exists to grant waiver in this case of the Commission's rules limiting the filing of rehearing applications by facsimile. Therefore, as further discussed below, FirstEnergy's motion to strike Citizen Power's rehearing application should be denied.

¹ This Memorandum Contra is being filed timely, pursuant to the Hearing Examiner's instructions issued on

FirstEnergy's motion rests entirely on its assertion that Citizen Power filed its rehearing application more than 30 days after the Commission's order and, since the thirty day period is statutory, the Commission has no power to waive the deadline. Motion at 3. In support of that argument, FirstEnergy maintains that because Citizen Power submitted its filing by facsimile on August 18, 2000, but its hard copy was not docketed until August 21, and because the Commission's rules permitting filing by facsimile do not include filings of rehearing applications "the effective filing...for rehearing was not until August 21" Motion at 3. (citing *Williams v. Ameritech Ohio*, Case No. 98-1362-TP-CSS (Entry on Rehearing, April 13, 2000); *Application of AT&T Communications of Ohio, Inc.*, Case No. 96-190-TP-ACE (Entry on Rehearing, October 17, 1996)).

There is no dispute that the time limit for filing rehearing applications is a statutory one that cannot be waived. But, as we discuss below, the Commission's own records show that Citizen Power's application was timely. There is simply no issue of timeliness in this case; statutory standards were not violated.

Instead, the issue here is the form in which the application was filed. Application form is governed by Commission rules. While those rules do not include rehearing applications among the types of filing that can be made by facsimile, the Commission plainly has the power to waive its rules, either upon its own motion² or for good cause³. As discussed below, there is ample

August 31, 2000 by E-mail.

² *Re Alternative Regulation for Large Local Exchange Telephone Companies*, Case No. 92-1149-TP-COL, 141 P.U.R.4th 1 (March 10, 1993)

³ *Id.* See also, Section 4901:1-18-08 of the Commission's regulations, which provides that: "The public utilities commission shall retain the authority to waive any rule or any part of a rule contained herein upon application and for good cause shown."

reason for the Commission to grant waiver of its rules to permit consideration of Citizen Power's rehearing application.

FirstEnergy does not acknowledge, much less discuss, the Commission's power to waive its rules. Conspicuous by its absence, moreover, is any claim that FirstEnergy has been prejudiced by Citizen Power's use of a facsimile machine to submit its filing. Indeed, on the very day it moved to strike, FirstEnergy filed a substantive response to the rehearing application, as did the OCC (without an accompanying motion to strike). All parties, as well as the Commission's Examiner, received copies by the August 18, 2000 due date. This point is critical. The Commission has made plain that, among the factors it considers in determining whether to waive its filing rules is whether other parties have been prejudiced.⁴ As discussed below, waiver of Rule 4901-1-02(B)(10) in this case is in the public interest.

Waiver of Rule 4901-1-02(B)(1) is Justified in this Case.

A. The Commission's Decision To Date-Stamp Citizen Power's Filing On August 18, 2000 Is Evidence That Citizen Power's Application Was Timely And That It Has Waived The Rule On Its Own Motion.

As noted above, the Commission has the power to waive its filing rules on its own motion. In fact, it appears that the Commission has already done so. While FirstEnergy argues that the "effective filing" of Citizen Power's rehearing "was not until August 21," (Motion to Strike at 3), the facts show otherwise.

Section 4901-1-02(A) of the Commission's rules states that "No pleading or other paper

⁴ *Re Alternative Regulation for Large Local Exchange Telephone Companies*, Case No. 92-1149-TP-COI, 141 P.U.R.4th 1 (March 10, 1993) ("Finding that no party has been prejudiced by the late filings of OCC and MCI, we will accept the memoranda contra as timely filed.")

shall be considered filed with the commission until it is received and date-stamped by the docketing division." The clear implication of this rule is that a pleading "shall be considered filed with the Commission [*when*] it is received and date stamped." Section 4901-1-02 (B)(9) of the Commission's rules (governing permissible filings by facsimile), reinforces this interpretation. It provides:

Because a document sent to the commission by facsimile will be date-stamped, and thus filed, the day it is received by the docketing division, the originator of the document shall serve copies of the document upon other parties to the case no later than the date of filing.

To be sure, the Commission was under no obligation to date-stamp a rehearing sent to it by facsimile, but it did.

As noted above, the Commission's date stamp identifies the date on which the Commission deems a document filed. Ms. Buzard of the Docketing office confirmed, in a conversation Dr. Odisio of Citizen Power, that Citizen Power's facsimile was received and date stamped by the Commission's docketing office on August 18, 2000. In fact, the hard copy received by the Commission on August 21, 2000 was also date stamped August 18, 2000. Attachment A. Consistent with the above, the "Docketing" page on the Commission's web site includes the following entry for August 18: "application for rehearing filed on behalf of Citizen Power." Thus, FirstEnergy's claim that the hard copy was not docketed until August 21 is false. Further, FirstEnergy's claim that the "effective filing" of Citizen Power's rehearing "was not until August 21," is inconsistent with the Commission's own records.

FirstEnergy's motion leaves unstated, but necessarily implies, that in (1) stamping the August 18 date on the fax, (2) stamping the August 18 date on the hard copy and (3) posting the

filing date as August 18 on its website the Commission committed not one, but three errors. There is no basis for such a conclusion, however. On the contrary, the Commission's conscious decision, thrice repeated, simply reflects its apparent recognition that no valid public purpose would be served in rejecting a faxed rehearing application that had been served on the Commission's Examiner and all parties the same day by email.

B. Assuming Arguendo That The Commission Did Not Grant Citizen Power's Faxed Rehearing Application An Effective Filed Date Of August 18, 2000, Good Cause Exists To Do So Now.

Citizen Power noted earlier in this pleading that lack of prejudice to other parties is a factor favoring waiver of its filing rules. *Re Alternative Regulation for Large Local Exchange Telephone Companies*, Case No. 92-1149-TP-COI, 141 P.U.R.4th 1(March 10, 1993) ("Finding that no party has been prejudiced by the late filings of OCC and MCI, we will accept the memoranda contra as timely filed.") In addition, the Commission has held that it is appropriate to consider (1) whether "the information required to be filed by these rules, absent a waiver, is relevant to the Commission's consideration of whether the application is reasonable," (Id.), (2) whether a request to extend a time limit is intended to delay or frustrate expedited processes (Id.) and generally, whether a waiver is in the public interest. Id.

All of the above factors militate in favor of a waiver in this case. Most important is the fact, already noted above, that no party was prejudiced by Citizen Power's use of a facsimile machine to deliver the rehearing to the Commission. Citizen Power's filing by fax has not impeded the ability of any party to file a timely response. In fact, the only party to object on these grounds, FirstEnergy, was able to file a timely response on the merits. Similarly, Commission acceptance of the Citizen Power rehearing as timely will not delay or frustrate

Commission action on this case. There are already a number of timely rehearing applications pending before the Commission and it will have to address them in any event.

C. The Commission's Prior Decisions Under Rule 4901-1-02(B)(10) Cited By FirstEnergy Do Not Support Striking Citizen Power's Application.

FirstEnergy's relies, without elaboration, on two cases -- *Williams v. Ameritech Ohio*, Case No. 98-1362-TP-CSS (2000) and *Application of AT&T Communications of Ohio, Inc.*, Case No. 96-190-TP-ACE -- involving the filing of rehearing applications by fax. Its reliance on these cases, however, is wholly misplaced.

Williams v. Ameritech is inapposite. The Commission did not strike and refuse to consider complainants rehearing application in that case, as FirstEnergy asks the Commission to do here. Instead, although it found grounds to reject the faxed rehearing, the Commission also found several other deficiencies in the record, and ultimately considered and denied the application on its merits. Thus the case is not even a bona fide example of a rehearing struck because it was faxed.

Citizen Power's case, moreover, is radically different from *Williams v. Ameritech Ohio*. There, the filing party had submitted a "rehearing" by fax that contained none of its argument and did not file a substantive rehearing until a month later. Unlike this case, the Commission observed that its docket records "show no filing prior to [the rehearing deadline]." The substantive filing, moreover, was not served on other parties until a month after the deadline for rehearing. *Id.* Finally, notwithstanding all of these deficiencies, *the Commission decided the merits*, albeit against the rehearing applicant. Thus, even in a case where the Commission would have been well within its rights to reject the rehearing as untimely, it nonetheless decided the

issues that had been raised..

As to the second case cited by FirstEnergy, the Company makes no attempt to explain how the facts in Citizen Power's case are similar to those in the other case it cites, *Application of AT&T Communications of Ohio, Inc.*, Case No. 96-190-TP-ACE (Entry on Rehearing, October 17, 1996). Again, the case is inapposite. There, unlike this case, the rehearing request was not docketed until four (4) days after the 30-day deadline for submission. Order at 3. Nor, apparently, was there any request for waiver, as has been requested in this case. Moreover, while the facts of this case make clear that no party was prejudiced by the fact that Citizen Power's filing was submitted by facsimile, the *AT&T* order makes no mention of any response by the applicant in that case, much less an effort to demonstrate good cause. Finally, the 1996 *AT&T* case was decided at a time when email delivery of pleadings was far less common, and the opportunity for prejudice more palpable.

The concern about prejudice to other parties will turn on the facts of each case. FirstEnergy has simply offered no reason why the Commission should depart from the waiver standards established in *Re Alternative Regulation for Large Local Exchange Telephone Companies*, Case No. 92-1149-TP-COI, 141 P.U.R.4th 1(March 10, 1993) and penalize rehearing applicants for the filing of rehearing applications by fax when there has been no showing of prejudice to other parties. The cases cited by FirstEnergy do not remotely support the notion that the Commission should reject rehearing applications filed by fax without regard to whether any party might be prejudiced if the rehearing were accepted.

D. A Waiver is in the Public Interest in this Case.

Assuming *arguendo* that waiver is necessary, waiver of Rule 4901-1-02(B)(10) is nonetheless in the public interest and Citizen Power accordingly requests that such a waiver be granted. The restructuring cases before the Commission are arguably among the most important it has ever faced. Reorganization of the electric industry will fundamentally change its way of serving the public and doing business. These are uncharted waters, with many vexing and complicated problems to resolve during such a transformation. The problems that have followed deregulation in other states certainly attest to that.

The issues presented by Citizen Power on rehearing are fundamental to a determination of the reasonableness of the settlement and its conformity with Ohio's restructuring legislation. No other party in this case has raised these issues, nor have any offered the arguments about them that Citizen Power has. Striking Citizen Power's application will leave these issues and arguments unheard, doing harm to the public interest. It would surely be exalting form over substance to strike the application on procedural grounds in the absence of prejudice to other parties and where such important public policy questions are at stake. Fully addressing all of the issues on the merits, moreover, is essential to building public consensus about restructuring and confidence in the process.

CONCLUSION

Where, as in this case, the Commission has time-stamped both Citizen Power's rehearing application sent to it by facsimile and the hard copy of same as timely filed, no party has been prejudiced by the use of a facsimile machine to deliver the application and the public

interest would be advanced by considering the application on the merits, FirstEnergy's motion to strike should be denied. To the extent the Commission determines that it has not already granted a waiver of Rule 4901-1-02(B)(10) on its own motion, Citizen Power requests that the Commission grant waiver of that rule and accept its rehearing as filed on August 18, 2000.

Respectfully submitted,



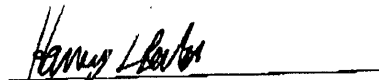
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Attorneys for Citizen Power

Certificate of Service

I certify that a copy of this Memorandum Contra and Motion has been sent to the Applicant and all Interveners by E-mail by this 5th day of September, 2000.


Harvey L. Reiter

Q:\citizen\99-1212 Sept 5 Answer to FE motion to strike

Attachment A page 1

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August 18, 2000

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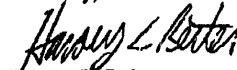
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Introduction

The Commission's Opinion and Order of July 19, 2000 (July 19 Order) sweeps aside the opposition of Citizen Power to the Stipulation and the Transition Plan of FirstEnergy (hereinafter FirstEnergy, FE or the Company) with hardly any comment, saying we presented no witness and were left with little record evidence to support our arguments. There is no legal requirement, however, that any intervenor present its own evidence in order to prevail on an issue. The Commissioner however, is obligated to follow S.B.3 and to respond to the arguments raised with a reasoned explanation for the