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BEFORE

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THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of)
FirstEnergy Corp. on Behalf of Ohio)
Edison Company, The Cleveland) Case No. 99-1212-EL-ETP
Electric Illuminating Company and)
The Toledo Edison Company for)
Approval of Their Transition Plans)
And for Authorization to Collect)
Transition Revenues)

PUBCO

In the Matter of the Application of)
FirstEnergy Corp. on Behalf of Ohio)
Edison Company, The Cleveland) Case No. 99-1213-EL-ATA
Electric Illuminating Company and)
The Toledo Edison Company for)
Tariff Approval)

In the Matter of the Application of)
FirstEnergy Corp. on Behalf of Ohio)
Edison Company, The Cleveland) Case No. 99-1214-EL-AAM
Electric Illuminating Company and)
The Toledo Edison Company for)
Certain Accounting Authority)

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INITIAL BRIEF OF THE SAFE ENERGY COMMUNICATION COUNCIL,
OHIO CITIZEN ACTION, and
OHIO PUBLIC INTEREST RESEARCH GROUP

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**INITIAL BRIEF OF THE SAFE ENERGY COMMUNICATION COUNCIL,
OHIO CITIZEN ACTION, and
OHIO PUBLIC INTEREST RESEARCH GROUP**

The Safe Energy Communications Council, Ohio Citizen Action, and The Ohio Public Interest Research Group (hereinafter "Intervenors") hereby present to The Public Utilities Commission of Ohio ("PUCO") their Initial Brief concerning the Application of FirstEnergy Corp.'s ("FirstEnergy") for Approval of its Transition Plan filed in these cases on December 22, 1999, the Stipulation and Recommendation ("Stipulation") filed on April 17, 2000, and the Supplemental Settlement materials filed on May 9, 2000.

INTRODUCTION

The Ohio General Assembly, after considerable consideration, passed S. B. 3, the electric utility deregulation bill, which became effective October 5, 1999. This legislation provided the controlling road map for the PUCO, the utilities, and the consumers, as to the electric utility deregulation. Sec. 4928.02, O. R. C., provides in part as follows:

4928.02 STATE POLICY

It is the policy of this state to do the following throughout this state beginning on the starting date of competitive retail electric service:

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, non-discriminatory, and reasonably priced retail electric service;

(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed (sic) and small generation facilities;

(D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service;

...

It is not likely that this recent FirstEnergy proceeding will “ensure” any of the above statements of policy. The issues of “adequate, safe, efficient, non-discriminatory, and reasonably priced retail electric service” were not even addressed by FirstEnergy, the PUCO Staff, or the Ohio Consumer’s Counsel.

There was not even any attempt to “...ensure the availability of unbundled and comparable retail electric services...” to the general public, or the consumers who were not specifically represented in the hearing. FirstEnergy made a number of private deals with some specific Intervenors who posed some risk to them, such as the Industrial Energy Users, the Kroger Company, Ohio Council of Retail Merchants, The Greater Cleveland Growth Association, The Ohio Hospital Association, and The Ohio Manufacturers Association. When counsel for Intervenors attempted to inquire as to the terms and conditions of these deals, in the cross-examination of the FirstEnergy President, he was told by the Attorney Examiner that such an inquiry would not be permitted.

Likewise, no attention was given by the parties primarily responsible for the protection of the public interest, the PUCO Staff, and the Ohio Consumer’s Counsel, as to the issues of the “...diversity of electricity suppliers...” or the requirement to “Encourage innovation and market access...” What happened to these issues, and the rest of the statements of policy in Sec. 4929.02, O.R.C?

THE “STRANDED INVESTMENT”

FirstEnergy filed some 11,000 pages in its Application, including the testimony and exhibits, which must have been primarily designed to conceal the real purpose of FirstEnergy in this proceeding. It is apparent that the real purpose was to have the PUCO “bailout” FirstEnergy from its many years of mismanagement, and waste of the resources provided by the investors and the consumers.

The FirstEnergy so-called “stranded investments”, AKA the “transition costs” apparently totaled \$8.7 billion, before income taxes, and \$6.7 billion, after taxes. S. B. 3 also provided very specific standards for the PUCO to use in determining these “transition costs.” Sec. 4928.39 provides in pertinent part as follows:

4928.39 TOTAL ALLOWABLE TRANSITION COSTS

Upon the filing of an application by an electric utility...for the opportunity to receive

transition revenues ...the public utilities commission...shall determine the total allowable amount of the transition costs of the utility to be received as transition revenues under these sections. Such amount shall be the just and reasonable transition costs of the utility, which costs the commission finds meet all of the following criteria: (Emphasis added).
(A) The costs were prudently incurred.

(B) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric customers in this state.

(C) The costs are unrecoverable in a competitive market.

(D) The utility would otherwise be entitled an opportunity to recover the costs.

...
There was no attempt on the record in this proceeding to determine if the "transition costs" were prudently incurred. The only evidence that the PUCO has on this issue is the uncontested claim, presumably somewhere in the 11,000 page FirstEnergy Application, that these costs were prudently incurred. It is apparent from the language of S. B. 3, and specifically the above quoted language, that the General Assembly did not expect the PUCO to just rubber stamp the utility application(s), or just rely on past decisions, by previous commissions.

What evidence is there that these costs are "legitimate, net, verifiable, and directly assignable..."? The PUCO Staff investigation certainly did not have the time, or take the time, to determine these requirements. What evidence is there that "...The costs are unrecoverable in a competitive market."? What evidence is there that "The utility would otherwise be entitled an opportunity to recover these costs."? The General Assembly set out 15 specific, detailed prerequisites and stated that "The public utilities commission shall not approve or prescribe a transition plan "...unless the commission first makes all of the following determinations." What evidence is there that the PUCO has complied with Sec. 4928.34, **Prerequisites to Approval of Transition Plan?** What specific language in the record in this proceeding is the Commission going to cite as complying with these 15 "Prerequisites"?

The Coalition For Choice In electricity ("CCE") expressed this concern very well in its Preliminary Objections to the FirstEnergy Application, filed on February 4, 2000, when it stated:

CCE objects generally to FirstEnergy's plan on the grounds that it fails to identify how the filing promotes the policy of this State under R. C. 4928.02. FirstEnergy's filing and proposed tariffs do not reference the goals contained in R. C. 4928.02 or use those goals to guide the construction, application, administration or modification of the plan, or its proposed tariffs, terms and conditions. CCE objects to this defect. (Preliminary Objections, p. 4).

This was a valid objection when made by the CCE coalition and it is still a valid objection.

THE STAFF REPORT

S. B. 3 clearly contemplated that the PUCO Staff would do an investigation of the utility's proposed plan and report to the Commission. Sec. 4928.32 specifically states, in part, that:

EXPEDITED DISCOVERY OF TRANSITION PLAN; OBJECTION TO PLAN

....

(B)...

In addition, not later than ninety days after the plan's filing, the commission staff shall file with the commission a report of its recommendations with respect to the plan.

The Staff did an investigation of some parts of the FirstEnergy Application and listed numerous "exceptions" to the FirstEnergy transition plan. The Staff Report (p. ii) stated that:

...

Exceptions presented include those that appear to be:

- In conflict with public policy including, but not limited to, public health, welfare and safety,
- In conflict with current and proposed Commission Rules.
- In conflict with acceptable utility regulatory or disciplinary practices.

The Staff went on for 53 pages explaining numerous "exceptions" to the FirstEnergy transition plan. What happened to the Staff between the time it filed this Report, and the agreement with FirstEnergy to join in the Stipulation and Recommendation? We will probably never know because the Staff never filed any testimony supporting the Stipulation, and never put on any witnesses supporting the Stipulation. Why not? What happened to all of the "exceptions" that the Staff originally had to the FirstEnergy plan? Were any of them resolved, or were they just abandoned?

THE OHIO CONSUMER'S COUNSEL

The Ohio Consumer's Counsel ("OCC") filed its Preliminary Objections to the FirstEnergy Plan on February 4, 2000, and raised specific Objections to the proposals for "Unbundling, GTC, Regulatory Assets, Corporate Separation, Tariff Related Issues, and Additional Objections" (p.i).

The OCC made 64 separate Objections to the plan, many of which were very substantive in nature. What happened to all of these Objections between February 4, 2000, and the April 17, 2000, signing of the Stipulation? Did all of these Objections get resolved, or satisfied? We will probably never know the details of this situation either, since the OCC did not put on any witness supporting the Stipulation, or explaining why it was signing the Stipulation. Why not?

Some of the more significant Objections of the OCC that still need to be answered are:

8. OCC objects to the inclusion in the Company's claimed transition costs of any amounts by which the company would have been required to reduce the fixed costs on the regulatory books of its operating subsidiaries pursuant to stipulations approved by the Commission in Case No. 95-830-EL-UNC and Case No. 96-1211-EL-UNC, because these amounts do not meet the statutory definition of transition costs in that the Company would not 'otherwise be entitled to recover the costs,' as required by Ohio Rev. Code section 4928.39.
26. OCC objects to CEI failing to demonstrate that it has excluded from the amount of transition costs it is seeking to recover the portion of its generating plant included in the \$1,558,241,341 recorded on its books as Goodwill under the purchase accounting related to the FirstEnergy merger in 1997.
27. OCC objects to Toledo Edison failing to demonstrate that it has excluded from the amount of transition costs it is seeking to recover the portion of its generating plant included in the \$516,374,903 recorded on its books as Goodwill under the purchase accounting related to the FirstEnergy merger in 1997.
62. OCC objects to the Company's assumption that its transition charges must be designed to permit recovery of 100 per cent of its allowed transition costs, when in fact the total allowable amount of transition costs is only one of the factors the Commission must consider in prescribing the transition charge for each customer class, pursuant to Ohio Rev. Code section 4928.40.(A).

These are just a few of the many significant and substantive Objections the OCC raised to the FirstEnergy plan. Have they now just disappeared? Have they evaporated? What happened to the \$1,558,241,341 in "Goodwill" on the CEI books? Is it included in the "stranded investment?" What happened to the \$516,374,903 in "Goodwill" on the Toledo Edison books? Did it disappear? Did it evaporate? Why did the OCC abandon such significant monetary issues?

What benefit will the Ohio utility ratepayers, or the Ohio taxpayers, receive from the \$695,000 the OCC had to spend to prepare for the defense of the utility customers in Ohio. Did it evaporate also? Will the people of Ohio ever know what advice the OCC received from its experts for this \$695,000.00?

MISCELLANEOUS INTERVENORS

A number of Intervenor originally took a very active part in the early stages of this proceeding. Then all of a sudden they started bailing out, without any real explanation of what they were receiving in consideration from FirstEnergy for their signing the Stipulation, or just not opposing it. What did they get? What were they promised? How can the Commission determine if the Stipulation is appropriate for adoption if it does not know the details of these agreements? The Stipulation recites, as they always do, that it "...is the product of lengthy, serious bargaining among knowledgeable and capable parties in a cooperative process..." Was the Stipulation the result of "serious bargaining" or was it the result of specific promises for some specific direct benefit to the intervenor(s) who signed the Stipulation?

One of the most active of the many Intervenor was the Coalition For Choice in Electricity ("CCE"). This group of Intervenor, which had very significant resources, and could have made a significant contribution to the record in this case unfortunately decided to forego their 87 pages of Objections and join in the Stipulation. However, the substance of these Objections they raised must still be addressed by this Commission before it can comply with the S. B. 3 mandate. One of the very significant Objections raised by CCE was as follows:

Z. Deferred Issues.

By Entry issued July 15, 1999, the Commission determined that it would defer and consider stranded cost related issues arising from FirstEnergy's generation asset swap with Duquesne Light Company in this proceeding:

We will not consider in this case issues related to stranded costs. FirstEnergy is on notice that these issues will be addressed in the transition plan proceedings which are expected to be filed in the near future as a result of the electric restructuring legislation recently passed by the Ohio General Assembly. (p. 87).

Now is the time for this Commission to address the "stranded costs" of FirstEnergy. How will it do that when all the principal parties, including the PUCO Staff, and the OCC, have failed to put on any evidence in the case? Is the Commission stuck with the 11,000 page Application of FirstEnergy?

The Commission must keep in mind that S. B. 3 did not repeal Sec. 4905.33 O. R. C., which provides in pertinent part as follows:

REBATES, SPECIAL RATES, AND FREE SERVICE PROHIBITED

(A) No public utility shall directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person, firm, or

corporation a greater or lesser compensation for any services rendered, or to be rendered, except as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923, of the Revised Code, than it charges, demands, collects, or receives from any other person, firm or corporation for doing a like and contemporaneous service under substantially the same or similar circumstances.

Since the Attorney Examiner would not permit any inquiry into the nature of the various negotiations, and the substance of these agreements, it is impossible for this Commission to know if any of these agreements violate the express language of the above statute. We do know however, if just from reading the newsclips that are circulated within the Commission, that the news media has reported enough of the details of some of these arrangements to cause a real concern.

The Commission must also keep in mind that S. B. 3 did not repeal Sec. 4905.35, which provides in pertinent part as follows:

UNDUE ADVANTAGE

(A) No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.

Is FirstEnergy going to give any preference to the various Intervenors who have previously objected so vigorously to its transition plan, but which now sit quietly by, waiting for some possible reward? Will the Commission ever know about these private deals? Does it even care?

INCORPORATION BY REFERENCE

These Intervenors, The Safe Energy Communication Council, Ohio Citizen Action, and Ohio Public Interest Research Group, support the positions, and incorporate by reference the arguments on brief, of the Ohio Partners for Affordable Energy ("OPAE") and the brief of Citizen Power and the Ohio Environmental Council, to the extent that those briefs do not expressly disagree with any of the positions expressed in this brief.

SUMMARY

The Commission must now focus on the relationship between proper unbundling, stranded or transition cost recovery, and the importance of retaining a healthy shopping credit necessary to ensure that Ohio and the service territories of FirstEnergy will receive the benefits of a successful competitive

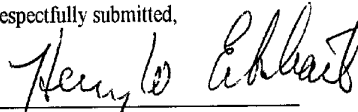
electricity market. To achieve the benefits of a competitive market, the Commission must adopt policies that promote robust competition. Robust competition is only achieved when multiple companies supply competitive services to a large market serving all classes of electric customers.

The FirstEnergy's shopping credit, even as modified in the Stipulation, is clearly too small. The FirstEnergy approach diverts too much of the shopping customers' unbundled generation rate to its own "stranded cost" recovery. The FirstEnergy Stipulation would permit most customers to save little or nothing by shopping while FirstEnergy would enjoy accelerated collection of its "stranded costs."

The FirstEnergy Stipulation should not be adopted because it would permit FirstEnergy to retain a dominant market share and likely make it very difficult to achieve the statutory switching mandate. This is particularly the case among the general class of residential customers who were not part of some private deal with FirstEnergy.

There is simply no economic or regulatory justification for this Commission to continue to "Bailout" Cleveland Electric Illuminating, Toledo Edison, and Ohio Edison, now known as FirstEnergy, from their decades of mismanagement and exorbitant rates. The Commission should not allow FirstEnergy to simply recover from its customers 100% of its claimed "stranded investment."

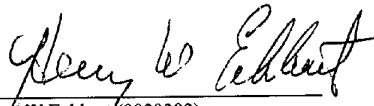
Respectfully submitted,



Henry W. Eckhart, Attorney for
Safe energy Communication Council,
Ohio Citizen Action, and
Ohio Public Interest Research Group

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a copy of this Initial Brief on the Applicant, FirstEnergy, and the parties on the most recent e-mail service list, by e-mail, this 2nd day of June, 2000. 26 paper copies have also been filed with the Commission Docketing Department.



Henry W Eckhart(0020202)