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October 1, 2001

Via Hand Delivery

Ms. Daisy Crockron
Chief, Docketing Division
Public Utilities Commission of Ohio
Docketing Division, 10th Floor
180 East Broad Street
Columbus, Ohio 43215-3793

Re: In the Matter of the Petition of The Northeast Ohio Public Energy Council for Waiver of Limited Tariff Provisions of Cleveland Electric Illuminating Company and Ohio Edison Company; Case No. 01-2284-EL-UNC

Dear Ms. Crockron:

Please find enclosed for filing in the above-captioned matter an original and fifteen (15) copies of *The Northeast Ohio Public Energy Council's Memorandum Contra FirstEnergy Corp.'s Motion to Intervene and Motion to Dismiss*. Please time-stamp and return the additional five (5) copies.

Very truly yours,

Dane Stinson

DS/sec
Enclosures

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Petition of The Northeast Ohio Public Energy Council for Waiver of Limited Tariff Provisions of Cleveland Electric Illuminating Company and Ohio Edison Company.	))))	Case No. 01-2284-EL-UNC

NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S MEMORANDUM CONTRA FIRSTENERGY CORP.'S MOTION TO INTERVENE AND MOTION TO DISMISS

I. INTRODUCTION

The Northeast Ohio Public Energy Council ("NOPEC") filed this Petition to waive the application of Cleveland Electric Illuminating Company's and Ohio Edison Company's ("FirstEnergy") discriminatory tariff provisions that demand a $5 switching fee only from opt-out governmental aggregators.[1] FirstEnergy waived the fee as to other alternative suppliers and, more recently, effectively waived the fee as to a select few opt-out governmental aggregators. By this Petition, NOPEC merely seeks equal treatment.

Once the Commission reviews the caustic comments[2] and meritless allegations in FirstEnergy's motion to dismiss, it will discover that the motion rests upon a single erroneous foundation: that the issues raised by this Petition have been "conclusively resolved adversely to NOPEC." FirstEnergy's Motion to Dismiss, at 3. In essence, FirstEnergy asserts that the

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[1] The sections of both tariffs provide as follows:

> **Certified Supplier Selection:** $5.00 per Customer processing fee will be charged to the Certified Supplier for each customer selecting or switching to the Certified Supplier. The $5.00 switching fee will not be assessed the first time a retail customer makes a voluntary choice to switch to an alternative generation supplier; *such voluntary choice shall not include "opt-out" in [sic] governmental aggregation.*

Emphasis supplied.

[2] NOPEC chooses not engage in such demeaning rhetoric and will address only the merits of FirstEnergy's motion to dismiss.

doctrine of collateral estoppel precludes NOPEC from raising, and the Commission from considering, FirstEnergy's discriminatory practices averred in NOPEC's Petition. As set forth subsequently, the doctrine clearly is inapplicable to the issue under consideration because NOPEC was not a party to the previous proceeding that FirstEnergy claims is controlling and because the Commission did not determine in that proceeding the merits of the issues that NOPEC raises by this Petition. Accordingly, the Commission must deny FirstEnergy's motion to dismiss.

II. THE DOCTRINE OF COLLATERAL ESTOPPEL APPLIES ONLY WHEN THERE IS AN IDENTITY OF PARTIES AND ISSUES IN THE PREVIOUS AND CURRENT PROCEEDINGS.

It is settled that "[t]he application of the concept of collateral estoppel requires an identity of both parties and issues" in the previous and current proceedings. *Trautwein v. Sorgenfrei*, 58 Ohio St.2d 493 (1979), citing *Whitehead v. Genl. Tel. Co.*, 20 Ohio St.2d 108 (1969); *Columbus v. Union Cemetery Assn.*, 45 Ohio St.2d 47 (1976); *Hicks v. De La Cruz*, 52 Ohio St.2d 71 (1977); *Werlin Corp. v. Pub. Util. Comm.*, 53 Ohio St.2d 76 (1978).

First Energy bases its collateral estoppel claim on the Commission's approval of the stipulation resolving FirstEnergy's electric transition plan. See *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, Cleveland Electric Illuminating Company, and Toledo Edison Company for Approval of Their Transition Plans*, Case No. 99-1212-EL-ETP (Opinion and Order, July 19, 2000).[3] As the Commission will recall, a partial

[3] FirstEnergy also claims that the Commission's recent order adopting rules for governmental aggregators conclusively resolved the issues raised by this Petition. See *In the Matter of the Commission's Promulgation of Rules for Competitive and Noncompetitive Retail Electric Service Standards Regarding Governmental Aggregation Service Pursuant to Chapter 4928, Revised Code*, Case No. 00-2394-EL-ORD (Finding and Order, August 9, 2001). In this rulemaking proceeding, NOPEC urged the Commission to adopt a rule that prevents the discriminatory application of the $5 switching fee. The Commission failed to do so without addressing the merits of NOPEC's arguments. Certainly, it was proper for NOPEC to attempt to invoke the Commission's quasi-legislative powers to redress an erroneous quasi-judicial determination, just as litigants seek redress from the Legislature for erroneous judicial decisions. Regardless, because the rulemaking was a quasi-legislative proceeding, the doctrine of collateral estoppel does not apply, as subsequently discussed.

stipulation was filed in that case on April 17, 2000 to resolve FirstEnergy's transition plan case. The stipulation did not include pivotal alternative suppliers as signatory parties, and FirstEnergy, perhaps leery of the Ohio Supreme Court's comments in *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229 (1996), at fn. 2, apparently found it necessary to make supplemental concessions for such suppliers to enter the agreement. It is these supplemental concessions, filed May 9, 2000, that contained the agreement between the alternate suppliers and FirstEnergy to waive the initial $5 switching fee as to all suppliers except their mutual competitors: opt-out governmental aggregators. NOPEC was not a party to the proceeding and the Commission approved the stipulation on July 19, 2000, without specifically addressing the merits of the switching fee waiver which is at issue in this proceeding. [4]

A. NOPEC Was Not a Party to the FirstEnergy's Transition Plan Case

In an attempt to prevent the superficial collateral estoppel claim that FirstEnergy raises in its motion to dismiss, NOPEC averred in its Petition that it had not been formed at the time the parties entered into negotiations in FirstEnergy's transition plan case, was not a party to the transition plan case or to the negotiated settlement process, and was not a signatory party to the stipulation. Petition at ¶ 8, 12. Indeed, NOPEC did not file its application with the Commission for certification as a governmental aggregator until November 28, 2001. See *In the Matter of the Application of the Northeast Ohio Public Energy Council's Application for Certification as a Governmental Aggregator*, Case No. 00-2317-EL-GAG.

[4] These actual circumstances surrounding FirstEnergy's waiver of the switching fee differ markedly from FirstEnergy's revisionist theory in its motion to dismiss, in which it claims that the Commission deemed the waiver appropriate to level the playing field between opt-out governmental aggregators and other alternative suppliers. See FirstEnergy Motion to Dismiss, at 5. The Commission made no such determination. Instead, the Commission merely recognized that waiver of the $5 switching fee would benefit retail customers *in general* (*i.e.*, the stipulating suppliers' customers), without addressing the merits of excluding the customers of opt-out governmental aggregators from the waiver. See *In the Matter of the Application of FirstEnergy Corp. on behalf of Ohio Edison Company, Cleveland Electric Illuminating Company, and Toledo Edison Company for Approval of Their Transition Plans*, Case No. 99-1212-EL-ETP (Opinion and Order, July 19, 2000), at 49, 68.

Apparently unfamiliar with the doctrine of collateral estoppel, FirstEnergy states that NOPEC, even though not a party to FirstEnergy's transition plan case, is as bound by the stipulation and order approving it, as it is bound by the laws enacted prior to its existence, such as the federal income tax enacted early in the Twentieth Century. FirstEnergy Motion to Dismiss, at 7. As the Commission is aware, collateral estoppel applies only to judicial (or, in this instance, quasi-judicial) determinations by a tribunal of competent jurisdiction. It does not apply to legislative acts. See, e.g., *In re Ohio Suburban Water Company*, Case No. 81-657-WW-AIR (Entry, April 7, 1982); *Union Rural Electric Cooperative, Inc. v. Dayton Power & Light Company*, Case No. 88-947-EL-CSS (Entry, August 16, 1988); *Whitehead, supra.* While NOPEC certainly is bound by legislative acts such as the federal tax laws cited by FirstEnergy, even though not a participant in the legislative proceeding leading to their enactment, it just as clearly is not bound by the quasi-judicial determinations of the Commission in proceedings to which it was not a party.

Indeed, by enacting § 4905.26, Ohio Revised Code, the Ohio Legislature specifically has countenanced challenges to Commission-approved rates and regulations in a utility's tariff, as well as the utility's practices in applying the tariff provision. Moreover, the Commission has recognized that a utility must waive a specific tariff provision as to one customer when it has done so for others. See *In the Matter of the Complaint of Westlake Condominium Unit Owners Association v. The Cleveland Electric Illuminating Company*, Case No. 94-1660-EL-CSS (Order, January 18, 1996; Entry on Rehearing, March 7, 1996). To adopt FirstEnergy's argument that the Commission's orders approving the stipulation and tariff provisions is conclusive as to NOPEC would render § 4905.26, Ohio Revised Code, and the Commission's precedent, a nullity.

FirstEnergy also suggests that NOPEC is somehow bound by the stipulation and order approving it because two municipalities that were parties to the transition plan case (the cities of Eastlake and Brook Park) subsequently joined NOPEC.[5] However, as a regional council of governments established under Chapter 167 of the Ohio Revised Code, and as a separate political subdivision of the State of Ohio, NOPEC is an independent entity whose interests are not represented by constituent members. Neither the City of Eastlake nor the City of Brook Park has been authorized to act on behalf of NOPEC or the other 93 municipalities, townships and counties that comprise its membership. Indeed, the cities could not have so acted because NOPEC had not even been formed at the time.

B. NOPEC's Issues Were Not Considered in FirstEnergy's Transition Plan Case

For the doctrine of collateral estoppel to apply, there must not only be an identity of issues in the previous and current proceedings, but the issue in the previous proceeding must have been "actually litigated, directly determined, and essential to the judgment in the prior action." *Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St.3d 193 (1983), at 200-201. Because the Commission's Order of July 19, 2000 does not specifically address the merits of FirstEnergy's agreement to waive the $5 switching fee to all suppliers except opt-out governmental aggregators, this prong of the collateral estoppel doctrine has not been satisfied, especially as to NOPEC which was not a party to the prior proceeding.[6] Indeed, NOPEC's lack of party status is outcome determinative in addressing FirstEnergy's motion to dismiss.

However, even assuming *arguendo* that NOPEC was a party to the prior proceeding

[5] The cities were **not** signatory parties to the stipulation.

[6] As stated previously, the Commission merely recognized that waiver of the $5 switching fee would benefit retail customers *in general* (*i.e.*, the stipulating suppliers' customers), without addressing the merits of excluding the customers of opt-out governmental aggregators from the waiver. See fn. 4.

(which it was not) and that the merits of the switching fee issue was "actually litigated" and "directly determined" therein, FirstEnergy's motion to dismiss still must be denied because the scope of NOPEC's Petition goes beyond the discriminatory tariff provision on its face, to include its subsequent application or, in this case, lack of practical application to other opt-out governmental aggregators. See Petition, at ¶ 14. In its motion to dismiss, FirstEnergy denies that it has waived the switching fee; however, its letter agreement with the City of Cleveland shows that FirstEnergy agreed to provide the City a one time payment of $650,000.00.[7] It becomes apparent that this payment constitutes an effective waiver of the $5 switching fee when considering that the City of Cleveland's CEI residential customer base consists of approximately 120,000 customers. Additionally, FirstEnergy Services' offer to the City of Toledo to absorb the $5 switching fee constitutes an effective waiver of the fee. Having liberally waived the $5 switching fee to suppliers that are not opt-out governmental aggregators, as well as effectively waiving the fee to select opt-out governmental aggregators, FirstEnergy likewise must be ordered to waive the $5 switching fee to NOPEC. See *In the Matter of the Complaint of Westlake Condominium Unit Owners Association v. The Cleveland Electric Illuminating Company*, Case No. 94-1660-EL-CSS (Order, January 18, 1996; Entry on Rehearing, March 7, 1996).

III. THE WAIVER OF THE $5 SWITCHING FEE FOR ALL SUPPLIERS EXCEPT OPT-OUT GOVERNMENTAL AGGREGATORS IS UNDULY DISCRIMINATORY

FirstEnergy asserts that the waiver of the switching fee for all suppliers except opt-out government aggregators is not discriminatory. Yet, in its next breath, it admits that the only purpose for the waiver is to benefit customer enrollment for CRES suppliers (FirstEnergy Motion

[7] Attached as Exhibit A is a copy of the FirstEnergy/City of Cleveland letter agreement dated May 15, 2000.

to Dismiss, at 4-5) which necessarily comes at the expense of FirstEnergy's most formidable competitor for residential customers: the opt-out governmental aggregator.

Incredibly, FirstEnergy attempts to justify the waiver by claiming that FirstEnergy "deemed it appropriate" to level the playing field between opt-out governmental aggregators, who have a "more 'captive audience,'" and other alternative suppliers, who do not. [8] As a threshold matter, NOPEC notes that the Ohio Legislature crafted § 4928.20, Ohio Revised Code, to ensure that customers of opt-out governmental aggregation were by no means "captive," by providing extensive safeguards that provide them the freedom to choose their electric supplier. These safeguards include public hearings on the aggregation and subsequent individualized notice providing the opportunity not to participate if they so choose. It is not for the Commission, and certainly not FirstEnergy, to alter the Legislature's intent.

Moreover, FirstEnergy's assertion that their partial waiver is justified based upon unsubstantiated additional marketing expenses that CRES providers must bear is without merit. Indeed, opt-out governmental aggregators must incur significant expenses that other CRES providers do not in order to secure initial enrollment, including the costs of special elections; the costs to develop, and hold two public hearings on, operation and governance plans; and the costs to develop, print and mail one, and in many cases two, opt-out notices. See § 4928.20(B)(C) and (D). In NOPEC's case, with 95 participating governmental subdivisions, and as many as 420,000 potential customers, these costs are significant and equally deserving of relief from the initial $5 switching fee.

[8] FirstEnergy also ascribes to the Commission this rationale for waving the switching fee only to other CRES providers; however, the Commission made no such determination. Instead, the Commission merely recognized that waiver of the $5 switching fee would benefit retail customers *in general* (*i.e.*, the stipulating suppliers' customers), without addressing the merits of excluding the customers of opt-out governmental aggregators from the waiver. See fn. 4.

Finally, however convincing the case that the waiver of the $5 switching fee for CRES providers is discriminatory as to opt-out governmental aggregators, it is even more compelling when considering that FirstEnergy has effectively extended the waiver to select other non-governmental aggregators such as the City of Cleveland.

IV. THE $5 SWITCHING FEE IS EXCESSIVE

FirstEnergy has done little to refute that the $5 switching fee for NOPEC's customers, a total of as much as $2.1 million, is excessive. Considering that the pre-enrollment CD already has been created, the burden shifts to NOPEC to ascertain the customers that wish to remain in the aggregation and to electronically submit this information to FirstEnergy. Indeed, the Commission's proposed rules make NOPEC, not FirstEnergy, financially responsible for errors in this regard. See Proposed Rule 4901:1-21-17(F), Ohio Administrative Code.

Even more astonishing is FirstEnergy's attempt to justify the $5 fee by asserting that it must send a confirmation letter to each of NOPEC's customers. As NOPEC explained in its application for rehearing of the Commission's order in Case No. 00-2394-TP-COI, while a confirmation notice and right of rescission may be appropriate for other providers of competitive retail electric service, it is unnecessary, unreasonable, and unlawful as applied to opt out governmental aggregators whose customers already are subject to unique statutory safeguards. These safeguards do not permit an electric distribution company to interfere with the opt-out process under the guise of a confirmation letter. See, § 4928.20(B)-(D), Ohio Revised Code. See, also, *State ex rel. Foster v. Evatt*, 144 Ohio St. 65 (1944), at 30 ("Administrative rules may facilitate the operation of what has been enacted by the General Assembly but may not add to or subtract from the legislative enactment.").

In essence, FirstEnergy seeks to use the confirmation letter process to frustrate NOPEC's aggregation efforts and retain its customers, and then have NOPEC support the cost of its efforts by the inclusion of such costs in the switching fee. The cost of the confirmation letter, which benefits only FirstEnergy should not be included in the switching fee, nor should customer inquiries related to the letter.

V. CONCLUSION

The Commission needs to do everything it can to encourage the development of competition in the residential market in Ohio. The initial switching fee -- particularly when it totals millions of dollar to governmental aggregators and is applied discriminatorily as here -- is a significant barrier to that competition. For all of the foregoing reasons, NOPEC respectfully requests the Commission to dismiss FirstEnergy's Motion to Dismiss and grant NOPEC's Petition in its entirety.

Respectfully submitted,

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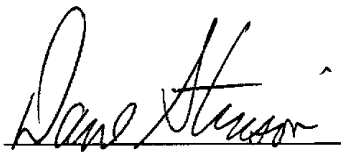
Counsel for Northeast Ohio Public Energy Council

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Northeast Ohio Public Energy Council's Memorandum Contra FirstEnergy Corp.'s Motion To Intervene And Motion To Dismiss was served via First Class U.S. mail, postage pre-paid, upon the following this 1st day of October, 2001.

Arthur E. Korkosz, Esq.
FirstEnergy Corp.
76 South Main Street
Akron, Ohio 44308



Dane Stinson

EXHIBIT A

AGREEMENT

This Agreement is entered into as of the 15th day of May, 2000, between the City of Cleveland, Ohio ("City"), acting through its Director of Law, and FirstEnergy Corp. and its Ohio operating companies (Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company) (collectively, "FirstEnergy"), acting through their duly authorized representative.

1. For the duration of the CEI Market Development Period, FirstEnergy shall make available to the City 75 MW of power at the rates and upon the terms contained in the "Stipulation and Recommendation" dated April 13, 2000 ("Stipulation") and "Supplemental Settlement Materials" filed on May 9, 2000 ("Supplemental Stipulation") for Market Support Generation ("MSG"), including but not limited to provisions relating to load factor, capacity factor, losses, and imbalance and scheduling charges. The 75 MW shall be in addition to the quantity of MSG made available by FirstEnergy pursuant to the Stipulation. The power shall be used by the City only for the purpose of supplying CEI residential retail customers within the City, provided, however, that the City may at its option use all or a portion of the power to supply City-owned facilities served by CEI located within and outside the City.

2. During the CEI Market Development Period, no affiliate of FirstEnergy will enter into any wholesale power contract with a term in excess of twelve (12) months without offering the same contract and terms to Cleveland Public Power ("CPP"). The City will have fifteen (15) days to determine whether or not it will elect to enter such contract on the same terms. This paragraph does not apply to transactions between FirstEnergy affiliates.

3. The City and FirstEnergy shall form a Power Supply Task Force, which will operate in a manner similar to the task forces created at the time of the merger, to investigate (1) ways in which the City can reduce or manage peak load, particularly in the summer; (2) opportunities that may be obtainable by joint purchasing of power and/or more coordination of power purchases; (3) whether existing CPP contracts can be hedged or otherwise used by FirstEnergy's trading organization in a way that could reduce the costs of such contracts to the City without imposing additional costs on FirstEnergy; and (4) such other matters relating to power supply and operations as the task force deems appropriate.

4. The City and FirstEnergy shall cooperate in formulating a Consumer Education Plan that shall be filed with the Public Utilities Commission of Ohio ("PUCO") as part of CEI's Local Consumer Education Plan. The Plan shall fairly and accurately explain the competitive choices available in the City with special emphasis on educational needs that arise from the existence of two electric suppliers within the City. Within fifteen (15) days of the approval of the Stipulation by the PUCO, FirstEnergy shall make a one-time payment of Six Hundred Fifty Thousand Dollars ($650,000.00) to the

City for such purposes relating to customer choice as the City in its sole discretion shall determine.

5. If CPP elects to take service under the FirstEnergy open access transmission tariffs, FirstEnergy shall not make any claim for wholesale stranded costs based on customer switches from the CEI to CPP distribution systems anywhere in the City.

6. The City agrees to withdraw all of the testimony sponsored by the City in Case Nos. 99-1212-EL-ETP, 99-1213-EL-ATA, and 99-1214-EL-AAM at the PUCO, and not to otherwise oppose the Stipulation and Supplemental Stipulation filed in those cases. The City shall be entitled to all of the rights contained in the provisions of both Stipulations to the same extent as if the City had signed the Stipulations as a stipulating party. The terms, conditions, and understandings contained in paragraphs 1, 2 and 4 herein are contingent upon the PUCO accepting the Stipulation and the Supplemental Stipulation in their entirety and without alteration, consistent with Section XII of the Stipulation. If the Stipulation and Supplemental Stipulation are not so accepted by the PUCO, the City shall be entitled to re-file all of its sponsored testimony referenced above.

Cornell P. Carter
Director of Law, City of Cleveland, Ohio

Leila L. Vespoli, General Counsel
FirstEnergy Corp.