BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of The Application of Ohio Edison Company for Approval of an Agreement with a New Customer (ASC Industries, Inc.)	)	Case No. 99 - 389 – EL – AEC
In the Matter of The Application of Ohio Edison Company for Approval of an Agreement with an existing Customer (R-G-T Plastics Company)	)	Case No. 99 – 390 – EL – AEC
In the Matter of The Application of Cleveland Electric Illuminating Company for Approval of an Agreement an Electric Service Agreement with Sherwin-Williams' Consumer Group	)	Case No. 99 – 427 – EL – AEC
In the Matter of The Application of Ohio Edison Company for Approval of an Agreement with a New Customer (Plas Tech, Inc.)	)	Case No. 99 – 664 – EL – AEC
In the Matter of The Application of Ohio Edison Company for Approval of an Agreement with an existing customer (Preferred Rubber Compounding Company)	)	Case No. 99 – 743 – EL – AEC
In the Matter of The Application of Cleveland Electric Illuminating Company for Approval of an Agreement an Electric Service Agreement with Lakeside Association Phase I	)	Case No. 99 – 786 – EL – AEC

(NOT CONSOLIDATED)

APPLICATION FOR REHEARING
AND
REQUEST FOR LIMITED INTERVENTION
BY
ENRON ENERGY SERVICES, INC.

Pursuant to Sec. 4903.10 Ohio Rev. Code, Enron Energy Services Inc., ("Enron") respectfully requests that the Public Utilities Commission of Ohio ("Commission") grant a rehearing of the December 16, 1999 Findings And Orders issued in the above styled seven cases. The seven cases have not been consolidated, but present a single common issue. The applicant also requests limited admission as a party of record in order to address the common issue. Enron does not oppose the immediate implementation of the seven contracts, as the single common issue raised applies only to implementation of the contract in the post deregulation period after January 1, 2001.

The single common issue is whether the condition placed in all seven of these special contracts cases which states: "(6) The approval of this contract is subject to the determinations and constraints of S.B. 3" means that these contracts will have to be unbundled and the end users permitted to purchase competitive supplies. It is unreasonable and unlawful to defer the determination of this issue to a point in time when an appeal would not be determined until after electric deregulation begins.

MEMORANDUM IN SUPPORT

Important Issues That Still Need To Be Determined

Although the legal and policy issues of whether special contracts have to be unbundled and the effect on the infant Ohio power market if special contract customers are excluded from the power market for years was discussed at the December 14, 1999 Commission meeting, no record of those issues were established in the seven cases listed above. More importantly, the Commission offered no clear cut answer as to how the

special contracts will function or need to be modified after deregulation. The Commission, acknowledging the importance of these issues, did insert as part of the Findings and Orders in all seven of the above cases a "place holder" which made approval subject to the deregulation statutes.

Though no transcript was taken of the discussion held at the December 14th Commission meeting, a quorum of sitting Commissioners along with counsel for the operating utilities who issued the special contracts, counsel for independent power marketers and counsel for large industrial customers explored both the policy ramifications and the dictates of Amended Substitute Bill 3 as to the need for universal unbundling and the opening of a competitive market to all end users on January 1, 2001. The question posed by this application for rehearing is when – not if – these questions be answered. For the sake of the affected utility, the end use customers, as well as the future participants in the competitive Ohio power market the answer should be now. Deciding the issue now would permit those adversely affected by the Commission interpretation of the requirements of Amended Substitute Senate Bill 3 to seek judicial review and possibly get a final answer before deregulation begins. In short, certainty is good for all affected persons in this issue, and we will not have certainty until first the Commission address directly the legal issues raised by special contracts which are supplied by post unbundled regulated utility or its affiliated power generation affiliate if the supply contract did not first go to the open market.

What Amended Substitute Senate Bill 3 Requires In The Post Deregulation Period

Sec. 4928.07 Ohio Rev. Code, requires all electric utilities to unbundle to the maximum extent practicable and separately price competitive retail electric services. No exception is made for special contracts which are a competitive retail electric service, and under the clear language of the statute then must also be unbundled. Many of the contracts in the above styled proceedings are discounted for economic development. The Commission has for years had the authority to permit cross subsidies. The Amended Substitute Senate Bill 3 does not strip the Commission of that authority, but the unbundling of competitive services required by the statute does seem to limit the discounts to regulated, non competitive services which are priced by the Commission.

If special contracts are allowed to have their generation remain bundled and the end users barred from entering the emerging Ohio power market on the starting date of competition, it would violate the stated purpose of Section 4928.02 Ohio Rev. Code, which requires the Commission to ensure that effective retail electric competition develops. Special contracts that permit the cross-subsidization of competitive retail electric services (such as generation) by non-competitive retail electric services will unlawfully result in an undue competitive advantage accruing to the incumbents that will severely impede the ability of third party suppliers to serve these customers.

Additionally, Sections 4928.03 and 4928.15(A) Ohio Rev. Code, require that on the starting date of competitive retail electric service, each consumer shall have comparable and nondiscriminatory access to the retail electric services of the utility. Allowing some consumers to benefit from special contracts while others are not afforded the same opportunity is in direct conflict with this provision.

Pursuant to Sec. 4928.17(A)(3) Ohio Rev. Code, a utility must implement a corporate separation plan that prevents a utility from extending an "...undue preference or advantage to an affiliate, *division, or part of its own business* engaged in the business of supplying the competitive retail electric service... (emphasis added)." Utility obligations under this provision are effective January 1, 2000. The offering of special contracts by a utility or its affiliate creates an undue preference and advantage that cannot be replicated by nonaffiliated third party suppliers and therefore is in violation of this section of the corporate separation plan.

A rehearing would permit development and refinement of the legal restraints on special contracts. As is often in the case with utilities, the questions raised by special contracts in the matter at bar are not limited to "yes" or "no" answers. For example, a well conceived "fresh look" at the time of deregulation in which the end use customer could shop the generation and keep part or all the discount may meet the above described statutory descriptions.

What is black and white in this case is that the incumbent utility after the start of competition cannot: 1) supply a bundled service in which the end user has no right to shop for generation; or 2) directly or indirectly award the generation portion of the special contract to its subsidiary that after corporate separation owns the affiliated generation. Such an outcome would be in conflict with Sections 4928.02, 4928.03, 4928.15(A), 4928.17(A)(3) Ohio Rev. Code. It should also be noted that if the special contract is still in place after the transition period, which is possible given the long life of some the special contracts, the incumbent utility may be able to recover any lost (i.e.

"delta" revenues on the generation under the Ohio Supreme Court recent decision in Cincinnati Gas & Elec. v. PUCO (1999) 86 Ohio St. 3d 53; 711 N.E. 2d 670

It is for the reasons set forth above that Enron respectfully requests that the Commission grant its request for rehearing and require that:

(1) All special contracts approved by the Commission after October 5, 1999, be restricted to a period ending no later than the starting date of retail electric competition; or

(2) Alternatively, unbundle pricing of competitive services and allocate all rate discounts from special contracts to the distribution rates; with a re-opener at the beginning of retail competition in order for the customer to better assess its options for energy and energy-related services and to allow other service providers an opportunity to offer their products and services; or

(3) Alternatively, unbundle pricing of competitive services and allocate all rate discounts after the starting date of retail competition to the competitive generation rate with the utility shareholders shouldering the revenue responsibility for the discount.

Grant of Rehearing on Request of a Non Party – Late Limited Intervention

Section 4903.10 states that in order for the Commission to grant leave to file an application for rehearing to a non party, it must find:

(1) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(2) The interests of the applicant were not adequately considered in the proceeding.

Enron's failure to enter an appearance prior to the entry upon the journal of the Commission Order was due to just cause. Enron, as a general matter, does not intervene in proceedings addressing special contracts between consumers and their respective electric utilities. However in the case at hand, although Enron does not take issue with the particular parties to the special contract *per se*, the Commission in its December 14th meeting, recognized the policymaking nature of this matter and it is for this reason that Enron has filed for intervention in this proceeding.

To date, Enron's interest in this matter has not been adequately considered in this proceeding. Enron has serious concerns regarding the extension of special contracts beyond the starting date of retail competition and the subsequent anticompetitive impact on the marketplace. The effect of the special contracts on the emerging competitive electric market was not adequately explored nor addressed in the record of this proceeding. Further, the fact that the Commission requested participation by third party suppliers in its December 14th meeting demonstrates the very real and substantial interest that Enron has in this proceeding.

No other party has intervened in this proceeding that can represent Enron's interest in this matter, and thus there is not duplicity of interest with an existing party. Enron's admission as a full party of record at this time will not unduly delay this proceeding or unjustly prejudice any existing party.

WHEREFORE, in light of its substantial interest, Enron respectfully requests that its motion for leave to file an application for rehearing in the above styled proceeding be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion to Intervene by Enron Energy Services, Inc. was served upon the parties listed below this 14th day of January, 2000.

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