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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

The City of Cleveland and WPS Energy Services, Inc.,	:	
	:	Case No. 01-174-EL-CSS
Complainants,	:	
v.	:	
Cleveland Electric Illuminating Company and FirstEnergy Corp.,	:	
Respondents.	:	

REPLY BRIEF OF INTERVENOR CITY OF PARMA

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INTRODUCTION

Complainants, City of Cleveland and WPS Energy Services Inc. have adopted the "linguine" approach in their post-hearing brief – they throw every possible allegation against a white wall and hope that some will stick. In their 45 page submission, Complainants attack virtually every aspect of FirstEnergy's determination that the City of Parma was eligible to, and did, file its claim before the City of Cleveland and that Parma's claim was valid. Complainants barrage this Commission with allegations that the original Parma ordinance was "illegal"; that Parma's consultant lacked the authority

to enter Parma's claim into the computer; that Parma's ordinance, if not illegal, at least limits Parma's eligibility to participate in the MSG program to one year; that Parma's contract with its energy supplier is deficient; that The E Group and FirstEnergy conspired to defraud Cleveland by applying different standards to the WPS claim; and generally that everything that occurred in the course of the auditor's function and FirstEnergy's decision process was utterly flawed, and discriminated unlawfully against Cleveland.

In fact, Cleveland's claims all come down to this: the City of Cleveland wants every megawatt of residential MSG that CEI made available as part of the electric transition plan. Cleveland already has rights to receive 75 megawatts of residential MSG under a separate agreement with FirstEnergy, and an additional 30 megawatts of CEI's residential MSG for claims which have been approved, as well as additional amounts of CEI's non-residential MSG. However, Cleveland is not satisfied with that amount. Cleveland also wants all the MSG that was awarded to Parma! Thus, Cleveland and WPS ask this Commission to direct FirstEnergy "to withdraw its allocation of MSG from Parma so that the MSG can be re-allocated to others who have properly submitted claims...." But the next applicant in the queue is Cleveland. What Cleveland is really saying is that it wants all of the CEI residential MSG. Cleveland gives lip service to the idea of a competitive electric retail market jump started by the availability of MSG, as foreseen

under the electric transition plan cases, but Cleveland's interest is in getting that MSG, not competition.

Cleveland lost the race for the power, fair and square. Now in an unseemly scramble to grab the MSG already fairly allocated to Parma, Cleveland offers fanciful scenarios that would, alternatively, (1) deprive Parma of any MSG, (2) deprive Parma of MSG after the year 2001, or (3) deprive Parma of MSG after the year 2002, depending on which of the many Cleveland arguments may find a taker. However, as Parma continues to operate its governmental aggregation program successfully using MSG, its ongoing vitality serves as a model for governmental aggregation programs. This Commission should confirm the successful implementation of CEI's electric transition plan and the proper allocation of MSG by rejecting Cleveland's invitation to destroy Parma's showcase program.

PARMA'S ORDINANCE IS VALID

Cleveland spends several pages in its brief arguing that Parma City Council's Resolution No. 363-99 is "invalid", and that it gave Parma "an unfair and illegal advantage in the MSG process". Cleveland's brief at pages 15 and 16. Cleveland then spins out an argument regarding statutory retroactivity referring to the June 2000 amendment to R.C. §4928.20.

Cleveland's extensive arguments regarding the unacceptability of retroactive application of statutory amendments are misguided, and should

not distract this Commission from the true issue before it.[1] Former R.C. §4928.20(A) stated that "on or after the starting date of competitive electric service [Jan.1, 2001], the legislative authority of a municipal corporation may adopt an ordinance...under which it may aggregate under this Section...." However, it quickly became clear to the legislature that a literal reading of that statute would eviscerate any government aggregation program, since the non-governmental aggregators could be prepared, in place, and have made their claims before the municipality could adopt an ordinance. Accordingly, R.C. §4928.20(A) was amended effective June 15, 2000 to provide that January 1, 2001 was the earliest date on which aggregation could occur. (Emphasis supplied.)

The intention of the legislature in amending a statute may simply be to correct a mistake or remove an obscurity in the original act. That was

[1] The Ohio Constitution's prohibitions on the passage of retroactive legislation are intended to prevent enactment of laws which, *ex post facto*, alter the *substantive* rights, obligations, or duties of Ohio citizens. See, e.g., *Kilbreath v. Rudy* (1968), 16 Ohio St. 2d 70, 72. This prohibition on retroactive application "has no reference," however, "to laws of a remedial nature providing rules of practice, courses of procedure, or methods of review." *Id.*

Even if this Commission were to give weight to Cleveland's arguments regarding the Constitutional prohibition on retroactive application of laws, Parma asserts that the prohibition is inapplicable in this instance, because the General Assembly's change to §4928.20 was merely procedural, rather than substantive, and "[a] procedural change in the law applies to all proceedings commenced after its effective date even though the right or cause of action arose prior thereto." *O'Mara v. Alberto-Culver* (Hamilton Cty. C.P. 1966), 6 Ohio Misc. 132 at syllabus paragraph 3, citing *Beckman v. State* (1930), 122 Ohio St. 443 and *Smith v. New York Cent. RR Co.* (1930), 122 Ohio St. 45.

exactly the intent of the General Assembly in this instance – there was no intent on the part of the legislature to change the substantive meaning of the law or alter the actions required or prohibited under it, and therefore "retroactive application" of the amendment is not a relevant consideration for this Commission. To assist the Commission in interpreting all of the facts and surrounding circumstances in order to discern the legislature's intent, the General Assembly has specified several factors that a reviewing body must consider in attempting to discern the legislative intent behind a particular amendment. R.C. §1.49. These factors include:

(A) The object sought to be obtained;

(B) The circumstances under which the statute was enacted;

(C) The legislative history;

(D) The common law or former statutory provisions, including law upon the same or similar subjects;

(E) The consequences of a particular construction;

(F) The administrative construction of the statute.

Id.

When this Commission considers these factors, it will conclude that the General Assembly's June, 2000 amendment of R.C. §4928.20 was intended only to clarify a simple linguistic obscurity in the statute's original version. No substantive rights were created, eliminated, or changed, and

thus, Cleveland's reliance on the constitutional prohibitions against retroactive legislation is misplaced, because the Constitutional prohibition on retroactive application of amendments applies only to statutes that alter substantive rights.[2]

Particularly compelling in this calculus are factors (A) and (E) above, the object sought to be obtained by R.C. §4928.20, and the consequences of a particular construction. The legislature's purpose in enacting Chapter 4928 was to allow governmental aggregation programs that would facilitate the development of competitive retail electrical service in the State of Ohio – no party to this action would argue otherwise. Yet Cleveland urges a hypertechnical and overly literal construction of the original version of §4928.20, the consequences of which would make the creation of the envisioned aggregation program virtually impossible, and which would frustrate entirely the General Assembly's purpose in enacting these statutes.[3]

Both the Cuyahoga County Board of Elections and the Ohio Secretary of State had to approve the form and substance of the ballot language giving rise to Parma's challenged ordinance, before it could be placed on the ballot in the March 7, 2000 election. Thus, each of these agencies has already

[2] See n. 1, *supra*, and cases cited therein.

[3] As Parma has previously noted, the Supreme Court of Ohio has long held that a reviewing body should not adopt a construction that is "supertechnical, and results in defeating instead of effectuating the obvious purpose of [the legislature's] enactment." *State, ex rel Euclid-Doan Bldg. Co. v. Cunningham* (1918), 97 Ohio St. 130, 138.

made a *de facto* determination that Parma's actions in passing the ordinance in advance of the January 1, 2001 start date were not "illegal" under the then-existing version of R.C. §4928.20, as Cleveland now urges. This Commission granted Parma governmental aggregator status following Parma's October 13, 2000 application, another *de facto* determination that Parma was acting within the bounds of the law as it existed at the time. (Exhibit 32)

Cleveland's argument that Parma's ordinance is somehow invalid or illegal also fails for an entirely separate, distinct, and indeed, much simpler reason – Parma did not require the General Assembly's authorization to pass this ordinance. Chapter 4928 *was* necessary to authorize the creation of the governmental aggregation program, and the subsequent competitive retail electric service market envisioned by the legislature, as the provision of electric service is an industry closely regulated by the State. However, Parma unequivocally did *not* need State authorization to pass an ordinance to permit participation in an aggregation or a market support generation program.

The Constitution of the State of Ohio provides municipalities with the "authority to exercise all powers of local self-government." Ohio Const. Art. XVIII, §3. "'Home rule' as understood by the members of the 1912 Constitutional Convention and as most concisely stated by one of the

delegates is 'the right of the people ... to control their own affairs.'" Gotherman & Babbit, Ohio Municipal Law (2000), §1.12. In Ohio, the Home Rule doctrine is generally understood to include "[t]he authority to exercise all powers of local self-government, subject only to the limitations imposed by the Ohio Constitution, and to choose the form of government to carry out these powers."[4] *Id.*, citing *State, ex rel Gordon v. Rhodes* (1951), 156 Ohio State 81. This grant of authority to municipalities is plenary, "subject only to the limitations contained in the United States Constitution." *Id.* Further, the right of municipal Home Rule in Ohio *explicitly* includes the authority to "contract with others" for the products or services of public utilities "to be supplied to the municipality or its inhabitants." Ohio Const. Art. XVIII, §4.

Even if the Ohio General Assembly had never passed Chapter 4928, Parma would have been fully within its rights under the Home Rule doctrine to pass an ordinance stating that – should such a program ever come to exist in the State – the people of Parma would like to participate in it. Again, Cleveland's intricate and esoteric arguments have missed a very simple point – while heavily regulated public utilities, *do* need the State's

[4] Gotherman & Babbit note that "Home Rule" is a "distinctive characteristic that sets Ohio municipal corporations apart from municipal corporations in other jurisdictions," and observe that "[t]he common-law concept long adhered to in American jurisprudence, which relegated municipal governments to the subordinate status of mere arms or agencies of the state government and regarded them as the subservient creatures of a legislative creator, is no longer a valid concept of the nature of municipal corporations in Ohio." *Id.* at §§1.10, 1.11. By urging its overly legalistic interpretation of the original R.C. §4928.20 on this Commission, Cleveland seeks to relegate Parma – and indeed, itself and all of Ohio's municipal corporations – to their pre-1912 status as "arms" of, or "subservient creatures" to, the General Assembly.

permission to create and implement a governmental aggregation program, Parma did *not* need the State's permission to pass ordinances authorizing participation in that program. Indeed, had Parma decided in December of 1999 to pass an ordinance *forbidding* participation in a governmental aggregation or market support generation program, it would have been within its rights under the Ohio Constitution, as well. Likewise, then, Parma did not need the State's permission to choose to enter such a program, and it validly made its choice in December, 1999, as subsequently ratified by Parma residents in March, 2000. The statutory amendment in June, 2000, merely allowed the residents' choice to become effectuated in the governmental aggregation program.

PARMA'S ORDINANCE IS EFFECTIVE

Complainants continue to allege in their brief that Parma's authorizing ordinance No. 363-99 (Exhibit 24) which was passed by the City Council and endorsed overwhelmingly by the residents of Parma to allow the city to act as a governmental aggregator, somehow limits the participation of Parma in the MSG program to a single year. As Parma pointed out in its original brief to this Commission, there is a significant jurisdictional issue regarding the Commission's ability to interpret municipal ordinances. In any event, it is clear that the intent of the ordinance is to permit participation by Parma as a governmental aggregator in an electric retail program, and stripped of

unessential verbiage, the ordinance literally provides that Parma may "enter into an agreement with an electrical supplier ... in the year of 2001". In fact, on January 8, 2001, Parma did enter into precisely such a contract with Allegheny Energy Supply Company LLC. (Exhibit 39)

Complainants' argument that the ordinance passed by City Council and the voters of Parma was intended to limit Parma's participation to a single year is specious. That same City Council authorized the Allegheny agreement (Exhibit 39) for an initial two-year period. The opt-out program offered to the City of Parma residents pursuant to the statutory requirement also indicated "if you don't opt-out at this time, you will be sent a notice every two years asking if you wish to remain in Parma's electric aggregation program". (Exhibit 42) It would be pointless for Parma to notify its residents that they would receive an opportunity to opt-out of the governmental aggregation every two years, if Parma only intended to be a governmental aggregator for one year. As Parma's law director, Timothy G. Dobeck observed at the hearing, such an assertion is "absurd".

PARMA'S PROGRAM IS ONGOING

Finally, Complainants are reduced to arguing that "the Commission can do no less than to order the termination of Parma's MSG claim at the end of 2002". (Complainants' brief at page 31). Complainants argue that this result follows from a supposed lack of a committed capacity sale by Parma.

The reason the Complainants are wrong in this instance is that the committed capacity sale occurs at the completion of the opt-out period, in this case, November 22, 2000. Thereafter, under R.C. §4928.20, aggregation group members may opt-out every two years. Thus, Complainants allege that "one of the most revealing statements at this hearing came in the questioning of Parma's legal director":

Q. Has the city signed any commitment or obligation to take MSG after the end of the first two years?

A. No. My understanding is we have the rights to it for five years, we are not obligated to take it.

(Tr. Vol. I, page 208.)

Mr. Dobeck's explanation is precisely correct. The City has the right to the MSG for five years. However, the residents of Parma, every two years under the statute, may opt-out of the program. The fact that the citizens may opt-out under the statute does not lead to the conclusion that there is a lack of "a committed capacity sale". The citizens of Parma are committed, unless and until they opt-out pursuant to the statute, to purchase their energy through the Parma governmental aggregation program. The program is what is known in the industry as a "load following" program. If a Parma resident moves, the load is reduced. In fact, Cleveland, as the next eligible claimant in the queue, would accede to that portion of MSG. What

Cleveland is actually requesting this Commission to do is to make the opt-out decision for every Parma resident, and to usurp their statutory choice. The fact that Complainants would even include such allegations in their brief demonstrates their desperation to raise any argument that might lead to Cleveland obtaining additional MSG. All Complainants have done, by first suggesting that Parma should get no MSG, and then suggesting that Parma should only get MSG for the year 2001, and finally suggesting that Parma should only get MSG for the years 2001 and 2002, is to expose the worthlessness of their case.

As these same Complainants have noted in another context in their joint comments to the staff's proposed rules for governmental aggregation service in Case No. 00-2394-EL-ORD, the final rule should "promote and encourage, rather than impede and discourage, the development of governmental aggregation programs". (Comments page 15.) That same filing with this Commission also notes the desirability of "avoiding regular conflicts and endless litigation between and among governmental aggregators ..." Right now we are engaged in a case that, if not dismissed, threatens to lead to just the sort of endless litigation that the Complainants advocated should be avoided. In addition, Complainants are promoting the "overly restrictive oversight" (Comments page 2) that they decried in their

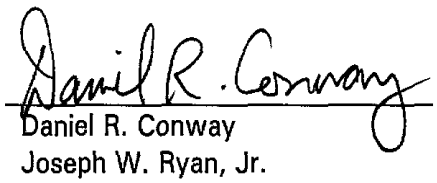
comments. This Commission should reject the unprincipled, short-sighted, and selfish agenda that the Complainants have pursued in this case.

CONCLUSION

Complainants post-trial brief only highlights the bankruptcy of their case. They failed to adduce evidence to support the allegations of their Complaint. Accordingly, they failed to meet their burden of proof. This Commission should put a swift end to this baseless and expensive litigation by finding in favor of the City of Parma and FirstEnergy and dismissing the Complaint.

Respectfully submitted,

CITY OF PARMA

By: 

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CERTIFICATE OF SERVICE

On May 4, 2001, I served a copy of the foregoing Reply Brief of Intervenor City of Parma via e-mail and/or regular mail upon:

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