

**FAX**

**William M. Ondrey Gruber**  
**Attorney-at-Law**  
2714 Leighton Road  
Shaker Heights, Ohio 44120  
Telephone: (216) 371-3570  
E-Mail: GruberWL@aol.com

RECEIVED DOCKETING DIV

01 DEC -7 PM 3:53

PUCO

December 7, 2001

**By Facsimile and Overnight Delivery**

Docketing Division  
PUCO  
180 East Broad Street—10<sup>th</sup> Floor  
Columbus, Ohio 43215-3793

**Re: Case No. 01-2736-EI-UNC**

To Docketing:

Please accept the accompanying Supplemental Memorandum Contra of Citizen Power, Inc. et al, to the Application of FirstEnergy in the above-named case for filing.

An original and sixteen (16) copies of this document is being sent by overnight delivery for docketing, as required. Please file the original and fifteen (15) copies of each of the two pleadings in this case, and return a time-stamped copy of each to me in the enclosed self-addressed envelope.

Thank you for your assistance and cooperation.

Sincerely,



William M. Ondrey Gruber

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business  
Technician ADK Date Processed 12/17/01

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 )  
Of Tariff Adjustments )

Case No. 01-2736-BL-UNC

Supplemental Memorandum Contra of Citizen Power, Inc.,  
David Hughes, Kelli O'Neill, Ron O'Connell, and Marguerite Schossler  
To Application of FirstEnergy

Citizen Power, Inc., David Hughes, Kelli O'Neill, Ron O'Connell, and Marguerite Schossler ("Citizen Power") hereby provide a supplemental memorandum contra the Application of FirstEnergy ("FE"), in order to provide new information in support of Citizen Power's Memorandum Contra, which was filed on December 4, 2001. Citizen Power wishes to bring to the Commission's attention an article in the December 6, 2001 edition of the Cleveland Plain Dealer (at p. C-3), in which a FirstEnergy spokesperson acknowledges that FirstEnergy Solutions ("FES") does not compete with its affiliates for retail sales of electricity. See the article attached hereto. The report, if accurate, reinforces the point made in Citizen Power's Memorandum Contra in this proceeding that, subsequent to Commission approval of the FE restructuring settlement, FE admitted to FERC that its affiliates did not compete with each other.

Particularly significant about the Plain Dealer report is that the FE statement is in apparent direct response to Citizen Power's Memorandum Contra. According to the article, FE

spokesperson Ellen Raines acknowledged, "FirstEnergy Solutions does not compete with FirstEnergy," but asserted that the FES does compete with other power marketers. This "explanation" amounts to an admission of the validity of Citizen Power's position.

When deciding whether a customer switching from the incumbent utility to another supplier constitutes a "competitive switch," i.e., a switch that results from competition between the incumbent supplier and the new supplier, the issue is straightforward. When a customer of, say, Cleveland Electric Illuminating Company ("CEI") switches suppliers, one question must be asked: *did that switch result from competition between CEI and the new supplier? If it did, it is a competitive switch. If it did not, it is not.*

Whether alternative suppliers to the incumbent, including FES, compete *with each other*, as FE has at times offered as an argument for counting switches to FES, is irrelevant. To continue our example, it is CEI customers we are concerned with, and more specifically, their choice of a supplier *instead of continuing to buy from CEI*. Thus, regardless of other circumstances, to be considered a competitive switch the new supplier must compete with CEI, and the switch must have been the result of that competition.

Throughout the restructuring proceeding FE asserted that its retail marketing affiliate, FES, competes with its affiliates, CEI, Ohio Edison ("OE"), and Toledo Edison ("TE"), just like suppliers unaffiliated with FE do. On December 4, Citizen Power filed a Memorandum Contra FE's Application pointing out that, subsequent to the Commission's Opinion and Order in Case Nos. 99-1212-EL-ETP, 99-1213-EL-ETP, and 99-1214-EL-ETP, issued July 19, 2000 (at pp

16-17) ("July 19th Order"), FE had acknowledged in a filing at FERC that this was not true: "affiliated utilities do not and are not expected to compete against each other in an economic sense". FES, FE asserted to FERC, does not compete with its affiliates, CEI, OE, or TE. *Application of FirstEnergy Trading Services, Inc. for Authority to Merge into FirstEnergy Services, Inc. and Related Transactions*, Federal Energy Regulatory Commission Docket No. EC01-3 (filed October 11, 2000), at p. 9.

In case there is any doubt about what it meant by that statement, FE has now removed it. In the Cleveland Plain Dealer of Thursday, December 6 (p. C-3), FE spokesperson Ellen Raines is quoted as saying: "And FirstEnergy Solutions does not compete with FirstEnergy." See article attached hereto. As we know from the U.S. Supreme Court (when it thought it was settling the matter): "the ultimate interests of the subsidiary and parent are identical, so the parent and the subsidiary must be viewed as a 'single' economic unit." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The parent (FE) and all wholly owned subsidiaries (FES, CEI, OE, and TE) operate as a single unit in which the subsidiaries act cooperatively in the interests of the shareholders of the parent. Rather than competing, FE and its subsidiaries cooperate among themselves in order to more efficiently compete with outsiders.

With this further clarification from FE acknowledging specifically that FES does not compete with CEI, OE, or TE, there can be no grounds for counting switches to FES

from customers of the latter group as competitive switches toward meeting the 20% target. The 20% target in the statute is meant to be an index of the extent of competition that has developed for the load of CEI customers. Counting a switch to FES is a claim for the existence of competition, when in fact, as FE has now twice said, there is none.

Citizen Power thus reiterates its request in its Memorandum Contra that FE be required to delete switches to FES from switch percentages, and provide the supporting data for the record in which switches are separated between those suppliers affiliated with FE and those not so affiliated.

Respectfully submitted,

*William M. Ondrey Gruber*

William M. Ondrey Gruber  
Attorney-at-Law  
(Registration No. 0005950)  
2714 Leighton Road  
Shaker Heights, Ohio 44120  
(216) 371-3570  
E-Mail: GruberWL@aol.com

December 7, 2001

Attorney for Citizen Power

Certificate of Service

I certify that a copy of this Supplemental Memorandum Contra FirstEnergy's Application has been sent to the Applicant and Intervenor Enron by regular U. S. mail this 7th day of December, 2001.

*William M. Ondrey Gruber*  
William M. Ondrey Gruber

