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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Applications of Ohio :
Edison Company, The Cleveland Electric :
Illuminating Company and The Toledo :
Edison Company for Authority to Con- :
tinue and Modify Certain Regulatory :
Accounting Practices and Procedures, for :
Tariff Approvals and to Establish Rates :
and Other Charges Including Regulatory :
Transition Charges Following the Market :
Development Period. :

Case No. 03-2144-EL-ATA

PUCO

In the Matter of the Applications of Ohio :
Edison Company's, The Toledo Edison :
Company's, and The Cleveland Electric :
Illuminating Company's Amendments to :
Their Supplier Tariffs. :

Case No. 03-1966-EL-ATA

Case No. 03-1967-EL-ATA

Case No. 03-1968-EL-ATA

In the Matter of the Complaint of WPS :
Energy Services, Inc. and Green Mountain :
Energy Company, :

Case No. 02-1944-EL-CSS

Complainants,

v.

FirstEnergy Corp., The Cleveland Electric :
Illuminating Company, The Toledo :
Edison Company, and Ohio Edison Com- :
pany, :

Respondents.

BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

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BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

BACKGROUND

This brief is limited in scope to issues raised as a result of the 03-1966-EL-ATA sequential cases consolidated by Commission Entry dated October 28, 2003, with the so-called Rate Stabilization application filed by the FirstEnergy operating companies in docket number 03-2144-EL-ATA. The 03-1966-EL-ATA case series seeks Commission approval of certain proposed tariff modifications to reflect FirstEnergy's legally-mandated joinder of the Midwest Independent System Operator (MISO) regional transmission organization and the assignment of functional control of transmission assets owned by FirstEnergy affiliate American Transmission Systems, Inc. (ATSI) to the MISO effective October 1, 2003.

Oral argument was held before the Commission on November 13, 2003 and this brief is timely submitted pursuant to instructions from Attorney Examiner Gooden at the close of that session.

INTRODUCTION

This case presents the Commission with the next phase of the development of the competitive market set in motion by SB 3 in 1999. FirstEnergy has transferred control of its transmission facilities to the Midwest Independent System Operator as was contemplated in R.C. 4928.12. Suppliers will, in the future, arrange their own transmission from an independent entity. This is a positive development for the competitive market in this State.

What remains for this Commission's consideration in this case is whether the costs of this new system require special treatment under state law. Under the stipulation in the FirstEnergy

restructuring case, no special treatment is required. Each entity buying transmission is responsible for paying for it. A level competitive playing field is created, just as contemplated in SB 3. This is in keeping with state and federal law and good sense.

The Commission will be presented with self-serving arguments mired in the legacies of history. The dead hand of history should not control the outcome of this case. State law and the stipulation in the restructuring or "ETP" case are forward-looking and they anticipate, welcome, and even require the very restructuring which has occurred here. Unfortunately, FirstEnergy's proposal does not match this structure. FirstEnergy's proposal would not recognize fully that it has left the transmission business. Although FirstEnergy (FE) would no longer provide transmission, it would propose to keep any reductions in the cost of transmission it no longer provides. This is gambling with other people's money. The intervenors will propose that they buy transmission but FirstEnergy pay for it. This perverse incentive changes the economics of the industry and rewards CRES providers at the expense of the FE operating companies. No transmission price is too high if you are paying with someone else's money. Only Staff's proposal avoids the Scylla and Charybdis of the company and intervenor positions. The current proposal fails and must be rejected.

DISCUSSION

As it reviews this portion of the consolidated FirstEnergy proceedings, it is important that the Commission fully appreciate what is not at issue in this case. This case is not about the wisdom of FirstEnergy joining the MISO regional transmission organization. FirstEnergy is compelled, by law, to do that.¹ Nor must the PUCO pass upon whether FirstEnergy still has an obligation to provide or acquire transmission, ancillary and related services on behalf of CRES

¹ Ohio Rev. Code Ann. § 4928.12 (Baldwin 2003).

providers, or what rate will be properly chargeable for such services. These are federal matters which the Federal Energy Regulatory Commission (FERC) has recently addressed.² In its October 24, 2003 order, the FERC stated that, since FirstEnergy had transferred transmission obligations to a FERC-approved RTO, existing service agreements between ATSI and CRES providers for such services were conditionally cancelled, premised upon the CRES entering into their own service arrangements with the MISO pursuant to the FERC-approved MISO rates and charges. The oral argument transcript reflects that CRES providers involved in this case have already executed service arrangements with the MISO.³ Most importantly, this case is not about whether transmission and ancillary services provided under the MISO OATT constitutes a “new service” under Ohio law or under the terms of the ETP stipulation. Although much was made of the new service concept during oral argument, the issue is not part of the filing now before the Commission. This issue cannot now be decided in the absence of any facts regarding what aspects of transmission and ancillary services are new, how much they will cost, and how the costs should be treated. This and more information is critical to the Commission’s ability to make an informed decision on this issue.

The issue now before the Commission is much narrower and uniquely one within the jurisdictional province of the PUCO. The FERC noted as much in its order.⁴ That issue is fairly straightforward: who should bear the financial responsibility for MISO-related transmission

² See Order Conditionally Accepting Tariff Sheets and Notices of Cancellation, Docket No. ER03-1276-000 (October 24, 2003).

³ Tr. at 14.

⁴ See *Id.*, note 7 at 5.

charges which are expected to be higher⁵ than existing transmission rates paid by FirstEnergy and its CRES customers. FE proposes to remit to CRES providers transmission revenues collected from CRES retail customers, but only up to amounts actually billed to the CRES by the MISO. In FE's view, they are entitled to retain any such excess as part of the bargain struck in the ETP stipulation.⁶ If such revenues exceed the MISO bill, FE would retain the excess. If the converse occurs, FE, under their proposal, would have no responsibility to the CRES for the "negative" delta. In contrast, the Staff's recommendation is very straightforward and comports with principles of common sense fairness. That recommendation is simply that FirstEnergy should be responsible for payment of transmission and related charges to MISO for customers on whose behalf FirstEnergy continues to acquire such services. Likewise, the Staff believes that CRES providers should bear the same obligation on behalf of their retail customers. In either case, the services will be made pursuant to rates set forth in the FERC-approved MISO OATT which now is the operative and controlling transmission rate document.

To the extent FirstEnergy continues to collect a transmission component in the frozen rates now charged to the CRES customers, the Staff believes that 100-percent of such revenues should be timely remitted to the CRES provider from whose customers such collections have been made. To the extent these revenues exceed the actual MISO bill paid by the CRES, the CRES will enjoy the difference. Conversely, if the MISO bill is greater than the rebated revenues, the CRES bears responsibility for the delta.

⁵ To argue that MISO charges will be higher is purely speculative at this point in time. A new administrative fee charged by the MISO for its services appears to principally fuel speculation that MISO charges for transmission services will be at higher levels. However, FirstEnergy characterizes MISO administrative charges as "new services" (a characteristic that not all parties agree with (*see, e.g.* Tr. at 77, 82-83)) and acknowledges that the recoverability of such fees is *not being pursued by FirstEnergy at this time and in this case*. Tr. at 24-25. Thus, the Commission need not reach the question in this case of whether MISO fees arise from provision of a "new service."

⁶ Tr. at 38. *See, e.g. Id.* at 22, 34-35, 38, 94.

In like manner, FirstEnergy will pay the MISO rate for transmission/ancillary services it obtains on behalf of its customers (non-shoppers and MSG) and, like the CRES, FirstEnergy will enjoy any excess or deficiency in collections based upon the difference between revenues collected at the current PUCO-approved transmission tariff rate and actual MISO charges. Simply, the risks and rewards associated with providing or arranging for the provision of such services will be borne by FirstEnergy for its customers and by the CRES on behalf of its customers. This creates a level playing field.

Not only does the Staff's recommendation reflect the business realities associated with FirstEnergy's joinder of the MISO, again as contemplated under Ohio law, but it also, the Staff submits, is consistent with the "bargain" struck by the parties in Case Nos. 99-1212-EL-ETP, *et al.* The Stipulation and Recommendation approved by the Commission contemplates a "clean break" or termination of any responsibility upon FirstEnergy to reimburse CRES providers for transmission charges once operational control of FirstEnergy's transmission system is assumed by a FERC-approved and operating RTO.⁷ The Commission-approved Supplemental Settlements Materials, which were either agreed to or not opposed by most CRES providers in the ETP case, are equally instructive on this point.⁸ The supplemental agreement contemplates no continuing obligation upon FirstEnergy or its affiliates to provide such services to CRES providers after the time FirstEnergy that joins an operational RTO. Again, that occurred effective October 1, 2003. The Staff's recommended approach merely couples the risks and/or rewards of providing transmission services through a FERC-approved RTO with the continuing obligation to do

⁷ *In re FirstEnergy*, Case Nos. 99-1212-EL-ETP, *et al.* (Stipulation and Recommendation at §V, ¶ 4) (April 17, 2000).

⁸ *In re FirstEnergy*, Case Nos. 99-1212-EL-ETP, *et al.* (Supplemental Settlement Materials at ¶ 6) (May 9, 2000).

so. This is entirely consistent with the agreement struck by FirstEnergy and CRES providers alike, and approved by the Commission in FirstEnergy's ETP case.

The Staff recommends that FE make minor modifications to its proposed tariffs to reflect the Staff recommendation that FE be required to timely remit to CRES providers all transmission revenues that FE continues to collect from CRES retail customers.

CONCLUSION

Based upon the foregoing, the Staff respectfully requests that the Commission issue an order adopting the positions advanced herein.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio was served by regular U.S. mail, postage prepaid, or hand-delivered to the following parties of record, this 21st day of November, 2003.


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