22

FILE

RECEIVED-DOCKETING DIV
2009 JAN 13 PM 3:01
PUCO

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish A Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan.	)))))))	Case No. 08-935-EL-SSO

MEMORANDUM CONTRA TO THE MOTION OF THE APPLICANTS TO STAY THE EFFECTIVE DATE OF THE COMMISSION ORDER OF JANUARY 7, 2009 PENDING RESOLUTION OF APPEALS AND REQUEST FOR RESOLUTION ON AN EXPEDITED BASIS BY THE OHIO CONSUMERS AND ENVIRONMENTAL ADVOCATES

Pursuant to Rule 4901-1-12[1] of the Ohio Administrative Code, the undersigned members of the Ohio Consumers and Environmental Advocates ("OCEA") hereby submit this Memorandum Contra to the Motion of the Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("TE") (collectively "FirstEnergy" or the "Companies") to Stay the Effective Date of the Commission Order of January 7, 2009 Pending Resolution of Appeals and Request for a Ruling on an Expedited Basis ("Motion"). Contemporaneous with the filing of the Motion, the Companies also filed an Application for Rehearing of the Commission's January 7, 2009 Order as well as an Application for Approval of Rider FUEL and Related Accounting

[1] As an initial matter, the Companies flagrantly disregarded the requirements of Section 4901-1-12(C) regarding expedited rulings. Contrary to the Companies' assertions, not a single member of the OCEA who is a signatory to this Memorandum Contra was contacted by the Companies prior to its filing nor was the Motion e-mailed until hours after it had been filed with the Commission late on the afternoon of Friday, January 9, 2009.

Authority.[2] After the above-referenced Motion was filed on the afternoon of January 9, 2009, Attorney Examiner Christine M. Pirik issued an Entry "to extend the January 12, 2009, filing date for the tariffs" . . . "to allow the Commission time to address the issues raised" by the Companies' Motion (the "Entry").[3]

The Commission already has fully and unambiguously addressed the issue raised: all regulatory transition costs for OE and TE authorized by the Commission in its January 4, 2006 Order in Case No. 05-1125-EL-ATA *et al.* have been fully recovered. Thus, there is no basis for continuing the Regulatory Transition Charges (RTCs) for customers of these two companies who have already paid this debt in full.[4] Contrary to the Companies' assertions in its Motion, continued payment of RTCs by OE and TE customers would be unjust, unreasonable, and unlawful, and would irreparably harm these customers by creating a potentially unrecoverable windfall to the Companies.

The undersigned members of OCEA hereby request the Commission 1) deny the Companies' Motion for Stay of the Commission's January 7, 2009 Order; 2) require the Companies to file tariffs consistent with the Commission's January 7, 2009 Order as soon as the Commission determines practicable; and 3) specifically find that the effective end date of the RTCs for OE and TE was December 31, 2008, that the effective date for the Commission-ordered new tariffs is January 1, 2009, and that the Companies must make all

[2] FirstEnergy's other filings of January 9, 2009 will be addressed by OCEA in other Memorandum Contra and Motions. However, as they relate to the Companies' Motion for Stay, OCEA hereby requests the full due process provided for under Ohio law and the Commission's Rules be allowed in the review of the Application for Rehearing and, especially, the new application to recover Rider FUEL.
[3] Case No. 08-935-EL-SSO (January 9, 2009), Entry at 3.
[4] Case No. 08-935-EL-SSO (January 7, 2009), Commission Finding and Order at ¶17.

necessary billing adjustments to implement these tariffs retroactively to January 1, 2009, consistent with the Commission's January 7, 2009 Order.[5]

The grounds for this Memorandum Contra are more fully set forth in the attached Memorandum in Support.

[5] *See* Case No. 99-938-TO-COI (June 20, 2002), *Commission Entry on Rehearing*, (dissolving the previously approved motion to stay after denying all arguments made by Ameritech Ohio in its application for rehearing and requiring Ameritech Ohio to make all billing adjustments necessary to retroactively implement the Commission's Order.

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish A Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan.	)))))))	Case No. 08-935-EL-SSO

MEMORANDUM IN SUPPORT

I. INTRODUCTION

After extensive proceedings in Case No. 08-935-EL-SSO, the Commission issued an Order on December 19, 2008 *authorizing* Ohio Edison Company ("OE"), the Cleveland Electric Illuminating Company ("CEI"), and the Toledo Edison Company ("TE") (collectively "FirstEnergy" or the "Companies") to implement a standard service offer ("SSO") consistent with the Commission's modification and approval of the Companies' electric security plan ("ESP") as provided for under R.C. 4928.143(C)(1). On December 22, 2008, the Companies' rejected the Commission-approved ESP SSO pursuant to R.C. 4928.143(C)(2)(a). In doing so, the Companies also filed tariffs for service after January 1, 2009. The tariffs for OE and TE extend all provisions of its previously approved Rate Certainty Plan past December 31, 2008, including regulatory transition charges ("RTC") for OE and TE, and cited R.C. 4928.141(A) as the controlling statutory provision.

In a December 23, 2008 motion[6], OCEA moved the Commission to reject the Companies' tariff filing as unlawfully seeking to extend the payment of RTCs by the customers of OE and TE as all Commission-approved regulatory transition costs for OE and TE would be recovered in full as of December 31, 2008. OCEA's December 23, 2008 motion correctly asserted that the Companies' so-called compliance tariff filing pursuant to R.C. 4928.141(A) was pursuant to the wrong statute, and that attempts by OE and TE to recover RTCs from customers after December 31, 2008 would violate Ohio law. OCEA requested the Commission to order the Companies to file tariffs that provide lawful SSO and generation service. At the direction of the Commission in a December 26, 2008 Entry, other intervenors and then the Companies in response also filed comments asserting their positions regarding how the default SSO provisions of Chapter 4928 should apply on and after January 1, 2009.

In its January 7, 2009 Finding and Order[7] (the "Order") addressing this issue, the Commission rejected the Companies' assertion that R.C. 4928.141 controlled the default SSO provisions to commence on January 1, 2009 as well as the Companies' December 22, 2008 tariff filing. The Commission determined that R.C. 4928.143(C)(2)(b) controlled the default SSO to commence on January 1, 2009 as its December 19, 2008 ESP Order already had authorized the Companies to implement an ESP SSO pursuant to its terms, which the Companies deemed in their own self-interest to reject. Specifically, the Commission's January 7, 2008 Finding and Order determined Commission-approved RTCs for OE and TE would be fully recovered by December 31, 2008 per the terms of the Commission's Opinion

[6] *See* Case No. 08-935-EL-SSO (Dec. 23, 2008), Motion to Reject Applicant's Rate Filings Under the Default Provisions for Standard Service Offers Pursuant to R.C. Chapter 4928 and Motion for A Commission Order Directing Applicants to Submit Tariffs Consistent With the Default Provision by The Ohio Consumers and Environmental Advocates.

[7] Case No. 08-935-EL-SSO (Jan. 7, 2009), Commission Finding and Order.

and Order in Case Nos. 05-1125-EL-ATA *et al.*, and it would be unlawful for their recovery to continue.[8] The Commission directed the Companies to file tariffs consistent with its Order by January 12, 2009 with the effective date of these tariffs retroactively being January 1, 2009.

The Companies, determining that the Commission's determination of the default SSO provisions to commence on January 1, 2009 is detrimental to their self interest, now seek to stay the Commission's Order pending resolution of appeal. Specifically, the Companies' Motion requests the Commission "stay the effective date of the January 7, 2009 Order in this matter *in its entirety until the resolution of any appeal of this Order.*"[9] (emphasis supplied) While a limited extension of the January 12, 2009 filing date for the tariffs was granted "to allow the Commission time to address the issues raised" in the January 9, 2009 Entry of Attorney Examiner Christine M. Pirik, hours after the Companies filed their motion, continuation of the extension beyond the time necessary for the Commission to reassess the arguments and directions made in its January 7, 2009 Order would, as set forth below, be unjust, unreasonable, and unlawful and be potentially irreparably harmful to customers.[10]

II. ARGUMENT

The law, and the facts and circumstances in this matter, do not warrant any further extension of the filing date for the new tariffs any longer than absolutely necessary for the Commission to address the issues and reject the arguments raised by the Companies' Motion. The Companies' Motion for a Stay – which seeks an **extraordinary** legal remedy – must be

[8] Case No. 08-935-EL-SSO (Jan. 7, 2009), Commission Finding and Order at ¶17. Importantly, the Commission also determined that the Fuel Cost Recovery Mechanism should continue only to the extent necessary to collect all remaining 2008 actual fuel costs and that the RTC Offset Rider and Fuel Cost Recovery Rider should also be terminated.
[9] Case No. 08-935-EL-SSO (Jan. 9, 2009), Companies' Motion to Stay January 7, 2009 Order, at 3
[10] Case No. 08-935-EL-SSO (Jan. 9, 2009), Entry at 3.

denied. A stay of the Commission's Order in its entirety pending the resolution of *any and all appeals of the Commission's Order* as requested by the Companies is clearly without legal basis. Senate Bill 221 provides a clear path that must be followed to establish SSO service for Ohio's consumers after December 31, 2008. Due to FirstEnergy's own self-interested actions, the Commission, intervenors, and most importantly, Northern Ohio's electric consumers, are now operating outside of that clear path. Instead of endeavoring to return to the path established by Senate Bill 221 as quickly as possible, the Companies have put themselves in a position where they are now dragging out the establishment of a new SSO approved under Senate Bill 221, and, further, asking for Commission approval to not comply with the Companies' January 7, 2009 order or Ohio law. As explained below, a stay of the Commission's order is neither justified nor lawful under application of the appropriate four-factor test, nor based on the Companies' self-serving assertions of practicality. The Motion should be denied as soon as possible.

A. FirstEnergy Unquestionably Fails to Meet the Standards Necessary to Grant a Stay of the Commission's January 7, 2009 Order Under the Appropriate Four Factor Analysis.

A stay of a Commission Order is an extraordinary legal remedy that should be granted only after substantial thought and consideration because of the nature of the legal relief at issue.[11] While FirstEnergy correctly articulates the four factors the Commission has previously determined appropriate to consider when deciding whether to stay its own Order, it clearly cannot demonstrate the elements of these four factors required to be shown for such

[11] *MCI Telecommunications Corp. v. P.U.C.O.* (1987), 31 Ohio St. 3d 604 (Douglas, J., dissenting) (stating that a stay of a Commission Order "should only be given after substantial thought and consideration -- if at all, and then only where certain standards are met.").

an extraordinary legal remedy. The four factor test the Commission has adopted from courts reviewing an administrative decision to determine whether to grant a stay includes:

a) Whether there has been a strong showing that the movant is likely to prevail on the merits;
b) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;
c) Whether the stay would cause substantial harm to other parties; and
d) Where lies the public interest.[12]

In assessing these factors in the context of a motion for a preliminary injunction, Ohio Courts have repeatedly held that "Under Ohio law, a party seeking a preliminary injunction "must establish a right to the preliminary injunction by showing clear and convincing evidence of each element of the claim." [13] (emphasis supplied) Thus, while some balancing of these factors may be necessary, the Companies must prove *each element* of their claim that a stay is appropriate.

Upon review and consideration of these factors, FirstEnergy fails to prove that a stay is justified based on *any* of the four factors, much less all four factors. Thus, First Energy fails to show by clear and convincing evidence that the granting of a stay of the Commission's Order is warranted.

1. FirstEnergy Has Failed to Show That it is Likely to Prevail on the Merits

The Companies are not likely to prevail on the merits on appeal of the Commission's January 7, 2009 Order. The Commission has already fully considered and addressed the issue of whether OE and TE could legally continue to recover RTCs from customers. "When

[12] *See In Re Investigation into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI (February 20, 2003) at 5, citing *MCI Telecommunications Corp. v. P.U.C.O.* (1987), 31 Ohio St.3d 604 (Douglas, J., dissenting)

[13] *See Hydrofarm, Inc. v. Orendorff* (2008), 2008 Ohio App. LEXIS 5717, at 9, *citing Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co., Gen. Commodities Div.* (1996), 109 Ohio App.3d 786, 790, 673 N.E.2d 182, appeal not allowed, 76 Ohio St. 3d 1495, 670 N.E.2d 242, citing *Mead Corp., Dtconix, Inc., Successor v. Lane* (1988), 54 Ohio App.3d 59, 560 N.E.2d 1319, jurisdictional motion overruled (1989), 41 Ohio St. 3d 709, 534 N.E.2d 1211.

asked to stay an administrative order, courts give significant weight to the expertise of the administrative agency, as well as to the public interest served by the proper operation of the regulatory scheme."[14] Neither the Companies' Motion nor Application for Rehearing referenced therein raise new substantive arguments regarding the operation of Chapter 4928 for the Commission's consideration, but merely reassert generally the same positions asserted by First Energy previously in the Companies' Comments of January 6, 2008.[15]

As discussed above, the Commission has already squarely rejected the arguments made by FirstEnergy in their Motion. The Commission correctly determined that R.C. 4928.143(C)(2)(b) and not R.C. 4928.141(A) controls.[16] The Commission's December 19, 2008 Opinion and Order approved and authorized the ESP SSO. Thus, once FirstEnergy terminated the authorized ESP SSO under Subsection (C)(2)(a) of R.C. 4828.143, the Commission became statutorily obligated to "continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any increase or decrease in fuel costs . . ."[17]

The Commission's determination that RTCs for OE and TE have already been fully recovered and, therefore, should not continue to be recovered under the continuing SSO (the Rate Certainty Plan or "RCP") is also a sound interpretation of Ohio law and the Commission's own regulatory scheme. Since the enactment of Senate Bill 3, Ohio law has required the Commission to "determine the *total allowable amount* of the transition costs of the utility to be received as transition revenues. . ." and to be recoverable as RTCs.[18]

---

[14] *Bob Krihwan Pontiac-GMC Truck, Inc. v. GMC* (Ohio Ct. App., Franklin County 2001), 141 Ohio App. 3d 777, 782.
[15] *See* Case No. 08-935-EL-SSO (Jan. 6, 2009), Companies' Comments to Various Intervenors In Response to Commission Entry of December 26, 2008.
[16] Case No. 08-935-EL-SSO (Jan. 7, 2009), Commission Finding and Order at ¶15.
[17] *See* R.C. § 4928.143(C)(2)(b).
[18] *See* R.C. § 4928.39.

(emphasis supplied) The Commission in its January 4, 2006 Opinion and Order in Case Nos. 05-1125 *et al.* determined that the total allowable amount of regulatory transition costs and extended regulatory transition costs would be fully recovered by OE and TE by December 31, 2008. Specifically, in Paragraph Nos. 2 and 4 of its January 4, 2006 Opinion and Order, the Commission states:

> 2. "The RTC and the Extended RTC recovery periods and the RTC rate levels for Ohio Edison and Toledo Edison both will be adjusted so that full recovery of all amounts authorized by the PUCO will be collected through the RTC rate components (RTC and Extended RTC) will occur through usage as of December 31, 2008."
>
> 4. "The recovery of Extended RTC amounts through the RTC rate component will begin on January 1, 2006 for Ohio Edison and Toledo Edison, rather than following the end of the recovery of regulatory transition costs. The recovery of RTC amounts by Ohio Edison and Toledo Edison will continue as provided in the RSP as modified by the Plan. Of the total revenue collected through the RTC rate components (before residential customer credits), 30% of such amount for Ohio Edison and 15% of such amount for Toledo Edison specifically recovers the Extended RTC amounts, and, accordingly, the associated regulatory asset amortization for each month, beginning January 1, 2006, will equal the specific revenue identified in that manner during the applicable month. The balance of the revenue collected through the RTC rate components (net of the residential customer credits) recovers the regulatory transition costs for Ohio Edison and Toledo Edison based on usage through December 31, 2008, and those Companies will continue to amortize their transitions regulatory assets using the effective interest method taking into account an extended amortization schedule for the period January 1, 2006 through December 31, 2008." [19]

Clearly, these provisions evidence the Commission's authorization of the OE and TE RTC's only through a date certain, December 31, 2008, and order that OE and TE end recovery of RTCs on December 31, 2008 even if the RCP SSO plan itself were to continue past that date. As the Commission states in its January 7, 2009 Order, "Given that the authorized amounts

[19] Case Nos. 05-1125-EL-ATA *et al.*, (January 4, 2006) Commission Opinion and Order at ¶2, ¶4.

have been fully recovered, there is no basis for continuing such a charge."[20] Thus, while the provisions, terms, and conditions contained in the Companies' RCP must continue pursuant to R.C. 4928.143(C)(2)(b), the total allowable transition costs owed to OE and TE after December 31, 2008 are effectively zero. The Commission's Order correctly required that recovery of RTCs terminate effective January 1, 2009 for OE and TE customers.[21]

FirstEnergy's position is contrary to the Commission's interpretation of the controlling statutory scheme. The Commission has correctly interpreted this statutory scheme. Contrary to the Companies' Motion, the Companies cannot show, by clear and convincing evidence, that they are likely to prevail on the merits. The Companies' failure to meet this first test is alone sufficient to deny the Motion in and of itself.

2. FirstEnergy has Failed to Show That it Would Suffer Irreparable Harm Absent the Stay

FirstEnergy's assertion that it will suffer irreparable harm is integrally intertwined with its grossly inaccurate, self-interested and misleading assertion that no other party will suffer any harm if the Commission stays its January 7, 2009 Order. FirstEnergy asserts that the Commission's January 7, 2009 Order wrongfully deprives OE and TE of the recovery of RTCs and all three Companies of fuel riders on a going-forward basis after January 1, 2009, resulting in a loss of operating revenues approximating $2,000,000 per day.

As explained in the Commission's Order, the amounts owed to the Companies by OE and TE customers under these specified charges have been paid in full. This is not a wrongful deprivation of monies owed to the Companies. They simply have no legal right to collect revenues to which they are not entitled. The Companies have been fully compensated

[20] Case No. 08-935-EL-SSO (Jan. 7, 2009), Commission Finding and Order at ¶17.
[21] *Id.* at ¶25.

the amounts authorized by the Commission under the RCP. Under Ohio law, RTCs were not to be generation-related subsidies, but generally were intended to "assist [the utility] in making the transition to a fully competitive retail electric generation market."[22] Moreover, Ohio law provided that the electric utility that receives RTC revenues was to be "wholly responsible for how to use those revenues and wholly responsible for whether it is in a competitive position after the market development period."[23] The market development period is over. The harm alleged by the Companies, at a time when all authorized RTCs have been fully recovered by OE and TE, after the end of the market development period, calls into question what FirstEnergy did with all of those revenues. FirstEnergy's hollow argument highlights the absurdity of why any burden should be on the customers, since the Companies have already been fully compensated.

Further, with regard to fuel costs, the Commission correctly notes in its Order that Section 4928.143(C)(2)(b) permits the Companies to file for any increases or decreases in fuel costs occurring after January 1, 2009. The Companies, indeed, have made such an application to the Commission.[24]

Essentially, the Companies are now alleging that they are being irreparably harmed by their own apparent miscalculation of the statutory scheme, and their own profits-driven determination that the Commission's December 19, 2008 Order was not in the Companies' self interest. The Companies cannot demonstrate by clear and convincing evidence that they are being irreparably harmed by not being able to collect the OE and TE RTC's, because they simply have no legal right to collect them after December 31, 2008.

---

[22] *See* R.C. § 4928.37.
[23] R.C. 4928.38.
[24] Case No. 08-935-EL-SSO (Jan. 7, 2009), Commission Finding and Order at ¶18.

3. FirstEnergy's Argument that Granting a Stay Would Not Cause Substantial Harm to the Other Parties Clearly Fails as Customers would be Harmed.

The Companies assert that continued collection of RTCs would not cause *any* harm to customers, and would effectually continue the status quo. OCEA vehemently disagrees. The Commission already appropriately determined that OE and TE customers should not be required to continue to pay RTC charges and that customers of all three Companies should no longer be required to pay previously approved 2008 fuel costs after they have been fully recovered, as R.C. 4928.143(C)(2)(b) provides a mechanism for fuel cost recovery. Clearly, continuing to pay the Companies these revenues would substantially and, potentially irreparably, harm all customers who have already paid these debts in full. While the Companies' Motion argues that a stay would not create a windfall to the Companies and that these revenues could be reallocated to reduce distribution deferrals owed or the amounts collected through the newly proposed FUEL rider, they have proposed no actual mechanism to implement these provisions. Nor have the Companies proposed any other customer safeguards, such as placing such monies in a separate, interest-bearing escrow account, posting an irrevocable bond for repayment of such monies or other means to secure a full and complete refund of these monies for the sole benefit of the OE and TE customers. FirstEnergy's retail customers are under incredible financial strains, not like First Energy. The Commission can take note that FirstEnergy earned a record $1.3 billion in net income in 2007 and announced a record $1.0 billion of net income in the first 9 months of 2008. Their top 3 executives alone made over $23 million in 2007. The Companies' customers should not be forced to subsidize the ever increasing profits-motivated decision of the Companies to reject the Commission's December 19, 2008 ESP SSO Order. Clearly, OE's and TE's

customers would be harmed if required to unlawfully continue to pay these charges as proposed by the Companies.

4. The Public Interest Dictates That a Stay Should Not be Granted In this Situation

As the United States Sixth Circuit Court of Appeals has held: "In litigation involving administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interest of private litigants must give way to the realization of public purposes."[25] FirstEnergy's Motion asserts that the public has an interest in viable utilities and in stable rates that are not unnecessarily volatile. Both of these assertions are true, but they certainly do not control the determination of the public interest.

The public interest to be considered should be determined largely from the controlling statutory provisions of Chapter 4928, as revised by Senate Bill 221. Most importantly, the public purposes should be guided by the State's Electricity Policies as set forth in R.C. 4928.02. In light of the Companies' now extant Application to recover their "fuel" costs, they will certainly not be "crippled" if a stay is not granted.[26] The Commission's January 7, 2009 Order correctly applies the applicable statutory provisions in Chapter 4928 and furthers the State's policies set forth in R.C. 4928.02. Further, considering the circumstances and recent profits-at-all-costs, self-interested actions taken by the Companies rejecting the Commission's just and reasonable approval of the Companies' ESP SSO, the public purpose would be more likely effectuated by directing the Companies to file a new standard service offer application by a date certain as soon as practicable. The Companies' cannot show that their proposed stay is in the public interest.

---

[25] *See Hamlin Testing Laboratories, Inc. v. United States Atomic Energy Com.* (6th Cir. 1964), 337 F.2d 221, 222.

[26] Case No. 08-935-EL-SSO (Jan. 9, 2009), Companies' Motion to Stay January 7, 2009 Order, at 3.

Based on the foregoing and the applicable four-factor test, the Companies have not demonstrated by any standard or scintilla that they have met the requirements for granting the extraordinary legal relief of a stay. The Commission should deny the Companies' Motion.

B. FirstEnergy's Argument That Practical Considerations Support a Stay Pending Resolution of All Appeals is Especially Unpersuasive

The Companies' argument that there is "little to be gained" from requiring the Companies to comply with the Commission's January 7, 2009 Order based on notions of practicality is unpersuasive and designed to benefit only the Companies themselves.[27] Mere practicality for the Companies alone cannot justify staying the Commission's just and lawful interpretation of its regulatory scheme, especially when it potentially could result in substantial harm to customers and would be in contravention of the public interest.

It is inconceivable how customers could benefit from continuing to pay the RTCs and fuel rider charges, obligations already paid in full. If the Commission determines it appropriate to order the recovery of prudently incurred fuel costs as provided for in R.C. 4928.143(C)(2)(b), customers will then be responsible for paying these obligations as required by statute and order of the Commission. However, continued collection of RTCs and past fuel riders, when they have already been fully collected, cannot be interpreted to be a proxy for *potential* future Commission approval of purchased power costs.

The Attorney Examiner's January 9, 2009 entry provides the Commission with further time to review its Order and the Companies with additional time to make changes necessary to implement the Commission's Order. As a stay of this order is unwarranted based on the analysis discussed above, the Commission should direct the Companies to make

[27] Case No. 08-935-EL-SSO (Jan. 9, 2009), Companies' Motion to Stay January 7, 2009 Order, at 7.

good use of this additional time to implement the Commission's Order as they have been previously directed.

III. CONCLUSION

The undersigned members of OCEA hereby request the Commission 1) deny the Companies' Motion for Stay of the Commission's January 7, 2009 Order; 2) require the Companies to file tariffs consistent with the Commission's January 7, 2009 Order as soon as the Commission determines practicable; and 3) specifically order that the effective end date of the RTCs for OE and TE was December 31, 2008; that the effective date for the Commission-ordered new tariffs is January 1, 2009; and that the Companies must make all necessary billing adjustments to implement these tariffs retroactively to January 1, 2009 consistent with the Commission's January 7, 2009 Order.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Jeff L. Small

Jeffrey L. Small, Counsel of Record (EBD per JLM consent)
Jacqueline Lake Roberts
Richard C. Reese
Gregory J. Poulos
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (Telephone)
small@occ.state.oh.us
roberts@occ.state.oh.us
reese@occ.state.oh.us
poulos@occ.state.oh.us

Glenn Krassen (EBB per consent)
Glenn Krassen
Bricker & Eckler LLP
1375 East Ninth St., Ste. 1500
Cleveland, OH 44114

Attorney for Northeast Ohio Public Energy Council

Henry W. Eckhart (EBB per consent)
Henry W. Eckhart
50 W. Broad St., #2117
Columbus, OH 43215

Attorney for National Resources Defense Council

Gregory J. Dunn (EBB per consent)
Gregory J. Dunn
Andre T. Porter
Schottenstein, Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215

Attorney for the City of Cleveland

Theodore S. Robinson (EBB per consent)
Theodore S. Robinson
Staff Attorney and Counsel
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217

Attorney for Citizen Power

Leslie A. Kovacik (EBB per consent)
Leslie A. Kovacik
Dept. of Law
420 Madison Ave., 4th Fl.
Toledo, OH 43604-1219

Attorney for NOAC

Lance M. Keiffer (EBB per consent)
Lance M. Keiffer, Asst. Prosecutor
711 Adams Street, 2nd Floor
Toledo, OH 43624-1680

Attorney for NOAC

Joseph Meissner (EBB per consent)
Joseph Meissner,
The Legal Aid Society of Cleveland
1223 West 6th St.
Cleveland, OH 44113

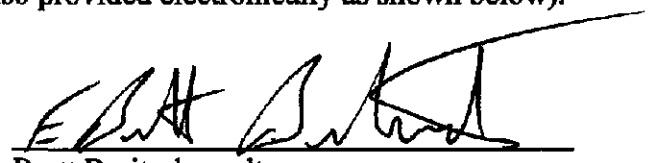
Attorney for Citizens Coalition,
Citizens for Fair Utility Rates,
Neighborhood Environmental Coalition,
Cleveland Housing Network, and
Empowerment Center for Greater Cleveland

Henry W. Eckhart (EBB per consent)
Henry W. Eckhart
50 W. Broad St., #2117
Columbus, OH 43215

Attorney for The Sierra Club Ohio Chapter

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing the OCEA's Memorandum Contra was served by first class United States Mail, postage prepaid, to the persons listed below, on this 13th day of January 2009 (courtesy copies also provided electronically as shown below).



Brett Breitschwerdt

PERSONS SERVED

David F. Boehm
Boehm, Kurtz & Lowry
36 East Seventh St., Ste. 1510
Cincinnati, OH 45202

Attorney for Ohio Energy Group

John W. Bentine
Chester, Willcox & Saxbe LLP
65 East State St., Ste. 1000
Columbus, OH 43215-4213

Attorney for The Kroger Company, Inc.

Barth E. Royer
Bell & Royer Co. LPA
33 South Grant Avenue
Columbus, OH 43215-3927

Attorney for The Ohio Environmental Council and Dominion Retail, Inc.

John Jones
William Wright
Assistant Attorneys General
Public Utilities Commission of Ohio
180 E. Broad St., 9th Fl.
Columbus, OH 43215

Samuel C. Randazzo
Lisa McAlister
Joseph Clark
McNees, Wallace & Nurick LLC
21 East State St., 17th Fl.
Columbus, OH 43215

Attorney for Industrial Energy Users-Ohio

David C. Rinebolt
Ohio Partners for Affordable Energy
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793

Attorney for Ohio Partners for Affordable Energy

James W. Burk
Arthur E. Korkosz
Mark A. Hayden
Ebony L. Miller
FirstEnergy Corp.
76 South Main Street
Akron, OH 44308

Lance M. Keiffer, Asst. Prosecutor
711 Adams Street, 2nd Floor
Toledo, OH 43624-1680

Attorney for Lucas County and NOAC

M. Howard Petricoff
Vorys, Sater, Seymour And Pease LLP
52 East Gay S., P. O. Box 1008
Columbus, OH 43216-1008

Attorney for Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc., Direct Energy Services, LLC and Integrys Energy Services, Inc.

Christopher Miller
Schottenstein, Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215

Attorney for The AICUO

Henry W. Eckhart
50 W. Broad St., #2117
Columbus, OH 43215

Attorney for The Sierra Club Ohio Chapter and Natural Resources Defense Council

Leslie A. Kovacik
Dept. of Law
420 Madison Ave., 4th Fl.
Toledo, OH 43604-1219

Attorney for the City of Toledo and NOAC

Garrett Stone
Brickfield, Burchette, Ritts & Stone
1025 Thomas Jefferson St., N.W.
8th West Tower
Washington, D.C. 20007

Attorney for Nucor Steel Marion, Inc.

Cynthia A. Fonner
David Fein
Constellation Energy Group, Inc.
550 W. Washington St., Suite 300
Chicago, IL 60661

Attorney for Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc.

Richard L. Sites
General Counsel and Senior Director of Health Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620

Craig G. Goodman
National Energy Marketers Association
3333 K St., N.W., Ste. 110
Washington, D.C. 20007

Sean W. Vollman
David A. Muntean
Assistant Directors of Law
161 S. High Street, Suite 202
Akron, OH 44308

Attorney for City of Akron

Eric D. Weldele
Tucker Ellis & West LLP
1225 Huntington Center
41 South High Street
Columbus, OH 43215

Attorney for Council of Smaller Enterprises

Joseph Meissner,
The Legal Aid Society of Cleveland
1223 West 6th St.
Cleveland, OH 44113

Attorney for Citizens Coalition,
Citizens for Fair Utility Rates,
Neighborhood Environmental Coalition
Cleveland Housing Network,
Empowerment Center for Greater Cleveland

Larry Gearhardt
Chief Legal Counsel
Ohio Farm Bureau Federation
280 North High St., P.O. Box 182383
Columbus, OH 43218-2383

Glenn Krassen
Bricker & Eckler LLP
1375 East Ninth St., Ste. 1500
Cleveland, OH 44114

Attorney for Northeast Ohio Public Energy Council and Ohio Schools Council

Gregory H. Dunn
Schottenstein, Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215

Attorney for the City of Cleveland

R. Mitchell Dutton
FPL Energy Power Marketing, Inc.
700 Universe Boulevard
CTR/JB
Juno Beach, FL 33408

Attorney for FPL Energy Power Marketing, Inc., and Gexa Energy Holdings, LLC

Langdon D. Bell
Bell & Royer Co., LPA
33 South Grant Ave.
Columbus OH 43215-3927

Attorney for Ohio Manufacturer's Association

Damon E. Xenopoulos
Brickfield, Burchette, Ritts & Stone, PC.
1025 Thomas Jefferson Street, N.W.
Eighth Floor, West Tower
Washington, DC 20007

Attorney for OmniSource Corporation

Craig I. Smith
2824 Coventry Road
Cleveland, OH 44120

Attorney for Material Sciences Corporation

Douglas M. Mancino
McDermott, Will & Emery LLP
2049 Century Park East, Ste. 3800
Los Angeles, CA 90067-3218

Attorney for Morgan Stanley Capital Group, Inc.

Dane Stinson
Bailey Cavalieri LLC
10 West Broad St. Ste. 2100
Columbus, OH 43215

Attorney for FPL Energy Power Marketing, Inc., and Gexa Energy Holdings, LLC

Theodore S. Robinson
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217

Attorney for Citizen Power

Gregory K. Lawrence
McDermott, Will & Emery LLP
28 State Street
Boston, MA 02109

Attorney for Morgan Stanley Capital Group, Inc.

Grace C. Wung
McDermott Will & Emery, LLP
600 Thirteenth Street, N.W.
Washington, DC 20005

Attorney for the Commercial Group

sam@mwncmh.com
john.jones@puc.state.oh.us
william.wright@puc.state.oh.us
drinebolt@aol.com
dboehm@bkllawfirm.com
BarthRoyer@aol.com
jbentine@cwslaw.com
Cynthia.A.Fonner@constellation.com
mhpetricoff@vssp.com
gas@bbrslaw.com
leslie.kovacik@toledo.oh.gov
lkeiffer@co.lucas.oh.us
mitch.dutton@fpl.com
LBell33@aol.com
robinson@citizenpower.com
lmcalister@mwncmh.com
jclark@mwncmh.com
Dane.Stinson@BaileyCavalieri.com

burkj@firstenergycorp.com
korkosza@firstenergycorp.com
haydenm@firstenergycorp.com
elmiller@firstenergycorp.com
ricks@ohanet.org
henryeckhart@aol.com
cgoodman@energymarketers.com
Vollmse@ci.akron.oh.us
jpmeissn@lasclev.org
LGearhardt@ofbf.org
gkrassen@bricker.com
gdunn@szd.com
dex@bbrslaw.com
wis29@yahoo.com
eric.weldele@tuckerellis.com
david.fein@constellation.com
gwung@mwe.com
cmiller@szd.com