

FILE

12

RECEIVED-BOOKETING DIV
2009 JAN 13 PM 5:25

**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 Approval of Rider)
FUEL and Related Accounting Authority.)

Case No. 09-21-EL-ATA
Case No. 09-22-EL-AEM
Case No. 09-23-EL-AAM
PUCO

**MOTION TO DISMISS AND, IN THE ALTERNATIVE,
MOTION FOR EXPEDITED DISCOVERY AND
MOTION TO SET THE MATTER FOR HEARING
BY
THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES**

The undersigned members of the Ohio Consumer and Environmental Advocates ("OCEA") move the Public Utilities Commission of Ohio ("PUCO" or "Commission") to dismiss the above-captioned case filed by Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company on January 7, 2009 for the approval of their proposed Rider FUEL.¹ Ohio law does not permit the adjustment of standard service offers by such a rider while the default provisions contained in R.C. Chapter 4928 are applicable.

In the alternative, the OCEA members move for a hearing as required by Ohio law regarding electric utility requests for an increase in rates. The Commission should set a procedural schedule for this case. The OCEA members couple this argument in the alternative with a motion for expedited discovery so that parties may effectively prepare their positions regarding the application ("Application"). Discovery should be required

¹ The Citizens Coalition, an OCEA member, supports this pleading and intends to intervene in this case.

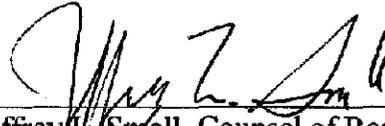
This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician SM Date Processed JAN 14 2009

based upon a ten-day turnaround and electronic transmission of all discovery requests and responses.

The Motion to Dismiss should be granted, as explained in detail in the attached Memorandum in Support. In the alternative, the Motion for a Hearing and Motion for Expedited Discovery should be granted for the reasons explained in the attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Jeffrey L. Small, Counsel of Record
Jacqueline Lake Roberts
Terry L. Etter

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
etter@occ.state.oh.us



Theodore S. Robinson
Staff Attorney and Council *by JLS*
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217

Attorney for Citizen Power



Glenn Krassen
Brett Breitschwerdt *by JLS*
Bricker & Eckler LLP
1375 East Ninth St., Ste. 1500
Cleveland, OH 44114

Attorney for Northeast Ohio Public Energy
Council

L. Kovacic

Leslie A. Kovacic
Dept. of Law *by PLS*
420 Madison Ave., 4th Fl.
Toledo, OH 43604-1219

Attorney for NOAC

L. Keiffer

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

Attorney for NOAC

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	Case No. 09-21-EL-ATA
Illuminating Company and The Toledo)	Case No. 09-22-EL-AEM
Edison Company for Approval of Rider)	Case No. 09-23-EL-AAM
FUEL and Related Accounting Authority.)	

MEMORANDUM IN SUPPORT

I. INTRODUCTION

On August 9, 2009, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or "Companies") filed their Application for the approval of their proposed Rider FUEL. This case appears to stem from developments in Case Nos. 08-935-EL-SSO and 08-936-EL-SSO that dealt with the establishment of standard service offers for the Companies' customers. In particular, the Commission issued an order on January 7, 2008 ("Interim Rate Order") that set standard service offers to address the circumstances where FirstEnergy withdrew its application in Case No. 08-935-EL-SSO.² The default provisions for standard service offers provided for under R.C. 4928.143 and R.C. 4928.141 address this factual situation. The Application seeks rate increases above the default standard service offers provided for under R.C. Chapter 4928. Therefore, the Application should be dismissed.

² The Interim Order is referred to in the Application in connection with the Companies' filing. Application at 4, ¶3.

FirstEnergy states that it issued a request for proposals (“RFP”) and contracted for power supply for the first three-months of 2009.³ Sparse information is provided by the attachments to the Application concerning the process and results of that RFP. In the event the Commission considers the Companies’ Application, more information should be obtained regarding the RFP and the Companies’ contracting for power supply. Discovery should be permitted, on an expedited schedule, and the matter set for hearing.

II. ARGUMENT: THE MOTION TO DISMISS SHOULD BE GRANTED.

The Revised Code provides for the contingencies involved in the event the electric distribution utility withdraws its ESP application. In the event that the Commission modifies the ESP proposal of the utility, as is the case in the above-captioned proceeding, the Revised Code provides for that contingency under R.C. 4928.143(C)(2)(a):

If the commission modifies and approves an application . . . the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section [4928.143 ESP] or a standard service offer under section 4928.142 [MRO] of the Revised Code.

This is the statutory provision cited by FirstEnergy in its letter docketed on December 22, 2008 that notified the Commission and parties about the Companies’ withdrawal of its application.⁴

The Revised Code also provides, again under R.C. 4928.143(C)(2)(b), for rates in conjunction with FirstEnergy’s withdrawal/termination of its ESP application:

³ Application at 10, ¶15. The Application states that FirstEnergy intends to purchase a small portion of its customer’s requirements by means of bilateral contracts. *Id.*

⁴ *In re FirstEnergy ESP Proceeding*, Case No. 08-935-EL-SSO, Letter (December 22, 2008).

If the utility terminates an application pursuant to (C) (2) (a) of this section . . . the commission shall issue such order as is necessary to continue the provisions, terms, and condition of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.141 of the Revised Code, respectively.

Since FirstEnergy has no generating units and therefore has no fuel costs,⁵ no fuel cost adjustments should be made to the current rates. FirstEnergy argues, based upon case law that pre-dates enactment of the above-quoted statute in S.B. 221, that "fuel costs" actually includes purchased power costs.⁶ The General Assembly did not contemplate any form of cost adjustment other than that stated in R.C. 4928.143(C)(2)(b) (quoted above), and the legal doctrine of *expressio unius est exclusio alterius* applies to this circumstance. *Weaver v. Edwin Shaw Hospital*, 104 Ohio St. 3d 390; 2004-Ohio-6549.

Default pricing without the adjustments proposed by the Application is also the result reached in the Commission's Interim Rate Order.⁷ According to the Commission's interpretation of the default provisions for standard service offers under R.C. 4928.143, the Companies request for approval of Rider FUEL may not be approved. Dismissal of the above-captioned case is the only approach consistent with the PUCO's Interim Rate Order.

⁵ See, e.g., Application at 9, ¶13.

⁶ Application at 13, ¶21.

⁷ Interim Rate Order at 9, ¶(18). OCEA's interpretation of the default pricing provisions recognizes that a "standard service offer under section . . . 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs. . . ." R.C. 4928.141(A). The standard service offer in the instant circumstances is provided for under R.C. 4928.143, in the form of the PUCO's directive regarding default rates as provided in R.C. 4928.143(C)(2)(b). Although this interpretation is different than that stated by the Commission, the results in this particular case are the same and do not affect the argument in the instant pleading.

FirstEnergy argued its interpretation of the default provisions contained in R.C. Chapter 4928 dealing with the factual circumstances addressed in the Interim Rate Order. FirstEnergy argues that the default pricing provisions contained in R.C. 4928.143(C)(2)(b) (quoted above) “does not address the instant circumstances, i.e. where there has yet to be a ‘first authorization’ of an SSO subsequent to the enactment of S.B. 221.”⁸ According to R.C. 4928.141, a SSO “first authorized” under either R.C. 4928.142 or 4928.143 is required to require default pricing as provided in the latter two statutes and the Commission has issued such authorization to FirstEnergy in this case.⁹ Even under FirstEnergy’s interpretation of the statutes, however, FirstEnergy’s default rates are those that it filed on December 22, 2008 that did not provide for increased rates such as those that would result from approval of Rider FUEL.¹⁰

The Companies rely upon “R.C. § 4928.141(A) in this circumstance.”¹¹ The default pricing provisions in R.C. 4928.141(A) state that “the rate plan of an electric distribution utility shall continue for the purpose of the utility’s compliance with this division.” “Rate plan” is defined in R.C. 4928.01(A)(33) as “the standard service offer in effect on the effective date of the amendment of this section.” No additional charges are provided for under the statute, and FirstEnergy’s Revised Tariff Pages proposed on December 22, 2008 do not contain any additional charges. Moreover, the Commission’s

⁸ FirstEnergy Reply Comments to Attorney Examiner Entry Dated December 26, 2008 at 5 (January 7, 2009).

⁹ Interim Rate Order at 5, ¶9 (“Commission did take action and approved, with modifications, the ESP filed by the Companies”).

¹⁰ FirstEnergy Revised Tariff Pages (December 22, 2008). The accompanying cover letter cited the provision contained in R.C.4928.141(A). Id.

¹¹ FirstEnergy Reply comments to Attorney Examiner Entry Dated December 26, 2008 at 6 (January 7, 2009).

Interim Rate Order states that the Companies are not entitled to such additional charges under its rate plan.¹² As a result, even the Companies' interpretation of the default pricing provisions contained in R.C. Chapter 4928 do not permit Rider FUEL to be charged to customers. The Application should, therefore, be dismissed.

Finally, FirstEnergy relies upon the "filed rate doctrine" for its argument that the Commission is compelled to pass along the cost of the Companies wholesale power costs.¹³ It is well established law that a state retains the jurisdiction to "determine the reasonableness of a utility company's claimed expenses."¹⁴ The Commission should follow Ohio law regarding rates deemed therein to reasonable compensate the Companies for their expenses.¹⁵

III. ARGUMENT: IN THE ALTERNATIVE, THE MOTION FOR A HEARING AND THE MOTION FOR EXPEDITED DISCOVERY SHOULD BE GRANTED.

In the event that FirstEnergy's Application is not dismissed, as supported in this pleading as the only result consistent with the Commission's Interim Rate Order, an investigation into FirstEnergy's RFP should be conducted to assure openness and accountability into a process whereby FirstEnergy seeks to set generation rates. Under

¹² Interim Rate Order at 9, ¶(18).

¹³ Application at 15, ¶26.

¹⁴ *Pike County Light and Power Co. v. Pennsylvania Pub. Util. Comm.* (1983), 77 Pa. Comwlth. 268, 275. Where a utility has multiple sources from which it could have purchased power, a state can inquire into the prudence of the utility's purchasing practices and re-price retail rates on the basis that the utility should have purchased lower-priced power from some other source. *Id.*

¹⁵ The Companies noticeably ignored purchase options that parties to the FirstEnergy ESP Proceeding deemed lower cost than the results from the Companies' RFP process. See, e.g., *In re FirstEnergy ESP Proceeding*, OCC Brief Regarding a Short-Term ESP at 8 (October 31, 2008).

these circumstances, a hearing should be conducted as the only prudent way of proceeding.

While the Application treads ground outside Ohio's statutory framework, generation rates and terms of service can only be filed an approved pursuant to R.C. 4928.142 (market rate option, or "MRO") or R.C. 4928.143 (electric security plan, or "ESP"). To the end of providing to consumers, "on a comparable and nondiscriminatory basis . . . a standard service offer," electric utilities in Ohio "shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code."¹⁶ The Application does not argue that it complies with the requirements set out by the Commission in the order regarding FirstEnergy's MRO proposal.¹⁷ An ESP proposal, if that is what FirstEnergy has proposed, requires that "the burden of proof in the proceeding shall be on the electric distribution utility."¹⁸ Such a proceeding requires an evidentiary hearing such the one conducted in Case No. 08-935-EL-SSO, the existing docket in which FirstEnergy filed an ESP application.

A hearing regarding the Application should be informed by both a PUCO Staff investigation regarding the RFP and the ability of parties to make inquiries and present their cases to the PUCO. Pursuant to Ohio Adm. Code 4901-1-17(A), "discovery may begin immediately after a proceeding is commenced and should be complete as expeditiously as possible." In keeping with the Companies desire to proceed

¹⁶ R.C. 4928.141(A).

¹⁷ *In re FirstEnergy MRO Proceeding*, Case No. 08-936-EL-SSO, Order (November 25, 2008).

¹⁸ R.C. 4928.143(C)(1).

expeditiously on its Application¹⁹ and prior procedure in ESP cases before the Commission,²⁰ discovery should be conducted on an expedited schedule in this case. Discovery should be conducted with ten-day responses, and all discovery requests and responses should be made electronically based upon an end of day that complies with the close of the PUCO's docketing offices at 5:30 p.m.

IV. CONCLUSION

The Application fails to follow the provisions contained in R.C. Chapter 4928 for the determination of standard service offers. The default provisions for standard service offers are provided by R.C. Chapter 4928 under circumstances where the Commission authorized a rate plan that extends beyond December 31, 2008 but the electric utility withdraws its electric security plan application under R.C. 4928.143(C)(2)(a). This circumstance currently applies for the determination of standard service offers for customers of the Companies. The Application seeks rate increases above those default standard service offers, and this case should be dismissed.

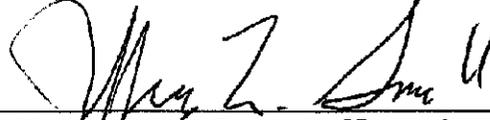
If the Commission considers the Application, which would be inconsistent with the PUCO's order issued on January 7, 2009 and Ohio law, more information must be obtained and presented to the Commission before any rate increase could be based upon the Companies' filing. Only prudently incurred costs can be recovered from customers. Expedited discovery should be provided if the PUCO fails to dismiss this case, and the matter should be set for hearing.

¹⁹ Application at 21, ¶38.

²⁰ See, e.g. *In re FirstEnergy ESP Proceeding*, Case No. 08-935-EL-SSO, Entry at 3, ¶6 (August 5, 2008). A more dependably expedited process would result from an entry that orders electronic service rather than recommending its use. *Id.*

Respectfully submitted,

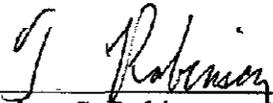
JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Jeffrey L. Small, Counsel of Record
Jacqueline Lake Roberts
Terry L. Etter

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
etter@occ.state.oh.us



Theodore S. Robinson
Staff Attorney and Counsel
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217

Attorney for Citizen Power



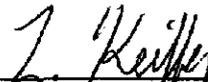
Glenn Krassen
Brett Breitschwerdt
Bricker & Eckler LLP
1375 East Ninth St., Ste. 1500
Cleveland, OH 44114

Attorney for Northeast Ohio Public Energy
Council



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

Attorney for NOAC



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

Attorney for NOAC

CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Motion to Dismiss* was served on the persons stated below, via First Class U.S. Mail, postage prepaid (also electronically), this 13th day of January 2009.



Jeffrey L. Small
OCC Counsel of Record

SERVICE LIST

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

Duane Luckey
Attorney General's Office
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215

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

Attorney for The Kroger Company, Inc.