

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric) Case No. 09-906-EL-SSO
Illuminating Company and The Toledo)
Edison Company for Approval of a)
Market Rate Offer to Conduct a)
Competitive Bidding Process for Standard)
Service Offer Electric Generation Supply,)
Accounting Modifications Associated)
with Reconciliation Mechanism, and)
Tariffs for Generation Service.)

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POST-HEARING REPLY BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,
CITIZEN POWER,
THE CITIZENS COALITION, AND
THE NATURAL RESOURCES DEFENSE COUNCIL

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I. INTRODUCTION

On October 20, 2009, Ohio Edison Company, the Cleveland Electric Illuminating Company (“CEI”), and the Toledo Edison Company (“FirstEnergy” or the “Company”) filed an application (“Application”¹) to request approval of their proposed market-rate offer (“MRO”) proposal that could determine prices consumers will pay for generation service. The MRO was filed months after an initial competitive bidding process (“CBP”) was conducted in May 2009 for the delivery of standard service off (“SSO”) electric supply beginning on June 1, 2009.

Initial briefs were filed on January 8, 2010. Many of those briefs refer to the largely successful May 2009 auction as well as FirstEnergy’s application before the

¹ FirstEnergy Ex. 7 (including schedules).

Federal Energy Regulatory Commission (“FERC”) in August 2009 to switch the transmission operations of the American Transmission System, Incorporated (“ATSI”) from under the footprint of the Midwest Independent System Operator (“MISO”) to PJM Interconnection, Inc. (“PJM”). While the proposal before FERC was largely ignored by FirstEnergy in the Application, it is the focal point for parties’ arguments against approval by the Public Utilities Commission of Ohio (“PUCO” or “Commission”) of the Application in its present form.

The initial briefs reflect wide agreement regarding the need for modifications to FirstEnergy’s proposal to satisfy its SSO obligations by means of a MRO, although the briefs show confusion regarding the appropriate basis upon which to make those modifications. The briefs address the CBP and the development of retail rates for customers, and stress the need for careful PUCO supervision and rejection of FirstEnergy’s request for approval for an endless means by which SSOs are made to customers.

The contents of this Post-Hearing Reply Brief are additional to, and not in substitute of, the contents of the Post-Hearing Initial Brief filed by the undersigned parties.

II. SUPPLEMENTAL STATEMENT OF LAW

Some confusion regarding the appropriate legal standard that should be applied in this case is evident from the briefs. R.C. Chapter 4928 was amended in 2008 such that the utility’s SSO may be established “in accordance with section 4928.142 or 4928.143

of the Revised Code.”² The Company’s Application in this proceeding depends upon R.C. 4928.142 that addresses setting the SSO according to a “market-rate offer.”³ The statute does not provide for a comparison of the “benefits of the MRO option in comparison to the electric security plan (‘ESP’) option.”⁴ No ESP application has been filed against which a comparison can be made.⁵

R.C. 4928.142(B) contains two sets of requirements, and the Commission must determine at the conclusion of a MRO proceeding whether an applicant-utility has satisfied the requirements stated in R.C. 4928.142. These requirements do not include the elimination of uncertainty, as suggested by various parties.⁶ The uncertainty and its sources, including the special circumstances associated with the proposed switch of regional transmission organizations (“RTOs”) to PJM, should be recognized in the Commission’s determination of the CBP under the PUCO’s oversight of electric distribution utilities pursuant to both R.C. Chapter 4928 and R.C. Chapter 4905.

Satisfaction of the minimum requirements set out in R.C. 4928.142 help ensure that wholesale market development supports a competitive supply process that protects customer interests. R.C. 4928.142(F) provides that a utility receiving approval of a MRO application “shall not, nor ever shall be authorized or required by the commission to file an application under section 4928.143 [i.e. regarding an ESP] of the Revised Code.” This

² R.C. 4928.141(A).

³ *Id.*

⁴ OPAE Brief at 1.

⁵ See IEU Brief at 8 (“benchmark against which any *ESP must be evaluated*” (emphasis added)).

⁶ OPAE at 1 (“not a viable option for customers because there is too much uncertainty”) and OEG at 1 (“too much uncertainty” and “[t]herefore, the application should be dismissed without prejudice”). An ESP does not remove uncertainty, and the myriad of possible provisions such as escalators to deal with future conditions can add to, rather than reduce, uncertainty.

is not, as some seem to argue, a criterion upon which the Commission judges the merits of a MRO application.⁷ The recoverable costs regarding SSO generation service under R.C. 4928.142(C) are those that are the “result of or related to the competitive bidding process or to procuring generation service to provide the standard service offer.” Other costs, such as those associated with electric distribution service,⁸ must be the subject of other proceedings before the Commission.

III. SUPPLEMENTAL RECOMENDATIONS

The following major issues are addressed in the Argument of this Post-Hearing Reply Brief, supplement the major recommendations stated in the Initial Post-Hearing Brief, and should be adopted by the Commission. In summary:

The GCR Rider, which would provide for reconciliation between generation supply costs and the revenues obtained by FirstEnergy for SSO service, should apply to only SSO customers and be bypassable by shopping customers.

The costs associated with interruptible customer programs, which FirstEnergy proposes to collect in a Peak Demand Reduction Rider (“Rider PDR”), should be collected through Rider DSE as part of FirstEnergy’s existing Energy Efficiency and Peak Demand Reduction filing.

The tariff schedules should not provide for the pass through of RTO realignment costs and charges stemming from the Companies’ filing at FERC to switch ATSI’s operations to PJM.

⁷ OEG Brief at 3-4 (“the finality of an MRO . . . requires that this application be dismissed”).

⁸ This treatment of distribution-related costs, which can be the subject of SSO service under an ESP, is an essential difference between a MRO under R.C. 4928.142 and an ESP under R.C. 4928.143.

IV. ARGUMENT

A. The CBP Should be Modified and the PUCO Should Maintain Oversight Regarding this Crucial Portion of the Application.

1. The criteria for movement to a MRO in R.C. 4928.142 are satisfied.

FirstEnergy has proposed to acquire generation resources for SSO customers by means of a MRO, beginning on June 1, 2011. The objections to approval of a MRO, in any form,⁹ based upon the advantages of an ESP fail on at least two important grounds. There is no ESP proposal before the Commission. Furthermore, support for an “ESP” over a “MRO” provides a substitute label, but does not provide the Commission with any alternative means by which SSO generation service can be obtained by FirstEnergy’s customers.¹⁰ The auction conducted in May 2009 obtained generation service by means of a CBP, the same means by which FirstEnergy proposes to acquire generation resources in its Application.

Neither is it appropriate under Ohio law to simply dismiss or disapprove the Application. Staff presented one witness who “support[ed] Section I of the Staff Comments.”¹¹ Section I of the Staff Comments states satisfaction that the Application meets the minimum requirements for approval of a MRO framework.¹² Yet the Staff

⁹ OPAE Brief at 1. Direct Energy states that “[s]ome parties may oppose the MRO because they prefer a set of specialized programs,” but “such a preference is not sufficient reason for the Commission to reject the MRO application.” Direct Energy Brief at 4.

¹⁰ “Thus, from a practical standpoint, in the case of FirstEnergy, the Commission’s choice between an ESP versus an MRO may have little effect on the ultimate SSO prices in Ohio.” IEU Brief at 8.

¹¹ Staff Ex. 2 at 2.

¹² Staff Ex. 1 (Staff Comments, Section I).

Brief states that “Staff cannot recommend approval of the MRO proposal at this time.”¹³ Similarly, the Ohio Energy Group (“OEG”) states that the “filing is premature”¹⁴ and that the “application should be dismissed without prejudice.”¹⁵ While these statements are understandable in light of FirstEnergy’s proposed change in RTOs, they lie outside the framework set out in R.C. 4928.142 for Commission evaluation of MRO applications. The minimum requirements stated in R.C. 4928.142 are met, as further supported in various briefs.¹⁶ Rather than dismiss the case, the Commission should require changes to the Company’s proposals that reflect and address the factual circumstances, including the proposed change in RTOs, under which power supply must be obtained to serve FirstEnergy’s customers.

2. The immediate-term and long-term CBP should be modified.

a. The immediate-term CBP must recognize contingencies related to the switch of ATSI operations to the PJM footprint.

FirstEnergy’s Brief follows the same course taken by the Company from the beginning of this case -- assume an uninterrupted course for the ATSI switch to PJM on June 1, 2011, including a CBP design that does not recognize other possible outcomes for the switch to PJM as contingencies.¹⁷ FirstEnergy’s Brief states that “FERC’s recent [December 17, 2009] decision provides the certainty that many intervenors sought when

¹³ Staff Brief at 1.

¹⁴ OEG Brief at 3.

¹⁵ *Id.* at 1.

¹⁶ Direct Energy Brief at 4; Constellation Brief at 3-10.

¹⁷ The Application contains only two contingency plans -- for the “insufficient bidder” and the “supplier default” situations. Application at 19-20.

they submitted their pre-filed testimony.”¹⁸ The level of comfort conjectured by FirstEnergy is *not* evident from the initial briefs that were filed in the instant case three weeks after the FERC order was issued.¹⁹

Many issues remain in controversy following FERC’s Order Addressing RTO Realignment Request and Complaint that was issued on December 17, 2009.²⁰ The order “den[ie]d ATSI’s request for waiver [regarding payment of PJMs Regional Transmission Expansion Plan, or “RTEP,” costs] and dismiss[ed] FirstEnergy’s related complaint.”²¹ The financial consequences of that denial/dismissal may be huge for customers,²² and there is likely to be substantial litigation regarding responsibility for the RTEP costs.²³

¹⁸ FirstEnergy Brief at 29.

¹⁹ See, e.g., Staff at 2-4; OMA/OHA Brief at 4-6; OEG Brief at 2-3; IEU Brief at 7-9, 22-23; OPAE Brief at 2-4. Staff states that “FERC’s action [n] authorizing the move has only very slightly reduced the uncertainty” (Staff Brief at 3), and emphasizes the many remaining issues regarding the proposed switch to PJM. Id. at 3-4.

²⁰ *American Transmission Systems, Inc.*, FERC Docket Nos. ER09-1589-000, et al., Order Addressing TTO Realignment Request and Complaint (December 17, 2009). While the Order is another step in the possible realignment of ATSI with PJM, it states (id. at ¶29):

[W]e cannot make any final determinations regarding ATSI’s right to withdraw from the Midwest ISO. Nor can determine at this time, whether, or to what extent, applicant’s anticipated replacement arrangements comply, or will comply, with the Commission’s *pro forma* OATT or the standard of review applicable to deviations from the *pro forma* OATT. However, with the preliminary guidance we provide below, ATSI should have the information it will need to decide its future plans.

²¹ Id. at ¶111.

²² The allocation of the RTEP costs in controversy to ATSI is expected to be about \$500 million. Tr. Vol. 7 at 892-895 (December 23, 2009) (Farley). FirstEnergy states that “FERC has also made its alternative dispute resolution service available to the parties.” FirstEnergy Brief at 30, footnote 131, citing Tr.. Vol. VII at 904-909 (December 23, 2009) (Farley). FirstEnergy’s Answer in the Complaint regarding PJM’s RTEP charges states that “[t]here is no prospect for this issue being resolved in a timely fashion through a ‘stakeholder’ process. The PJM transmission owners have long been divided over transmission cost allocation issues” OCC Ex. 5, *FirstEnergy Service Company v. PJM Interconnection, L.L.C.*, FERC Docket No. EL10-6-000, Answer of FirstEnergy Service Company at 16 (November 12, 2009).

²³ Requests for rehearing in the FERC docket are due January 19, 2010. The OCC intends to file such a request. A FERC decision on requests for rehearing will take place well after the end of the ninety-day period provided for the instant proceeding.

OCC Witness Wallach recommended changes to the CBP that should be made to deal with obtaining generation service beginning on June 1, 2011 as the result of the uncertainties surrounding the proposal for ATSI to switch its operations to PJM.²⁴ Procurement for twelve months of generation service for delivery beginning on June 1, 2011, with subsequent procurements subject to later Commission approval, would address pre-integration uncertainty and would also effectively deal with any failure of the integration to take place on June 1, 2011.²⁵ In the alternative, in the event that the Commission determines that more than twelve months of generation service should be obtained, OCC Witness Wallach's recommendation should be followed such that multiple years' generation service is obtained in twelve month contracts in order to minimize the pre-integration risk premium, improve price transparency, and provide economic benefits to SSO customers.²⁶

FirstEnergy cites the testimony of Constellation Witness Fein in support of the Company's selection of a long lead time between auctions and dates for delivery.²⁷ OCC Witness Wilson testified that the periods selected by FirstEnergy were unnecessarily

²⁴ FirstEnergy counters testimony submitted on behalf of the OCC with arguments that are both conjectural and unsupported by the record. For example, FirstEnergy states that "Mr. Wallach also ignores that *most bidders have extensive experience* providing supply into PJM." FirstEnergy Brief at 35 (emphasis added). Without citation and record support, FirstEnergy remarkably claims that it knows the identity of bidders, as well as their levels of experience in PJM markets, and expects the PUCO to rely upon the Company's Brief to refute sworn, expert testimony.

²⁵ OCC Ex. 2 at 15-16 (Wallach), accord OCC Ex. 4 at 24 (Wilson) ("offers for one-year contracts in the CBP auctions, as proposed by Mr. Wallach"). OCC Witness Wilson also supports offers of "one-year contracts in the CBP auctions," along with reducing the lead time between auction and delivery to reduce the "uncertainty about ATSI integration into PJM." OCC Ex. 4 at 24 (Wilson).

²⁶ *Id.*

²⁷ FirstEnergy Brief at 15. The PUCO Staff Comments state that "[t]he level of uncertainty of risk among potential suppliers/bidders in the energy and capacity auctions should be a factor in the decision as to any recommendation that the FE *proposed scheduled* be adopted." Staff Ex. 1 at 6 (Staff Comments, Section I) (emphasis added).

excessive, which would lead to excessive auction prices.²⁸ While Constellation Witness Fein testified that the time periods provided for the 2009 auction amounted to a “compressed time frame,”²⁹ he was comfortable with a planning period in the “two- to three-month time frame.”³⁰ The auctions proposed in June and October of 2010 for delivery beginning on June 1, 2011³¹ result in periods much longer than the two to three-month time period needed for planning purposes. Delay in the timing of the auctions for the 2011 delivery year should be ordered.

- b. The longer-term CBP should be reformed to undertake a portfolio approach to reduce overall costs for customers, and a PUCO-directed process should be established to determine the optimal approach.**

FirstEnergy awkwardly combines the argument that the portfolio approach recommended by OCC Witness Steinhurst does not comply with R.C. 4928.142(C)³² with the Company’s statement that FirstEnergy itself “consider[ed] active portfolio management” in its development of an MRO.³³ The misconception spread by FirstEnergy’s argument, and the testimony prepared on behalf of the Company, is that a portfolio approach does not involve competition between providers of the resources required to ultimately provide SSOs for customers. Dr. Steinhurst’s testimony describes how portfolio management is undertaken elsewhere, and specifically references the use of

²⁸ OCC Ex. 4 at 27 (Wilson).

²⁹ Id. at 413-414.

³⁰ Id.

³¹ Application, Attachment B.

³² FirstEnergy Brief at 10.

³³ Id. at 11.

consultants to help commissions evaluate proposals stemming from “an RFP to obtain the services.”³⁴ He recommended a process based upon “the issuance of a RFP for such services.”³⁵ Obtaining resources by way of a “RFPs” (i.e. request for proposals) involves a bidding process as much as by way of a declining clock auction.³⁶

R.C. 4928.142(C) contains three essential elements: a “bidding process,” Commission “select[ion of] the least-cost bid winner or winners of that process,” and resulting retail rates “prescribed . . . by the commission . . . [as] the electric utility’s standard service offer.” FirstEnergy’s proposal to conduct a declining clock, “slice of system” auction process involving the blending of prices from auctions conducted at different times for a single delivery period³⁷ is neither described in R.C. 4928.142(C) nor is it required by any other source of Ohio law. To the contrary, the Commission’s rules provide that a MRO application “shall include a discussion of alternative methods of procurement that were considered and the rationale for selection of the CBP plan being presented.”³⁸ The OCC, through the testimony of OCC Witness Steinhurst, presented an alternative method of procurement.

OCC Witness Steinhurst recommended a portfolio approach in response to FirstEnergy’s proposal that “does not include long-term, fixed price renewables or energy

³⁴ OCC Ex. 3 at 12.

³⁵ OCC Ex. 3 at 23.

³⁶ Dr. Steinhurst’s testimony abounds with references to a RFP process that ignored by the Company. See, e.g., OCC Ex. 3 at 30-31 (Steinhurst).

³⁷ Application, Vol. 1 at 5-7.

³⁸ Ohio Adm. Code 4901:1-35-03(B)(2)(a).

efficiency among the resources used.”³⁹ OPAE is receptive to the approach, especially the incorporation of energy efficiency into the CBP process.⁴⁰ Dr. Steinhurst described that such a portfolio approach has been the direction taken by other states that have restructured their regulation to utilize the competitive provision of generation service.⁴¹ Ohio is such a state, and one whose stated policy is to “[e]nsure diversity of electricity supplies and suppliers” as well as to “[e]ncourage innovation and market access for cost-effective supply- and demand-side retail electric service.”⁴² Options other than those selected by FirstEnergy should be explored.

FirstEnergy’s Brief continues the Company’s narrow view of the alternatives available for a CBP. FirstEnergy asserts that the advantage of its simple approach is that “it utilizes, in essence, several portfolio managers (bidders) competing against each other – thereby promoting lower costs.”⁴³ The advantage described by FirstEnergy (and FirstEnergy Witness Warvell) is one provided by a competitive process that involves multiple bidders. Mr. Warvell was asked whether his understanding of a portfolio acquisition approach ruled out competition between multiple bidders. His response was “no.”⁴⁴ OCC Witness Steinhurst proposed a process with advantages in addition to those provided by the competition that would exist under FirstEnergy’s proposed CBP.

³⁹ OCC Ex. 3 at 8 (Steinhurst).

⁴⁰ OPAE Brief at 7, citing OCC Ex. 3 at 32 (Steinhurst).

⁴¹ Id.

⁴² R.C. 4928.02(A)(C) and (D).

⁴³ FirstEnergy Brief at 12, citing Tr. Vol. 2 at 252 (December 16, 2009) (Warvell).

⁴⁴ Tr. Vol. 2 at 252 (December 16, 2009) (Warvell) (fuller context provided at 251-252). The response is the only one permitted unless the Company, and Mr. Warvell, were involved in the evaluation of alternatives that could not be part of a CBP.

Dr. Steinhurst also testified that “[i]n no event, should the Commission give permanent approval to a given product mix as has been proposed by the Companies in this proceeding. * * * This review requirement should be explicitly stated by the PUCO to formalize a process.”⁴⁵ Opposition to the Company’s request for approval of an on-going process without specific review is stated in initial briefs by a variety of parties, and other parties propose changes that should be subject to further review.⁴⁶ Staff argues for a process to “reexamine the wisdom and utility of whatever structure is approved”⁴⁷ Citing Ohio Adm. Code 4901:1-35-11(D), the PUCO Staff states that any approval in this case “must be made subject to these ongoing review requirements and the possibility that such ongoing review could result in periodic revisions to the CBP.”⁴⁸ The Commission should order and administer a process (e.g. scheduling meetings, setting deadlines) organized to guide the next Commission process to consider FirstEnergy’s SSO under R.C. 4928.142 in order to assure confidence in the process.⁴⁹

⁴⁵ OCC Ex. 3 at 33-34 (Steinhurst).

⁴⁶ See, e.g., OEG Brief at 16; Constellation Brief at 18. Constellation proposes changes that require additional evaluation. For instance, Constellation proposes that competitive providers be given “web-based customer-specific data,” a change that may aid competitive providers of generation service but which may have a negative impact on customer privacy and could subject customers to abuse.

⁴⁷ Staff Brief at 2.

⁴⁸ *Id.*

⁴⁹ See Tr. Vol. 3 at 410 (December 17, 2009) (Fein), for a discussion of the need for a collaborative process in which the participants have confidence.

3. The tariff schedules should not provide for the pass through of RTO realignment costs and charges stemming from the Companies' filing at FERC to switch ATSI's operations to PJM.

The PUCO Staff and intervening parties⁵⁰ convincingly argue that the Commission should not allow pass through of costs associated with plans for ATSI to switch its operations to PJM. The PUCO Staff argues that “[b]ased on the information now available, it does not appear that there is any basis upon which the new costs engendered by the move to PJM *could* be recovered by either ATSI from CEI, TE, and OE, or, in turn, by CEI, TE, and OE from their retail ratepayers.”⁵¹ Staff’s apparent reference is to FERC’s recent order on the subject of the proposed switch to PJM:

Transmission owners that seek to change RTOs should be prepared to assume the costs attributable to their decisions. ATSI is permitted to balance the benefits it associates with its decisions to join PJM under its existing tariff against the costs it anticipates it will incur in exiting the Midwest ISO and joining PJM to determine whether such a move is cost-justified.⁵²

IEU argues that “the Commission should put FirstEnergy on notice that . . . it will prohibit FirstEnergy from recovering any [costs associated with the switch to PJM] not prudently incurred.”⁵³ The connection between such arguments and the instant case is that FirstEnergy’s Application proposes Rider NMB, the Non-Market-Based Service Rider, which would recover such costs on a non-bypassable basis.⁵⁴ No costs associated

⁵⁰ E.g., IEU Brief at 22-23.

⁵¹ Staff Brief at 3 (emphasis sic).

⁵² *American Transmission Systems, Inc.*, Docket No. ER09-1589-000, 129 FERC 61,249, Order Addressing RTO Realignment Request and Complaint at ¶113 (December 17, 2009).

⁵³ IEU Brief at 23.

⁵⁴ Application, Schedule 2, Page 60 of 63 (Original Sheet 119, Page 1 of 2).

with the proposed switch in RTOs should be charged to customers unless and until the costs are presented to the Commission for review and receive the PUCO's approval.

4. The Commission should eliminate anti-competitive provisions proposed by FirstEnergy in its Application.

The briefs demonstrate cross-currents regarding provisions that inhibit shopping, and the desirability of shopping itself. OEG supports provisions that “reduce[] the probability that . . . customers will leave standard service and move to alternative providers.”⁵⁵ The argument is not founded upon Ohio law that provides, as State energy policy, support for providing consumers “options,”⁵⁶ for “effective choices over the selection of . . . supplies and suppliers,”⁵⁷ and for “effective competition in the provision of retail electric service.”⁵⁸ As observed by NOPEC/NOAC, the Revised Code specifically directs the Commission to “encourage and promote large-scale governmental aggregation in this state.”⁵⁹

FirstEnergy proposes to remove network integration transmission service (“NITS”) from the CBP product that was offered in the May 2009 auction and charge for that service by means of a new, unavoidable charge in FirstEnergy tariffs (i.e. Rider NMB).⁶⁰ IEU Witness Murray stated that the change “will hinder the development of competitive retail electricity markets and interfere with existing CRES contracts that

⁵⁵ OEG Brief at 10.

⁵⁶ R.C. 4928.02(B).

⁵⁷ R.C. 4928.02(C).

⁵⁸ R.C. 4928.02(H).

⁵⁹ R.C. 4928.20(K), cited by NOPEC/NOAC Brief at 5.

⁶⁰ Application, Vol. 2, Schedule 2 at 18-19 of 63.

extend beyond May 31, 2011.”⁶¹ Direct Energy, a competitive retail electric supplier in Ohio, states “one of the consistent problems it has faced is regulatory consistency.”⁶² Direct Energy argues that such consistency is needed to provide a “price structure against which [customers] can shop.”⁶³ At least for the next CBP, NITS should remain as treated in the May 2009 auction to provide desirable regulatory consistency.⁶⁴

Several parties discuss riders GCR and PDR, both non-bypassable as proposed by FirstEnergy, as impediments to competition.⁶⁵ FirstEnergy’s charges should be appropriate for the service that customers receive. The first of these riders, the proposed Generation Cost Reconciliation Rider (“Rider GCR”), would provide for reconciliation between generation supply costs and the revenues obtained by FirstEnergy for SSO service.⁶⁶ The Application states that the “cost [is] incurred by the Companies associated with the provision of generation service. . . .”⁶⁷ The GCR Rider, therefore, should apply to only SSO customers and be bypassable by shopping customers. Its imposition on customers who shop for generation service is anti-competitive because such customers would be faced with paying duplicate costs for the supply of generation service.

⁶¹ IEU Ex. 1 at 4 (Murray).

⁶² Direct Energy Brief at 3.

⁶³ *Id.*

⁶⁴ IEU states that at the time of any discussion regarding NITS in past collaborative discussions, “FirstEnergy and any prospective bidders were well aware that the Midwest ISO’s systems could not support the change in the SSO product. . . .” IEU Brief at 18. A discussion of changes in the treatment of NITS charges that could not be implemented under the information known at the time could not have been effective in revealing the policy implications of the change.

⁶⁵ Kroger Brief at 2-5 (GCR only); NOPEC/NOAC Brief at 6-8 (GCR and PDR); Cleveland at 3-5 (GCR and PDR); Constellation at 19-20 (GCR and PDR).

⁶⁶ Application, Vol. 1 at 23-24.

⁶⁷ *Id.* at 23, ¶69.

The proposed Peak Demand Reduction Rider (“Rider PDR”) is different in nature from Rider GCR. FirstEnergy proposes that Rider PDR collect the costs incurred with the Interruptible Generation Service Opportunity (“IGSO”) offering from all customers.⁶⁸ Proposed Rider PDR would collect from customers the amounts needed to pay for credits provided to (non-residential) interruptible customers who are prepared to reduce their loads under certain conditions.⁶⁹ The Application states that such payments are made by the FirstEnergy electric distribution utilities in furtherance of the peak load reduction requirements “provided by R.C. Section 4928.66(A)(2)(c),”⁷⁰ which is repeated in FirstEnergy’s Brief.⁷¹ The programs required by that section set out reductions that must be met by the *electric distribution utility*. Therefore, the costs associated with those programs should be borne by shopping as well as non-shopping customers.⁷²

As argued below, however, Rider PDR should not be approved. The costs associated with the IGSO and any related activities should be collected through Rider DSE as part of FirstEnergy’s existing Energy Efficiency and Peak Demand Reduction filing. The purpose of Rider DSE is to provide customers with demand-side management (“DSM”) options and help the Company meet its peak demand reduction requirements under R.C.

⁶⁸ Company Ex. 4 at 11 (Fanelli).

⁶⁹ Application, Vol. 1 at 27.

⁷⁰ *Id.* at ¶80.

⁷¹ FirstEnergy Brief at 56.

⁷² This is the argument made, and the conclusion reached, by FirstEnergy. *Id.* at 56-57.

Section 4928.66.⁷³ This is the same purpose served by FirstEnergy's proposed Rider PDR (which is not necessary).

B. The Commission Should Modify FirstEnergy's Proposed Retail Rate Design to Serve the Public Interest.

1. Service to the Company's customers should encourage demand responsiveness by including demand components in large customer rates.

FirstEnergy relies upon PUCO decisions in instances,⁷⁴ but rejects the Commission's determinations when they do not fit its positions. FirstEnergy correctly notes that the OCC draws support for including demand components in large customer rates "based on the historical use [in PUCO-approved rates] of such charges as a demand reduction measure."⁷⁵ OCC Witness Gonzalez testified that he submitted similar testimony in favor of retaining demand charges in industrial rates in opposition to "the elimination of the demand charges in [FirstEnergy's] initial SSO filings in 2008 following S.B. 221."⁷⁶ In the resulting order regarding FirstEnergy's proposed ESP following extensive litigation, the Commission stated "that the issues raised by various intervenors regarding the inclusion of demand components in the generation rate design must be addressed."⁷⁷ FirstEnergy refuses all forms of consultation or direction on the matter.

⁷³ OCC Ex. 1 at 14 (Gonzalez).

⁷⁴ See, e.g., FirstEnergy Brief at 38-39 ("Commission already has determined is just and reasonable").

⁷⁵ FirstEnergy Brief at 45, citing OCC Ex. 1 at 6 (Gonzalez).

⁷⁶ OCC Ex. 1 at 6 (Gonzalez).

⁷⁷ *In re FirstEnergy ESP Case*, Case No. 08-935-EL-SSO, Order at 23 (December 19, 2009).

The proposed product for the auction is a “slice of system,”⁷⁸ which means that generation prices for residential customers are linked to the rate design for non-residential customers by means of the bids potential suppliers are willing to offer given the load characteristics of the entire system. As explained by OCC Witness Gonzalez:

The Company’s proposal eliminates the principal source of responsiveness to differences in demands that has historically been in place for large customers, and that is needed going forward to reduce the bid price.⁷⁹

Such demand components should be reintroduced before any bidding takes place in order to properly reflect the cost of generation in rates and to reduce the price likely to be bid in the proposed auctions.⁸⁰ Correspondingly, prices for residential customers would decrease.

FirstEnergy’s Brief focuses on the product it has selected for auction that provides the electric distribution utilities with only variable costs.⁸¹ In order to reduce the cost of service and thereby induce lower bids from auction participants, the focus should not be on the Company’s procurement of power but on the impact of retail rates on customer behavior.⁸² The proposed rated design does not send the appropriate price signal to customers that electricity should be used in an economically efficient manner.⁸³ FirstEnergy Witness Fanelli agreed that demand charges, as a general concept, could

⁷⁸ See, e.g., Application Vol. 1 at 7, ¶17.

⁷⁹ *Id.*

⁸⁰ The elimination of required demand charges from all generation tariffs will encourage an inefficient demand for, and use of, generation resources. OCC Ex. 1 at 6 (Gonzalez).

⁸¹ FirstEnergy Brief at 45.

⁸² *Id.* at 6-7 (Gonzalez).

⁸³ *Id.* at 8 (Gonzalez).

provide an appropriate price signal to large customers.⁸⁴ However, FirstEnergy continues to propose rate designs for large customers without demand charges, which will encourage the inefficient and environmentally unsound demand for, and use of, generation resources by large consumers.⁸⁵ The resulting increased bids to serve the system will increase prices for residential customers.

2. The Commission should modify the rate design for the residential customers by removing the proposed inclining block structure.⁸⁶

FirstEnergy's Brief makes the vacuous argument that "the inclining block structure in schedule RS service a valid purpose"⁸⁷ without explaining that purpose. The Company's rate design for residential customers is inconsistent with the flat rate design proposed for seven other rate schedules proposed by FirstEnergy in Rider GEN.⁸⁸ The Commission should modify the Company's proposal to reflect a flat rate structure for RS customers (i.e. constant per kilowatt-hour rates over usage levels as provided in the other rate schedules).⁸⁹

FirstEnergy argues for its proposed residential rate structure, stating that "[c]urrent residential rates reflect an inclining block structure * * * [which] was deemed

⁸⁴ Tr. Vol. 4 at 642 (December 18, 2009) (Fanelli).

⁸⁵ OCC Ex. 1 at 7 (Gonzalez).

⁸⁶ NRDC and Citizen Power do not support FirstEnergy's proposed rate design for residential customers because the Company's Application and its testimony lack detail and a careful analysis of the proposed rate design.

⁸⁷ FirstEnergy Brief at 42.

⁸⁸ See, e.g., Application, Schedule 2 at 12 (Rider Gen – The Ohio Edison Company).

⁸⁹ Id. 11-12 (Gonzalez).

just and reasonable when approved in the ESP Case.”⁹⁰ Before the stipulation in the ESP Case presented the Commission with a package of provisions to evaluate as a whole,⁹¹ the Commission held against the Company’s proposed inclining rate structure in a distribution rate case decided in 2009.⁹² The original ESP order, decided in the litigated portion of the case, also rejected the rate design features correspondingly proposed in the pending (at that time) distribution rate case and the generation portion of the ESP case.⁹³ A flat rate structure, approved by the Commission on the merits in earlier cases, should be approved by the Commission in the instant case.

3. The Commission should extend legacy rates for certain residential customers.

FirstEnergy’s Brief disingenuously argues that the Company “propose[s] no change to the structure of the SSO charges for rate schedule RS [for residential customers].”⁹⁴ FirstEnergy also defends its retail rate designs on the continuation of rates approved as the result of the stipulation “approved in the ESP Case.”⁹⁵ Yet, FirstEnergy’s Brief declares that the Company proposes “discontinuing the residential non-standard credit in Rider EDR,”⁹⁶ a credit provided by reference in existing Rate RS where it mentions “applicable riders,” riders approved in the “ESP Case” and changed in

⁹⁰ FirstEnergy Brief at 42.

⁹¹ OCC Ex. 1 at 12 (Gonzalez).

⁹² *In re FirstEnergy Distribution Rate Case*, Case Nos. 07-551-EL-ATA, et al., Order at 30 (January 21, 2009).

⁹³ *In re FirstEnergy 2008 ESP Case*, Case No. 08-935-EL-SSO, Order at 22 (December 19, 2008).

⁹⁴ FirstEnergy Brief at 42.

⁹⁵ *Id.*

⁹⁶ *Id.* at 43.

the Company's Application.⁹⁷ The credit assists residential customers who made commitments to major electricity-using equipment in their homes in response to earlier FirstEnergy promotions, and who were previously charged promotional rates that were recently eliminated.⁹⁸ The only explanation offered by FirstEnergy for the Company's departure from proposing the existing rate structure for residential customers is that the change is "[b]ased on the Companies' assessment of overall rate impacts."⁹⁹

FirstEnergy claims that its design of retail rates is principled,¹⁰⁰ but the elimination of the residential non-standard credit does not fit within the framework described by the Company. FirstEnergy states that the application of "gradualism" to rates should transition[] certain customer groups or classes *over a reasonable period of time* toward fairly aligned retail charges."¹⁰¹ The Company proposes to continue rate discounts for street light customers (Rate STL) and traffic light customers (Rate TRF) in their current form and effect, without any transitional period.¹⁰² At the same time, FirstEnergy proposes to discontinue the existing residential non-standard credit that is the

⁹⁷ Rate RS refers to "applicable riders," which are shown in FirstEnergy's "Tariff Sheet 80." Application, Vol. 2 at 187 of 340. "Tariff Sheet 80" continues to show that the "Economic Development" rider remains applicable to Rate RS. However, nothing on proposed Rider EDR, Sheet 116, applies to residential customers. Application, Vol. 2 at 222 of 340. The "Residential Non-Standard Credit Provision" has been removed from Sheet 116 in FirstEnergy's Application without recognition of that situation by adjustment to "Tariff Sheet 80."

⁹⁸ As stated FirstEnergy, the elimination of rate schedules was recent, the earliest change being associated with the Company's "Rate Certainty Plan" (PUCO Case No. 05-704-EL-ATA). FirstEnergy Brief at 43. Residential customers do not have available to them the many devices used by large customers to obtain lower electricity prices. See, e.g., OEG Brief at 6-8 (requesting rate mitigation for industrial customers generally in addition to the mitigation that is available to specific customers by means of special contracts).

⁹⁹ Id. The explanation amounts to nothing more than a statement that the proposal is located in the Application.

¹⁰⁰ FirstEnergy Brief at 38-41.

¹⁰¹ Id. at 41 (emphasis sic).

¹⁰² Id. at 41, also Application at 26, ¶76.

*only mitigation provision that involves grandfathered accounts*¹⁰³ -- i.e. the impact of the rate mitigation dissipates over time because it is not offered to customers who establish new accounts. Discounts for street and traffic light accounts should not be continued at existing levels while entirely eliminating the residential non-standard credit that actually transitions the residential class towards standard rates.¹⁰⁴

The Commission should consider “gradualism” in the case of residential customers by modifying FirstEnergy’s proposal.¹⁰⁵ The Residential Non-Standard Credit Provision in Rider EDR should be continued.

4. The Commission should modify FirstEnergy’s proposed retail rate design regarding the costs FirstEnergy proposes to recover in Rider PDR in order to provide a reasonable and consistent rate design.

Briefing on the subject of cost recovery for peak demand reduction programs under “Rider PDR” argue for charging residential customers, a result that conflicts with the recovery for other such programs and with Commission precedent. The Company proposes to collect, from all customers, the costs incurred with the IGSO (i.e. interruptible program) according to Rider PDR. The Company intends to rely upon the interruptible offerings to satisfy the requirements in R.C. 4928.66(A)(2)(c).¹⁰⁶ FirstEnergy’s Brief argues for recovery of the costs “across all customer classes” on “an energy-only basis.”¹⁰⁷ The OEG argues that a program designed to reduce peak demands

¹⁰³ FirstEnergy Brief at 43.

¹⁰⁴ OCC Ex. 1 at 13 (Gonzalez).

¹⁰⁵ Id.

¹⁰⁶ Company Ex. 4 at 11 (Fanelli), repeated in FirstEnergy Brief at 56. See also Application at 27, ¶79.

¹⁰⁷ FirstEnergy Brief at 57.

should be allocated for cost recovery on the basis of class demands, including demands for classes composed of small customers.¹⁰⁸ Both FirstEnergy and OEG argue in favor of charging residential customers for a program designed for FirstEnergy to meet its statutorily required peak demand reduction requirements, and one in which *residential customers are ineligible to participate*.¹⁰⁹ Such a result conflicts with FirstEnergy cost recovery for peak demand reduction programs and with Commission precedent.¹¹⁰ The Company's proposal should be modified.

OCC Witness Gonzalez testified that residential customers should not be required to contribute to the cost for customer interruptible programs used to meet the PDR requirements if large customers are not required to contribute to the cost of residential PDR programs.¹¹¹ Mr. Gonzalez testified that the Commission should modify the Company's proposal and incorporate the interruptible program into the Company's Energy Efficiency and Peak Demand Reduction filing and collect such program costs through Rider DSE,¹¹² and implement a rate design for DSM costs based upon recovery from the customer class targeted for participation in the program.¹¹³

Mr. Gonzalez's recommendation is supported by the DSM cost recovery agreed to in settlement of the ESP in Case No. 08-935-EL-SSO, which states "that the allocation of costs will be on a rate schedule/class specific basis or as otherwise recommended as part

¹⁰⁸ OEG Brief at 13-14.

¹⁰⁹ Company Ex. 5 at 6-7 (Paganie).

¹¹⁰ OCC Ex. 1 at 14 (Gonzalez).

¹¹¹ Id.

¹¹² Id.

¹¹³ Id.

of the energy efficiency collaborative”¹¹⁴ This recovery design is also supported by results used by Duke Energy, DP&L, and the electric distribution utilities of American Electric Power.¹¹⁵ The Commission should modify the Company’s proposal to ensure that any program costs recovered for implementation of DSM programs to reduce peak demands are recovered from only the customer class the program targets.

5. The Commission should provide for public review and continuing oversight of the Company’s retail rate design.

Staff argument regarding continuing review and oversight, noted above, is not limited to the CBP but applies to the entire MRO process that includes FirstEnergy’s proposed rate design.¹¹⁶ Staff emphatically states: “The MRO as proposed would continue indefinitely. This is not acceptable.”¹¹⁷ Staff cites Ohio Adm. Code 4901:1-35-11(D) as an example of the Commission’s concern regarding ongoing review of the MRO process, which includes reporting and review concerning alternative rate structures.¹¹⁸ According to Ohio Adm. Code 4901:1-35-11(D)(6), the Commission (itself or through its representatives) “shall determine the level of review required” As OCC Witness Gonzalez testified, sufficient time should be allotted for review of the retail rate design elements associated with future CBP auctions.¹¹⁹

¹¹⁴ Id., footnote 17, quoting from *In re FirstEnergy ESP Application*, Case No. 08-935-EL-SSO, Stipulation and Recommendation at 21 (February 19, 2009).

¹¹⁵ OCC Ex. 1 at 14, footnote 17 (Gonzalez), citing the Duke ESP Case (Case No. 08-920-EL-SSO), DP&L ESP Case (Case No. 08-1094-EL-SSO), and AEP’s DSM Portfolio Case (Case No. 09-1089-EL-POR).

¹¹⁶ Similarly, OEG argues that the Commission should establish a proceeding for ongoing review to consider, “most importantly, the impact of the MRO rates on customers.” OEG Brief at 16.

¹¹⁷ Staff Brief at 1.

¹¹⁸ Ohio Adm. Code 4901:1-35-11(D)(5).

¹¹⁹ OCC Ex. 1 at 15-16 (Gonzalez).

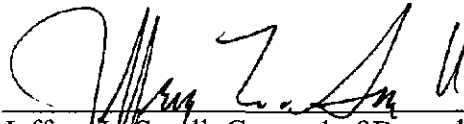
Commission oversight of bidding procedures should continue. The oversight should include opportunities for interested stakeholders to participate in the process and propose improvements to the Company's pricing procedures in addition to its procurement practices.

V. CONCLUSION

Significant changes should be ordered by the Commission regarding both the CBP and the development of retail rates from the wholesale rates obtained through the CBP. The Commission should approve a CBP that is limited in duration. The time prior to the end of the new delivery period should be used for development, according to a PUCO Staff directed collaborative, of an improved CBP that will serve Ohio customers at lowered costs.

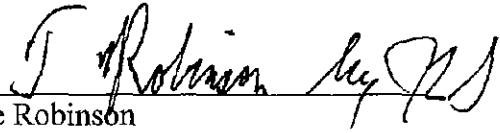
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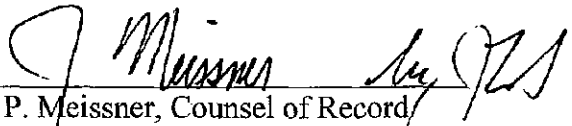


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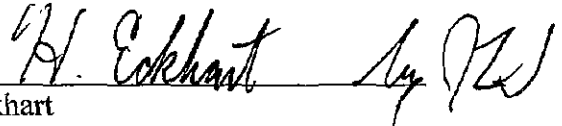
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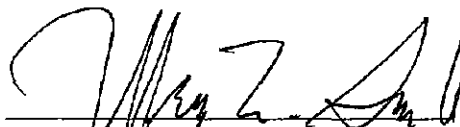
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