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

APPLICATION FOR REHEARING
BY
THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

February 2, 2009

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The undersigned members of the Ohio Consumer and Environmental Advocates ("OCEA"), pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A), apply for rehearing of the Finding and Order ("Interim Rate Order") issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") on January 7, 2009 in the above-captioned case. The Order addressed default pricing under circumstances where the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy" or "Companies") withdrew their Application in the above-captioned case in response to the Commission's December 19, 2008 Order.

The Interim Rate Order was unjust, unreasonable, and unlawful, and the Commission erred in the following particulars:

A. The Commission Erred by Setting Default Standard Service Offer Pricing Based Upon an Incorrect Statutory Interpretation.

B. The Commission Erred When it Failed to Properly Continue the Provisions, Terms, and Conditions of FirstEnergy's Most Recent Standard Service Offer as Required by R.C. 4928.143(C)(2)(b).

C. The Commission Erred When it Failed to Order FirstEnergy to File a New Application to Provide Standard Service Offers.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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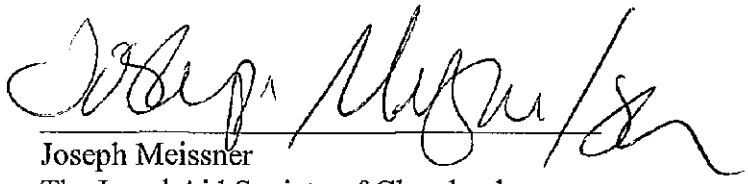

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On July 31, 2008, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or "Companies") filed an application ("ESP Application") for the approval of their proposed electric security plan ("ESP"). The Commission modified and approved the ESP Application on December 19, 2008. FirstEnergy withdrew its ESP Application on December 22, 2008. The Commission issued an order on January 7, 2008 ("Interim Rate Order") that set standard service offers to address these circumstances.[1] The default provisions for standard service offers provided for under R.C. 4928.143 and R.C. 4928.141 address this factual situation.

The Companies filed proposed tariffs, and members of OCEA as well as other parties filed comments that opposed the rates contained in the Companies' proposed tariffs.[2] On January 7, 2009, the Interim Rate Order was issued.

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[1] The Interim Order in the *FirstEnergy ESP Case* is referred to in the Application in connection with the Companies' filing. Application at 4, ¶3.

[2] See, e.g., OCEA Motion to Reject Applicants' Tariff Filing (December 23, 2008).

The Companies responded (in part) to the Interim Rate Order by filing a new application ("Rider Application") in Case Nos. 09-21-EL-ATA, et al. ("*Rider Case*"). The Rider Application sought rate increases above the default standard service offers provided for under R.C. Chapter 4928 and above those stated in the Commission's Interim Rate Order.

On January 14, 2009, the Commission issued an order in the *Rider Case* ("Rider Order"). Another order on January 14, 2009 in the above-captioned cases directed FirstEnergy to file tariffs at higher rates than were previously authorized in the Interim Rate Order.

II. ARGUMENT

A. The Commission Erred by Setting Default Standard Service Offer Pricing Based Upon an Incorrect Statutory Interpretation Regarding the Termination of Transition Charges.

The Revised Code provides for the contingencies involved in the event the electric distribution utility withdraws its ESP application, and the Commission's Interim Rate Order misapplies Ohio law. 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.[3]

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:

> 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.

The Companies argued that the default pricing provisions in R.C. 4928.143 do not apply, and that pricing in early 2009 should continue according to the default pricing stated in R.C. 4928.141.[4] The Companies' position was apparently argued to support the continued charging of transition charges that are not permitted if a "[s]tandard service offer [is set] under section . . . 4928.143 of the Revised Code."[5]

The Interim Rate Order misapplies Ohio law when it states that the "termination of transition charges is only applicable if there is an effective SSO established pursuant

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

[4] *FirstEnergy ESP Case*, FirstEnergy Application for Rehearing at 4-7 (January 9, 2009). R.C. 4928.141 would have been the controlling statute for establishing rates if the Commission had not rendered a decision by the end of December, 2008. The Commission rendered a decision based on the evidence presented after approximately two weeks of hearings. Upon the occurrence of that event, R.C. 4928.143 became the controlling statute.

[5] R.C. 4928.141(A). FirstEnergy's argument changed in its Rider Application, and now the Companies support the use of R.C. 4928.143 for default pricing because it includes a provision for charging "fuel costs." The Companies argue that "fuel cost adjustments include purchased power costs." Rider Application at 13, ¶21. As argued elsewhere by OCEA members, R.C. Chapter 4928 clearly distinguishes between fuel costs and purchased power costs. *Rider Case*, OCEA Application for Rehearing at 3-6 (January 26, 2009). The default pricing provisions stated in R.C. 4928.143(C)(2)(b) do not include adjustment for purchased power costs.

to Section 4928.142 (MRO) or 4928.143 (ESP), Revised Code, which is not the case at this time."[6] R.C. 4928.141(A) states that transition charges may not be charged in any "standard service offer under section 4928.142 or 4928.143 of the Revised Code. . . ." As stated by the Interim Rate Order itself, "Section 4928.143(C)(2)(b), Revised Code . . . is the section which defines the applicable SSO that will be in effect until a subsequent ESP or MRO is authorized."[7] Transition charges must be excluded from the default pricing provisions contained in R.C. Chapter 4928 as a matter of Ohio law. The Commission's findings to the contrary should be corrected upon rehearing.

B. The Commission Erred When it Failed to Properly Continue the Provisions, Terms, and Conditions of FirstEnergy's Most Recent Standard Service Offer as Required by R.C. 4928.143 (C)(2)(b).

1. Default Pricing for FirstEnergy Does Not Include Purchased Power.

The Interim Rate Order appeared to appropriately exclude adjustments for purchased power expenses,[8] but the PUCO's Rider Order and corresponding order in the above-captioned case authorized higher rates without stating that they were inconsistent with the result in the Interim Rate Order. The Interim Rate Order should have been clear that no adjustments for "fuel costs" should be made to FirstEnergy's rates as part of the default pricing provided for in R.C. 4928.143(C)(2)(b). The Commission appears to have inappropriately adopted FirstEnergy's change in argument that "fuel costs" in R.C.

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[6] Interim Rate Order at 8, ¶(15).

[7] Interim Rate Order at 5, ¶(9).

[8] Interim Rate Order at 9, ¶(18).

4928.143(C)(2)(b) really means "fuel costs and purchased power costs"[9] based upon law that pre-dates enactment of the above-quoted R.C. 4928.143(C)(2)(b).[10] The Commission failed to provide statutory analysis based upon the primary legal authority for such analysis: *R.C. 4928.143 itself* and related provisions regarding SSO setting enacted by S.B. 221.[11]

The key SSO setting provisions within S.B. 221 are located in R.C. 4928.14-4928.145. R.C. 4928.143(B)(2)(a) refers to automatic recovery of the following costs as part of an ESP:[12]

> . . . the *cost of fuel* used to generate the electricity supplied under the offer; the *cost of purchased power* supplied under the offer . . . and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes.

Correspondingly, the Commission's rules require the filing of information regarding "the automatic recovery of fuel, purchased power, and certain other specific costs."[13] R.C. 4928.142(D) regarding MROs refers to changes to a standard service offer for four costs by an electric distribution utility:[14]

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[9] Such a combination of words is not found in S.B. 221.

[10] Order at 5 ("history of considering and reviewing electric fuel components and purchased power costs concurrently"). The PUCO argued that the OCC's appeal of Case Nos. 03-93-EL-ATA, et al., should be dismissed because the "General Assembly has completely restructured this [rate setting] statutory mechanism" with passage of S.B. 221. *Ohio Consumers' Counsel v. Public Util. Comm.*, S.Ct. Case No. 08-367, PUCO Motion to Dismiss at 5 (January 2, 2009). Whether a decision should hinge on S.B. 221's changes to R.C. Chapter 4928 depends upon whether the changes are important to the legal issue.

[11] FirstEnergy, on the other hand, offers repealed provisions from S.B. 3 and rescinded rules in support of its arguments. Application at 14.

[12] Emphasis added.

[13] Ohio Adm. Code 4901:1-35-03(C)(9)(a), approved *In re SSO Rules*, Case No. 08-777-EL-ORD, Order at 3-5 (September 17, 2008). The rules remain pending, on rehearing, at the Commission.

[14] Emphasis added.

(1) . . . prudently incurred *cost of fuel* used to produce electricity;
(2) . . . prudently incurred *purchased power costs*;
(3) . . . prudently incurred costs of satisfying the supply and demand portfolio requirements of this state . . . ;
(4) . . . costs prudently incurred to comply with environmental laws and regulations.

Fuel and purchased power costs in S.B. 221's SSO provisions are clearly distinct and separate costs.[15] Where R.C. 4928.143(C)(2)(b) provides for fuel cost adjustments, the exclusion of purchased power costs from the adjustments must be interpreted as purposeful. Statutory construction requires the interpretation that the exclusion of purchased power from the default pricing provision in R.C. 4928.143 means that the General Assembly intended this result (i.e. the legal doctrine of *expressio unius est exclusio alterius* applies[16]). The purchased power costs sought by FirstEnergy were unlawful.

The unlawful adjustment of FirstEnergy's rates is the source of additional problems that should not exist if the status quo was continued as required by the default pricing provisions contained in R.C. 4948.143(C)(2)(b). The Application for rehearing filed by NOPEC/NOAC demonstrates the difficulties posed by the PUCO's utility-favored result.[17] The unlawful increase in rates for FirstEnergy's customers did not provide customers the ability to avoid FirstEnergy's additional charges that the Rider

[15] Other than references to "fuel cells," S.B. 221 added the word "fuel" to R.C. Chapter 4928 in only one other instance. R.C. 4928.01(A) states that a renewable energy resource includes "fuel derived from solid waste . . . through fractionation, biological decomposition, or other process that does not principally involve combustion . . . ." Again, the reference to "fuel" does not include purchased power.

[16] See, e.g., *Weaver v. Edwin Shaw Hospital*, 104 Ohio St. 3d 390, 2004-Ohio-6549.

[17] NOPEC/NOAC Application for Rehearing at 14-20 (January 22, 2009).

Application refers to as "avoidable" if such customers switch to a competitive supplier.[18] On rehearing, the Commission should correct its application of the default pricing provisions contained in R.C. Chapter 4928 that apply to the circumstances of this case.

2. Continuation of FirstEnergy's Standard Service Offer Must Include Provisions Relied Upon by Consumers and Not Only Those that FirstEnergy Desires to Continue.

NOPEC/NOAC also point out that the Companies' proposed tariffs and the Commission's subsequent Interim Rate Order provide new dates on the tariffs themselves but do not provide new dates for the notice provisions for shopping.[19] All provisions, terms, and conditions in FirstEnergy's standard service offering must be continued according to R.C. 4928.143(C)(2)(b), not just those that FirstEnergy wants to continue. The Commission should correct this error on rehearing.

C. The Commission Erred When it Failed to Order FirstEnergy to File a New Application to Provide Standard Service Offers.

The Interim Rate Order is silent on the subject of the means by which standard service offers for FirstEnergy's customers will be set on a basis more permanent than the end of March 2009. The Commission should have addressed the Companies' failure to meet its obligation to apply for approval of their standard service offer. R.C. Chapter 4928 provides:[20]

> Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric service necessary to maintain essential electric service to consumers, including a firm supply of electric

[18] Rider Application, Attachment A-1.

[19] NOPEC/NOAC Application for Rehearing at 20-26 (January 22, 2009).

[20] R.C. 4928.141(A) (emphasis added).

> generation service. To that end, the electric distribution utility *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 . . . .

FirstEnergy has failed to apply to the PUCO to gain approval for its standard service offer.

The Companies' MRO proposal, pursuant to R.C. 4928.142, was rejected by the Commission.[21] The Companies withdrew their ESP application.[22] The Companies, therefore, have no application before the PUCO to provide their standard service offers even though they are not providing service pursuant to an approved SSO application. The Commission's Interim Rate Order should have ordered the Companies to submit a SSO application for review by the Commission to prevent FirstEnergy from continuing operations outside full regulatory review.

FirstEnergy should submit a SSO application, having due regard for the Commission's decisions in the fully litigated MRO and ESP cases regarding deficiencies in the Companies' previous SSO applications. In the absence of a SSO application by FirstEnergy, it is not evident that FirstEnergy intends to conduct itself within the bounds of R.C. Chapter 4928 in the near or distant future. The Commission should have ordered FirstEnergy to submit a SSO application for consideration by interested stakeholders as well as review and decision by the Commission.

On rehearing, it is imperative that the Commission order FirstEnergy to file for approval of its SSOs (i.e. either an ESP or a MRO proposal, or both) so that the current period of rate uncertainty -- which is solely FirstEnergy's creation -- ends.

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[21] *FirstEnergy MRO Case*, Order (November 25, 2008).

[22] *FirstEnergy ESP Case*, FirstEnergy Letter at 1 (December 22, 2008).

III. CONCLUSION

The Order 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 Interim Rate Order should also have instructed FirstEnergy, according to Ohio law, to submit another application for approval of the Companies' standard service offers. The Companies have neither approved rates pursuant to a MRO or ESP application nor an application before the Commission to set such rates subject to the PUCO's regulatory process. FirstEnergy's failures in this regard should be corrected, and the Interim Rate Order should have instructed the Companies to comply with Ohio law.

On rehearing, the Commission should correct its errors in accordance with the arguments set forth above.

Respectfully submitted,

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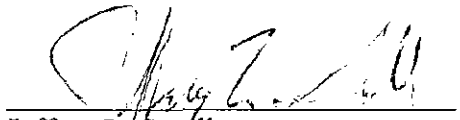
CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Application for Rehearing* was served on the persons stated below, via First Class U.S. Mail, postage prepaid (also electronically), this 2rd day of February, 2009.



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