FILE

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

MEMORANDUM CONTRA FIRSTENERGY'S APPLICATION FOR REHEARING BY THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

February 5, 2009

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I. INTRODUCTION

On January 9, 2009, Ohio Edison Company, The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company (collectively, "FirstEnergy" or "Companies") filed an Application for the approval of their proposed Rider FUEL. This case stems from developments in cases that involved standard service offers ("SSOs") for the Companies' customers, Case No. 08-935-EL-SSO (electric security plan, or "ESP," reviewed in the "*FirstEnergy ESP Case*") and Case No. 08-936-EL-SSO (market rate option, "MRO," reviewed in the "*FirstEnergy MRO Case*"). 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 the *FirstEnergy ESP Case.*[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 Application seeks rate

[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.

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 13, 2009, members of the Ohio Consumer and Environmental Advocates ("OCEA") filed a Motion to Dismiss. The OCEA members also sought, in the alternative, expedited discovery and a hearing under circumstances where the Commission did not dismiss the Application.

On January 14, 2009, the Commission issued the Order to which the instant pleading seeks rehearing. The Order on January 14, 2009 directed FirstEnergy to file tariffs at higher rates than were previously authorized in the *FirstEnergy ESP Case.*

On January 26, 2009, FirstEnergy filed its Application for Rehearing regarding the Order. The undersigned members of OCEA herein respond to FirstEnergy's Application for Rehearing. The Commission should reject FirstEnergy's arguments, and correct the errors addressed in the Application for Rehearing filed by OCEA on January 26, 2009.

II. ARGUMENT

A. FirstEnergy Misstates the Commission's Duties Regarding Default Pricing for Generation Service Under Ohio Law.

1. The Commission Is Required Under Ohio Law to Determine Rates According to the Default Pricing Provisions Contained in R.C. 4928.143 and Not Any Amount Demanded by FirstEnergy.

The Companies' review of Ohio law regarding the pricing of generation services under circumstances where they have withdrawn their application pursuant to R.C. 4928.143 is missing a careful statutory interpretation of existing law. FirstEnergy cites to

cases decided under S.B. 3, nearly without reference to statutes under S.B. 221.[2] The Companies briefly mention R.C. 4928.143(C)(2)(b),[3] a statute that FirstEnergy recently argued did not apply to the present factual circumstances.[4] The Companies position in the *FirstEnergy ESP Case* 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] Their flip-flopping position is not persuasive in the above-captioned case.

The Revised Code provides for the contingencies involved in the event the electric distribution utility withdraws its ESP application, and the Commission's Rider 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.

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[2] FirstEnergy Application for Rehearing at 8-9.

[3] FirstEnergy Application for Rehearing at 9 ("conveniently, the General Assembly included in R.C. § 4928.143(C)(2)(b) a simple process").

[4] FirstEnergy recently argued that pricing should be determined under R.C. 4928.141. *FirstEnergy ESP Case*, Case No. 08-935-EL-SSO, 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. FirstEnergy's changing "statutory" argument apparently results from the desire to take advantage of a provision for "fuel costs" in R.C. 4928.143 that is not contained in the default pricing provisions in R.C. 4928.141. As analyzed below, "fuel costs" do not include purchased power costs.

[5] R.C. 4928.141(A).

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.[6]

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 argue that the above-quoted provision expresses the General Assembly's "simple process pursuant to which EDUs may recover their purchased power costs"[7] The matter that FirstEnergy considers "simple" involves an interpretation that conflicts with the plain language contained in the statute.[8] The Companies do not own generating units, they have no "fuel costs,"[9] and the statute does not mention "purchased power costs."

Default pricing without the adjustments proposed by the Application is the result reached in the Commission's Interim Rate Order.[10] According to the Commission's

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

[7] FirstEnergy Application for Rehearing at 9.

[8] Pursuant to the statutory construction rule in R.C. 1.42, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage."

[9] R.C. 4928.143(C)(2)(b).

[10] 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 situation are the same and do not affect the argument in the instant pleading.

earlier 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. FirstEnergy's arguments in its Application and now in its Application for Rehearing should be rejected according to the rate results in the Commission's Interim Rate Order. On rehearing, the result stated in the Interim Rate Order should be restored.

FirstEnergy was clearly unhappy with Commission orders that would provide fewer revenues than desired by the Companies. The Companies' decision to purchase power from their affiliate in a bidding process that has not been approved by the Commission is a blatant attempt by FirstEnergy to evade the Commission's regulation in order to collect more revenues from captive customers than the Commission determined was reasonable. On rehearing, the Companies' arguments regarding default pricing for generation service under R.C. 4928.143 should be rejected.

2. The Commission's Refusal to Permit FirstEnergy to Charge All Amounts Demanded by FirstEnergy Is Not Enough to Satisfy the Commission's Duty to Base Charges on the Default Pricing Provisions Contained in R.C. 4928.143.

FirstEnergy's Application demanded costs in addition to the totality of the Companies' alleged purchased power costs, and again seeks these additional amounts for uncollectible and administrative costs.[11] FirstEnergy's argument fails on the same basis as its claim for other alleged costs that are discussed above. The lawful rates charged to FirstEnergy's customers after the Companies withdrew their ESP application in December are those provided for in R.C. 4928.143. FirstEnergy's argument for all other amounts, including those amounts demanded by FirstEnergy in this case but not ordered

[11] FirstEnergy Application for Rehearing at 17.

collected by the Commission on January 14, 2009 must fail because those amounts exceed the default generation rates provided for under Ohio law.

3. FirstEnergy Incorrectly Argues that the Commission, a Creature of Statute, is Permitted to Set Generation Rates Based Upon a Constitutional Interpretation Instead of Upon the Default Provisions for Pricing Generation Service that are Stated in R.C. Chapter 4928.

FirstEnergy's argument that the Supremacy Clause of the U.S. Constitution[12] requires the Companies' favored result depends upon Commission authority to make such a determination. The Rider Order's increase in rates above those previously approved in the Interim Rate Order appears driven by the PUCO's concern to "avoid a confiscatory result" that FirstEnergy might argue as part of a constitutional claim. The Commission is a creature of statute, and is required to follow Ohio law.[13] The Commission has the duty to set default rates according to the default provisions contained under Ohio law. As stated above, the provisions of R.C. Chapter 4928 provide for default pricing under the current factual circumstances.[14]

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[12] FirstEnergy Application for Rehearing at 10-11.

[13] *Time Warner AxS v. Public Util. Comm.* (1996), 75 Ohio St.3d. 229, 234; *Canton Storage & Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St. 3d 1, 4.

[14] OCEA members, arguing in the alternative, previously countered FirstEnergy's claim that the Commission must authorize rates that fully recognize the Companies' claimed costs under their RFP bidding procedure. *FirstEnergy ESP Case*, Case No. 08-935-EL-SSO, OCEA Memorandum Contra Joint Application for Rehearing at 15 (January 13, 2009). It is well established law that a state retains the jurisdiction to "determine the reasonableness of a utility company's claimed expenses." *Pike County Light and Power Co. v. Pennsylvania Pub. Util. Comm.* (1983), 77 Pa.Comwlth. 268, 275; approved, *Public Service Co. v. Patch*, 167 F.3d 29, 35 (1st Cir. 1998). Where a utility has multiple sources from which it could have purchased power, the 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.

Ohio's statutes, which the PUCO is required to follow, are presumed to be constitutional.[15] In contrast, the Rider Order appears to presume that the default rate provisions contained in R.C. 4928.143 (and upon which the PUCO relied in the Interim Rate Order) are unconstitutional. Administrative bodies in Ohio such as the PUCO do not have the authority to violate Ohio law based upon constitutional interpretations.[16] The Commission itself has recognized this statement of Ohio law in its decisions.[17] The reliance placed by the PUCO on *Monongahela Power Co. v. Schriber*, 322 F. Supp.2d 902[18] is inapposite because the Commission undertook its review -- after "*finding that it lacked jurisdiction to resolve Mon Power's constitutional claims*"[19] -- at the direction of a federal court. The Commission should follow Ohio law regarding rates deemed in the law to reasonably compensate the Companies for their expenses.[20]

An important feature of the present circumstances is that FirstEnergy *chose* to withdraw its ESP Application and conduct itself under the default provisions of Ohio law. This choice was presumably made with consideration for the default provisions contained

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[15] *State v. Cook*, 83 Ohio St.3d 404, 409, 1998 Ohio 291 ("strong presumption of constitutionality").

[16] See, e.g., *Derakhshan v. State Med. Bd.*, 2007 Ohio 5802 at ¶26 (Ohio App. 10th Distr.) ("administrative bodies have no authority to interpret the Constitution"); also *Grant v. Ohio Dept. of Liquor Control* (1993), 86 Ohio App.3d 76, 83 ("constitutional issues cannot be determined administratively"); also *Cleveland Gear Co. v. Limbach*, 35 Ohio St. 3d 229,231 ("an administrative agency, a creature of statute, . . . is without jurisdiction to determine the constitutional validity of a statute").

[17] See, e.g., *In re Panhandle Eastern Pipe Line Company v. Public Util. Comm.*, PUCO Order (October 19, 1997), reviewed in *Panhandle Eastern Pipeline Co. v. Public Util. Comm.*, 56 Ohio St. 2d 334, 336 ("commission also indicated that because it was an administrative body with its powers specifically delineated by statute, it had no authority to declare the application of the statutory scheme to be unconstitutional").

[18] Rider Order at 6, ¶(9).

[19] *Monongahela Power Co. v. Schriber*, 322 F. Supp.2d 902, 906 (emphasis added).

[20] 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).

under Ohio law. Even the tariffs submitted by the Companies on December 22, 2008 in the ESP Case (i.e. ordered modified on January 7, 2009) did not include the rate adjustments now claimed by FirstEnergy. FirstEnergy has made no claim that the Commission's order modifying the Companies' ESP Application was unlawful in any respect -- including any confiscatory result -- and the default rates were chosen by FirstEnergy over those originally approved by the Commission. The Commission should reject FirstEnergy's newest arguments which contradict its earlier submissions in the ESP Case.

B. The Commission Incorrectly Approved Additional Deferrals that Provide CEI with Benefits Above and Beyond the Compensation Required to Meet its Alleged Requirements for Obtaining Wholesale Generation Service.

FirstEnergy claims that CEI must obtain part of its compensation in the form of deferrals,[21] but the Companies make no claim that the rates approved in the Rider Order fail to provide the revenues required to pay the power supply costs that were requested in the Companies' Application. The Rider Order unlawfully provides benefits to FirstEnergy in *excess* of those required to compensate the Companies' wholesale suppliers as that compensation is stated in the Application. For CEI, the Rider Order states:[22]

> With regard to CEI, we conclude that Rider FUEL should be established at an amount equal to the difference in the costs incurred by the Companies to purchase power for customers receiving generation service pursuant to the Companies' power supply agreement and the unbundled generation revenues for CEI's customer classes as set out in the Companies' current rate plan. *Additionally, we find that CEI should be granted the appropriate*

[21] FirstEnergy Application for Rehearing at 14.

[22] Rider Order at 6-7, ¶(11) (emphasis added).

> *accounting authority to defer, with carrying costs, any amount for such purchased power that exceeds the authorized amount in Rider FUEL for future recovery* plus the current unbundled generation revenues for CEI's customer classes as set out in the Companies' current rate plan.

Thus, the Commission authorized deferrals for CEI in *addition* to increasing customer rates sufficiently to pay FirstEnergy's claimed cost of its purchased power.

Neither the Commission's most recent (and errant) statutory interpretation nor its rationale for higher rates based upon an (inappropriate) interpretation of the U.S. Constitution justifies the award of the additional deferrals. Furthermore, the Rider Order does not "determine[ ] that an emergency existed requiring approval of Rider FUEL . . . ."[23] The "emergency" is simply an alternative rationale offered in the Companies' Application for approval of Rider FUEL that was not adopted by the Commission in the Rider Order.[24] The Commission is obligated to apply the default pricing provided in R.C. 4928.143. The additional deferrals are not provided for by statute, and are not required even by the Commission's interpretation of its obligations to avoid a confiscatory result in its default pricing decision.

C. The Default Provisions for Pricing Generation Service Under Ohio Law do Not Include Purchased Power Within Allowances for "Fuel Costs."

Despite the Commission's approval of higher rates in the Rider Order, FirstEnergy complains that the PUCO was not sufficiently "clear that the Companies' increased fuel costs, in the form of purchased power costs, may be recovered pursuant to

[23] FirstEnergy Application for Rehearing at 14 (providing no citation).

[24] Application at 16-21.

R.C. § 4928.143(C)(2)(b)."[25] No adjustments for "fuel costs" should be made to the current rates. "Fuel costs" in R.C. 4928.143(C)(2)(b) does not mean "fuel costs and purchased power costs."[26] The Rider Order cites law that pre-dates enactment of the above-quoted R.C. 4928.143(C)(2)(b).[27] The Rider Order does not base its statutory analysis on the primary legal authority for such analysis: *R.C. 4928.143 itself* and related provisions regarding SSO setting enacted by S.B. 221.[28]

The key SSO-setting provisions within S.B. 221 are located in R.C. 4928.14 through 4928.145. R.C. 4928.143(B)(2)(a) refers to automatic recovery of the following costs as part of an ESP:[29]

> . . . 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."[30] R.C.

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[25] FirstEnergy Application for Rehearing at 15.

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

[27] 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.

[28] FirstEnergy, on the other hand, offers repealed provisions from S.B. 3 and rescinded rules in support of its arguments. FirstEnergy Application for Rehearing at 15.

[29] Emphasis added.

[30] Ohio Adm. Code 4901:1-35-03(C)(9)(a), approved in *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.

4928.142(D) regarding MROs refers to changes to a standard service offer for four costs by an electric distribution utility:[31]

> (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 under the SSO provisions in S.B. 221 are clearly distinct and separate costs.[32] Pursuant to the statutory construction rule in R.C. 1.42, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." FirstEnergy and the Rider Order read the statutory wording out of context and outside common usage for the words.

FirstEnergy argues that because the General Assembly "conducted extensive hearings on S.B. 221," the term "fuel costs" must have been intended as "a broad term – that could be applied by the Commission to the different circumstances presented by different electric distribution utilities."[33] S.B. 221 is clear on the topic of fuel costs under various default settings: the default pricing under R.C. 4928.141 where the Commission has not "first authorized" a SSO does not permit PUCO flexibility to include any fuel costs, and only fuel costs (not purchased power costs) are permitted under the terms of

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[31] Emphasis added.

[32] 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.

[33] FirstEnergy Application for Rehearing at 16. FirstEnergy does not offer an explanation for the absence of even fuel cost adjustment under the default pricing provisions in R.C. 4928.141. That is the statute that FirstEnergy originally claimed applied to the present set of circumstances. *FirstEnergy ESP Case*, Case No. 08-935-EL-SSO, FirstEnergy Application for Rehearing at 4-7 (January 9, 2009).

R.C. 4928.143(C)(2)(b). R.C. 4928.143(C)(2)(b) provides for only fuel cost adjustments, and the exclusion of purchased power costs from the adjustments must be interpreted as purposeful in the context of the statute. Statutory construction requires the interpretation that the exclusion of purchased power from the default pricing provision in R.C. 4928.143(C)(2)(b) means that the General Assembly intended this result (i.e. the legal doctrine of *expressio unius est exclusio alterius* applies[34]).

The purchased power costs that FirstEnergy seeks to collect from Ohio customers, and that the PUCO approved in the Rider Order, are unlawful.

III. CONCLUSION

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. FirstEnergy seeks rate increases and other benefits above those default standard service offers, and remains dissatisfied despite the favorable rate treatment given to the Companies in the Rider Order. The PUCO should reject FirstEnergy's arguments in its Application for Rehearing.

On rehearing, the Commission should correct the errors addressed in the arguments set forth by OCEA members on January 26, 2009.

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

Respectfully submitted,

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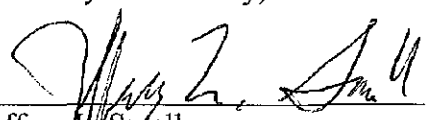
CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Memorandum Contra FirstEnergy's Application for Rehearing* was served on the persons stated below, via First Class U.S. Mail, postage prepaid (also electronically), this 5th day of February, 2009.



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