BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of First-Energy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues.	)))))))	Case No. 99-1212-EL-ETP Case No. 99-1213-EL-ATA Case No. 99-1214-EL-AAM

ENTRY ON REHEARING

The Commission finds:

(1) On July 19, 2000, the Commission issued its opinion and order in this proceeding approving, to the extent set forth in the order, the electric restructuring transition plan submitted by FirstEnergy Corporation, on behalf of its operating companies, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (jointly referred to as FirstEnergy, the company, or the operating companies). In its order, the Commission adopted a stipulation and recommendation filed on behalf of FirstEnergy, the Commission staff, and a number of other intervenors. The order also approved a separate agreement that was signed by FirstEnergy and a number of marketer intervenors.

(2) Applications for rehearing were filed on August 17, 2000 by CNG Retail Services Corporation (CNG), jointly by the Neighborhood Environmental Coalition and Western Reserve Alliance (Western Reserve), and jointly by the National Electrical Contractors Association, the Ohio Association of Builders and Contractors, and the Ohio Mechanical Contracting Industry (Contractors). Additional applications for rehearing were filed on August 18, 2000 by FirstEnergy, and jointly by Enron Energy Services, Inc. (Enron), Exelon Energy (Exelon), Mid-Atlantic Power Supply Association (MAPSA), NewEnergy Midwest LLC (NewEnergy), Strategic Energy LLC (Strategic), and WPS Energy, Inc. (WPS). A separate application for rehearing or, in the alternative, request for clarification, was filed by Enron and NewEnergy. Also, on August 18, 2000, the Utility Workers Union of America (UWUA) and Citizen Power submitted, via facsimile, applications for rehearing. The actual filings of UWUA and Citizen Power's applications for

rehearing were not received by the Commission until August 21, 2000. Simon Property Group, Inc. and Simon Property Group, L.P., dba Simon Real Property Group, L.P. (Simon) also filed an application for rehearing on August 18, 2000. Memoranda contra each of the intervenor's applications for rehearing were filed on August 28, 2000 by FirstEnergy. Memoranda contra FirstEnergy's application for rehearing were filed on August 28, 2000 by Unicom Energy Services, Inc. (Unicom), and jointly by Citizen Power, Ohio Environmental Council, Ohio Partners for Affordable Energy, and Neighborhood Environmental Coalition.

(3) On August 28, 2000, FirstEnergy filed a motion to strike the applications for rehearing filed by UWUA and Citizen Power. Memoranda contra FirstEnergy's motion were filed on September 5, 2000 by UWUA, Citizens Power, and Western Reserve. FirstEnergy argues that both rehearing applications were untimely filed because they were sent by facsimile (fax), rather than with an original document. Section 4903.10, Revised Code, requires that an application for rehearing must be filed within 30 days after the issuance of the Commission's decision. Under the Commission's procedural rules, applications for rehearing, unlike other pleadings or documents, may not be filed by fax. Rule 4901-1-02, Ohio Administrative Code. We agree with FirstEnergy that the rehearing applications filed by Citizen Power and the UWUA were not timely filed and, therefore, no effective filing was made within the 30-day time limit prescribed by Section 4903.10, Revised Code. *See*, *Williams v. Ameritech*, Case No. 98-1362-TP-CSS (April 13, 2000), at 4; *AT&T Communications of Ohio, Inc.*, Case No. 96-190-TP-ACE (October 17, 1996). Accordingly, the applications for rehearing filed by Citizens Power and the UWUA are denied. Although these requests for rehearing are procedurally deficient, we have, nonetheless, addressed below the arguments raised by Citizens Power and the UWUA in their applications for rehearing.

(4) FirstEnergy alleges that the Commission erred by failing to approve the company's proposed net metering riders and proposed partial service tariffs. With respect to the net metering issue, the opinion and order (at 20) directed FirstEnergy to file an amended rider that is consistent with

the Commission's generic rules[1]. FirstEnergy claims that this ruling is contrary to the parties' intent as set forth in the stipulation. FirstEnergy also contends that, contrary to the Commission's decision, Section 4928.67, Revised Code, does not require that the flow of electricity be registered in both directions (*i.e.*, to determine a net of output and input to the system). FirstEnergy further argues that the Commission's decision would improperly allow customer-generators to avoid paying costs incurred by the company for providing distribution, transmission, and ancillary services. According to FirstEnergy, relieving customer-generators of these costs would deprive the company of the opportunity to recover its costs and would, therefore, be constitutionally confiscatory. Regarding the partial service tariff issue, FirstEnergy contends that the Commission's rejection of this proposed tariff is unreasonable and unlawful, as well as contrary to the intent of the stipulation's signatory parties.

We disagree with FirstEnergy on both counts. As set forth in the opinion and order (at 18-19), the net metering rules were established in our generic rulemaking proceeding[2]. We indicated in the generic rules proceeding that the intent of the legislature under S.B. 3 was that net metering should be accomplished using a single meter capable of measuring the flow of electricity in both directions. As Unicom pointed out, FirstEnergy's proposed rider would necessitate the installation of new meters, contrary to the legislature's intent and the Commission's rules, which provide that a customer's meter that is capable of registering the flow of electricity in both directions satisfies the requirement for net metering.

With respect to the partial service tariff issue, we also continue to disagree with FirstEnergy's arguments. We indicated in the order (at 20) that we did not disagree with FirstEnergy that transmission and distribution facilities must be dedicated to stand ready to provide service to partial service customers. However, the order went on to state that "it is apparent that some portion of the capacity reservation charge is also compensation for generation facilities that are dedicated to stand ready in the event of an unscheduled

---

1 *In the Matter of the Commission's Promulgation of Rules for Minimum Competitive Retail Electric Service Standards*, Case No. 99-1613-EL-ORD (April 6, 2000); *In the Matter of the Commission's Promulgation of Amendments to the Electric Service and Safety Standards*, Case No. 99-1611-EL-ORD (April 7, 2000).

2 Case Nos. 99-1611-EL-ORD and 99-1613-EL-ORD, *supra*.

outage of a customer's own generation" (*Id.*). FirstEnergy argues that no record exists to support the Commission's conclusion on this issue and, according to the company, the decision is not consistent with the restructuring legislation that requires generation to be treated as a residual. As explained in the opinion and order (at 19-20), we believe, contrary to the company's assertions, that some portion of the capacity reservation charge in these tariffs must be considered compensation for generation facilities that are dedicated to stand ready in the event of an unscheduled outage of a customer's own generation. As we further stated, if a customer is not requiring FirstEnergy to have generation in reserve, due to the customer's utilization of an alternative supplier, such a customer should not have to pay the full capacity reservation charge. FirstEnergy has not raised any new arguments that were not previously considered by the Commission and, accordingly, the company's application for rehearing will be denied.

(5) In the Enron/Exelon/MAPSA/NewEnergy/Strategic/WPS (Marketers) request for rehearing, the Marketers claim that clarification is needed regarding the operation of the shopping credits and incentives due to the "rambling nature of the stipulation" and the absence of a description of the shopping credit and incentive mechanism in the order. The Marketers contend that it is unclear what happens with the shopping credit and incentives after the 20 percent shopping threshold is reached. The Marketers request that the Commission issue an order stating that: customers will continue to receive shopping credits and incentives even after their customer class has reached the 20 percent threshold; commercial and industrial classes shopping incentives shall increase by 5 percent annually from 2001 to 2005; from 2001 to 2005 the shopping credit shall escalate in accordance with the inflation and price increase projections listed in the stipulation, irrespective of the 20 percent threshold; shopping credits and incentives will not be reduced absent a Commission order, so that any customer with existing supply contracts will be grandfathered from incurring any future reduction in the shopping credit or incentive; and, once the 20 percent switching by customer class has been achieved, the differential between the shopping credit in Attachment 2 and the shopping incentive in Attachment 3 to the stipulation will be added to FirstEnergy's regulatory assets recovery.

Enron/NewEnergy's separate application for rehearing seeks "clarification" on the following points: whether the Commission intends to address through a public proceeding the requirement that FirstEnergy must join a regional transmission organization (RTO); whether renewals of special contracts must comply with the requirements of Section 4905.31, Revised Code; whether new or extended special contracts must be unbundled in a separate tariff setting forth various discounted rates; and the process under which marketers would be entitled to a portion of the 1,120 MW of market support generation.

We first note that it is unusual for parties that have signed a stipulation, after lengthy negotiations, to attack the Commission's adoption of that settlement agreement as an unreasonable act. For example, the Marketers claim that "given the rambling nature of the stipulation, the absence of a description of the shopping credit and incentive mechanism ... and tariffs that cover only the rates for the first year," the Commission should "clarify," among other things, that customers with existing supply contracts will be protected from any future reduction in the shopping credit and incentive. We agree with FirstEnergy that the settlement package was the result of negotiation and serious bargaining of knowledgeable parties with divergent interests represented by capable counsel. The settlement package ultimately arrived at reflected a compromise of the positions that various parties may have otherwise taken. Necessarily in this process, the end result will represent a middle ground and, as with any negotiation process, it is likely that no party got everything it wanted. The Commission's adoption of the settlement agreements honors the compromise of the parties. Under the guise of "clarification," the Marketers now seek to have the Commission undo the balance of the agreement and impose additional conditions and terms onto the settlement. We believe that the Marketers' requests go far beyond clarification and seek, after the fact, to have the Commission impose terms and conditions that the Marketers apparently were unable to secure in negotiations. If the stipulating or non-opposing parties believed that clarification of these issues was needed, the time to raise such issues was during the hearing process. However, it is inappropriate to raise such issues at this stage of the proceeding. We believe that, in approving the settlement,

we reached a reasonable and lawful decision on the issues and record before us. Rehearing is denied.

(6) In its application for rehearing, Western Reserve argues that the Commission improperly approved FirstEnergy's consumer education plan because, allegedly, Western Reserve did not have an opportunity to cross-examine the FirstEnergy witness on this issue. Western Reserve also claims that the Commission erred by not requiring adequate provisions to protect the environment and ensure that customers will have the opportunity to purchase "green power." Finally, Western Reserve expressed concern that the Commission did not set goals or deadlines for FirstEnergy's participation in a RTO.

With respect to the customer education issue, Western Reserve fails to recognize that, under S.B. 3, the Commission needs to have a hearing only on "those aspects of the plan that the Commission determines reasonably require a hearing." Section 4928.17(B), Revised Code. The Commission has the authority to approve any aspect of the plan based on the filing alone. Thus, whether or not any party wanted to cross-examine Mr. Welsh (FirstEnergy's witness on the consumer education issue), the Commission did not have to have a hearing on the consumer education plan. There was no denial of due process rights. Moreover, given the fact that counsel for Western Reserve never attended the evidentiary hearings in Columbus, it is unclear how Western Reserve believes it was denied the opportunity to cross-examine Mr. Welsh, or any other FirstEnergy witness. In fact, the attorney examiners required the company to make all of its witnesses available for cross-examination. However, consistent with normal Commission practice, if no party requested the opportunity to cross-examine a given witness, the pre-filed testimony was admitted into the record (Tr. I, 28-29).

In our order approving all of the utilities' consumer education plans on a consolidated basis, we stated that "the Commission will continue to maintain its overall supervision of the education plans and that our authority to direct further development and implementation of the education plans does not end by approving the education plans set forth in the transition plan…" (*Consumer Education Plan Order*, Case No. 99-1658-EL-ETP, et al., July 19, 2000, at 8). The fact that additional details on the plan need to be worked

out among the Advisory Board, the companies and the staff does not mean that the plan was incomplete or inadequate. It simply reflects the fact, as acknowledged by the Commission, that "the educational process will continue to be adapted and changed," based on market research and other factors "that would require shifts in the plan" (*Id.* at 7). There is no basis for granting rehearing on the consumer education plan.

Regarding Western Reserve's environmental arguments, we agree with FirstEnergy that it is not the company's or the Commission's responsibility to ensure that there are suppliers offering such options to customers. There is nothing in S.B. 3 that requires such action by the utilities or by the Commission. With respect to Western Reserve's transmission claims, the order makes clear that FirstEnergy is a part of the Alliance RTO that has been conditionally approved by FERC, and the testimony presented by FirstEnergy witness Burgess explains FirstEnergy's plan to satisfy the requirements of R.C. 4928.12. As the Commission stated in the opinion and order, it cannot determine whether the Alliance RTO complies with Section 4928.12, Revised Code, until FERC acts on the Alliance filing. Accordingly, we exercised our authority "to defer compliance until an order is issued under division (G) of section 4928.35 of the Revised Code" (Opinion and Order, at 60). Rehearing on this issue is denied.

(7) Citizen Power argues that the Commission erred by allowing the transfer of customer accounts to the FirstEnergy marketing affiliate to count toward satisfying the load switching percentage described in Section 4928.40, Revised Code. Citizen Power also claims that the Commission erred by approving the section of the stipulation that precludes the marketing affiliates of other Ohio utilities from taking any of the 1,120 MW of capacity offered by FirstEnergy, unless those companies offer similar amounts of capacity in the same way on their own system or they have no capacity close by to sell. Citizen Power next contends that the Commission erred by approving FirstEnergy's capacity offer because the offer is for only a limited amount of capacity, and is for only a limited time period. Finally, Citizen Power asserts that FirstEnergy's transition plan fails to meet the intent of S.B. 3 regarding independent control of transmission.

The Commission first dealt with the affiliate marketer issue in the rules it issued in Case No. 99-1141-EL-ORD.[3] In that proceeding, which established rules for the conduct of the transition cases, corporation separation, operational support, shopping credits and other matters, we specifically considered and overruled certain parties' contention that a switch to an affiliated certified supplier could not be counted toward the 20 percent switching level (*Id.* at 46-47). We continue to disagree with Citizen Power that Section 4928.40, Revised Code, prohibits the counting of switches to an affiliate. If the legislature had intended to include the type of restriction advocated by Citizen Power, it could have, among other things, prohibited a utility affiliate from competing in the utility's territory, limited the certification of utility affiliates as retail electric suppliers, or defined switching to exclude affiliated suppliers. Moreover, the Commission's own orders in Case No. 99-1141-EL-ORD expressly allow a customer load that is switched to an affiliated supplier to be counted toward the 20 percent.

We also disagree with Citizen Power's criticism of the provisions of the stipulation relating to FirstEnergy's making 1,120 MW of market support generation available. It is clear that FirstEnergy's offer of this generation was made in the context of the stipulation as part of an overall settlement of this proceeding. FirstEnergy was under no legal obligation to make this offer, but agreed to do so as part of the settlement process. We believe that the conditions imposed on this market support generation are reasonable, including the condition that precludes purchase of this generation by other utilities unless their affiliated utility makes power available in a similar manner and magnitude in its service territory. Rather than hampering competition, this provision should serve to make more generation available to suppliers.

We turn next to Citizen Power's argument that the Commission erred by deferring consideration of FirstEnergy's independent transmission plan. As indicated in the opinion and order (at 60), and as described above in response to Western Reserve's arguments, pursuant to Section 4928.34(A)(13), Revised Code, the Commission may authorize a company "to defer compliance [of the independent transmission plan

---

3 *In the Matter of the Commission's Promulgation of Rules for Electric Transition Plans and of a Consumer Education Plan, Pursuant to Chapter 4928, Revised Code*, Case No. 99-1141-EL-ORD (November 30, 1999).

requirements] until an order is issued under division (G) of section 4928.35 of the Revised Code." We stated in the order that "[b]ecause the Commission cannot determine, at this time, whether the Alliance RTO is compliant with the requirements of Section 4928.12, Revised Code (due to changes that will occur as a result of the FERC's proceeding addressing the Alliance RTO), the Commission will defer the approval decision until the opportunity is available to address the changes to the Alliance RTO at FERC" (*Id.*). We believe, contrary to Citizen Power's assertions, that good cause exists for deferring approval of the independent transmission plan pursuant to the discretion afforded under Section 4928.34(A)(13), Revised Code.

(8) The UWUA claims that the Commission erred in approving FirstEnergy's employee assistance plan (EAP). In fact, UWUA's application offers the same arguments that the Commission considered and rejected in the opinion and order. As we stated in the opinion and order (at 29): "Pursuant to Section 4928.34(A)(10), Revised Code, the Commission finds that the company's employee assistance plan sufficiently provides severance, retraining, early retirement, retention, outplacement, and other assistance for the company's employees whose employment is affected by electric industry restructuring." In the order, we described the company's plan and discussed the testimony of FirstEnergy witness Bowers that the EAP is consistent with industry standards. We also found, contrary to the UWUA's assertions, that the EAP "sufficiently" provides the types of employee assistance noted in the statute. The UWUA appears to want a guarantee that there will be no downsizing during the market development period. However, as the company points out, that is not what S.B. 3 requires. Rather, S.B. 3 contemplates that there could be downsizings as a result of restructuring which, indeed, is the whole point of the requirement that an EAP must be developed. The Commission correctly found that FirstEnergy's proposed EAP meets the standard that was adopted by the Ohio General Assembly.

(9) The Contractors assert that the Commission erred in three respects. The Contractors first contend that FirstEnergy's operating companies are not permitted to provide special distribution services to customers under S.B. 3. The Contractors argue that the prospect of identical services being

provided by the competitive and regulated entities under the same parent company should be prohibited. As FirstEnergy asserts, however, such services have been provided to customers for many years and specific tariff provisions delineating the scope and terms of service govern them. Indeed, the Contractors have not pointed out any definition of statutory language that excludes these services or that prohibits a utility from providing what have been traditional utility services to customers. The Contractors also claim that the Staff Report filed in this proceeding supports its position on the special services issue. The Contractors' reliance on the Staff Report is misplaced, however, given that the staff is a signatory party to the stipulation and, thus, any prior positions taken by the staff in its Staff Report, that are not part of the stipulation or the company's filing, are no longer supported by staff and are irrelevant. Further, the Staff Report does not state that the company's provision of special services is unlawful. Rather, the staff indicated only that "it is more appropriate" for the company's competitive unit to provide these services. However, the Staff Report also stated that, subject to the Commission's rules, "employees and equipment of the utility may be used to perform these services, subject to proper accounting and adherence to the code of conduct" (Staff Report at 27). Given that FirstEnergy's approved corporate separation plan includes accounting and compliance with the code, even if staff's former position were relevant, FirstEnergy's provision of these special services is consistent with position set forth in the Staff Report.

The second point raised by the Contractors is that the Commission failed to properly require that customers be fully informed that other service providers are available to perform special services. FirstEnergy has indicated that it will ensure that customers are fully informed that other service providers are available to perform special services. In addition, the company will inform customers that a customer's choice to contract with the company or others able to provide these services will not in any way impact the service it receives from the FirstEnergy electric utility. We do not believe that the Contractors' concerns on this issue warrant rehearing.

The final issue raised by the Contractors is its claim that FirstEnergy's separation of its organization into three business units violates the corporate separation provision of S.B. 3. However, as FirstEnergy points out, the corporate support

unit is a fully separate business unit that performs common functions specifically permitted under Section 4928.18(D)(2), Revised Code. In addition, the corporate support unit is bound by the same code of conduct applicable to FirstEnergy's electric utilities in that it may not share customer or other utility information with the competitive unit. The record supports FirstEnergy's claim that it has embarked on an educational program so that all employees, including those in the corporate support unit, will fully comply with the code of conduct. The Contractors' application for rehearing is denied.

(10) We note, initially, that CNG's untimely motion to intervene, which was filed at the time of the parties' post-hearing briefs, was denied in the opinion and order (at 6). We continue to believe that CNG's motion to intervene was not filed in a timely manner and, therefore, CNG will not be granted intervention in this proceeding. Pursuant to Section 4903.10, Revised Code, a party that is denied intervention in a contested proceeding must be granted leave to file an application for rehearing. CNG did not seek leave to file its application for rehearing and we find, pursuant to Section 4903.10(A), Revised Code, that CNG has not demonstrated that its failure to request intervention in a timely manner was due to "just cause." Therefore, leave to file an application for rehearing is denied. Even if CNG's request for intervention were granted, however, the substantive arguments raised in CNG's application for rehearing would be denied. CNG contends that approval of the stipulation causes a discriminatory impact on CNG compared to other marketers because other marketers, which are not affiliated with electric utilities, do not have to make generation available in a manner similar to FirstEnergy's 1,120 MW of capacity.

As indicated previously, FirstEnergy's provision of its own generating capacity to energy marketers, for sale to customers in FirstEnergy's own service areas, is not a requirement of S.B. 3 or the Commission's rules. Rather, the signatory parties negotiated the terms under which this benefit would be offered in order to stimulate the development and diversity of competitive retail electricity markets. We believe that marketers will benefit from this provision of the agreement. Contrary to CNG's assertion, we believe the provision at issue will level the competitive playing field, by

providing that affiliates of utilities that own or lease generating capacity within one wheeling transaction from FirstEnergy's service areas will qualify for the 1,120 MW of generation capacity to be made available under the stipulation, only if the affiliated utility makes capacity available in a similar manner. Moreover, this reciprocity provision applies to affiliates of utilities that own or lease generating capacity within one wheeling transaction from FirstEnergy's service areas, including American Electric Power, Cinergy, Dayton Power & Light, and Allegheny Power System. We disagree that CNG was singled out by this provision and we believe that it will be applied in a non-discriminatory manner.

(11) Simon filed a motion to intervene on July 27, 2000. In its motion, Simon alleges that the Commission's order in FirstEnergy's transition case effectively decided the resale/redistribution issues for Toledo Edison and CEI that have been pending for several years in Case Nos. 96-1083-EL-ATA and 96-1084-EL-ATA. These ATA cases arose as a result of the Commission's decision in *Brooks et al. v. Toledo Edison Co.*, Case No. 94-1987-EL-CSS (May 8, 1996), which held that Toledo Edison could not restrict the resale or redistribution of electric service by a landlord to a tenant if the landlord was not operating as a public utility. According to Simon, it was unaware until recently that FirstEnergy's transition plan filing included tariff changes associated with resale/redistribution, changes which Simon claims are not in compliance with the Commission's decision in *Brooks*.

The issue raised by Simon as the basis for its intervention was raised in the Staff Report filed in this case on February 11, 2000. FirstEnergy subsequently amended its application with respect to this issue on March 13, 2000 and again addressed the issue through supplemental testimony docketed on April 4, 2000. We believe that Simon had the opportunity to pursue this issue in a timely manner, and its attempt to litigate the issue at this stage of the proceeding is inappropriate. We conclude that Simon's motion to intervene was untimely filed and its intervention is, therefore, denied. However, we will consider the resale/redistribution issue in the context of the company's compliance tariff application.

(12) We believe that the opinion and order fully and adequately explained the reasons for our adoption of the stipulation, and

> our conclusion that FirstEnergy's transition plan, as modified by the settlement agreements and the Commission's order, satisfies the requirements of S.B. 3. For the reasons set forth in the opinion and order, as well as in this entry on rehearing, the applications for rehearing filed in this case are denied.

It is, therefore,

ORDERED, That Simon's motion to intervene is denied. It is, further,

ORDERED, That FirstEnergy's motion to strike the applications for rehearing filed by UWUA and Citizen Power is granted. It is, further,

ORDERED, That the applications for rehearing filed by FirstEnergy, Contractors, Marketers, Enron/NewEnergy, Western Reserve, and CNG are denied. It is, further,

ORDERED, That a copy of this entry on rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

_____
Alan R. Schriber, Chairman

_____	_____
Ronda Hartman Fergus	Craig A. Glazer
_____	_____
Judith A. Jones	Donald L. Mason

DDN/SDL;geb

Entered in the Journal
September 13, 2000

Gary E. Vigorito
Secretary

Signed by Commissioners
Schriber
Fergus
Mason